4. Report of the Secretary-General: analysis of comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea (A/CN.9/110)*

CONTENTS

I. Introduction

1. In accordance with a decision of the Commission taken at its seventh session (13-17 May 1974), the text of the draft convention on the carriage of goods by sea adopted by the Working Group on International Legislation on Shipping at its eighth session (10-21 February 1975) was transmitted to Governments and interested international organizations for their comments. All comments received by the Secretariat as at 27 January 1976 are reproduced in document A/CN.9/109.**

2. At its seventh session, the Commission also requested the Secretariat to prepare an analysis of such comments for consideration by the Commission at its ninth session. The present document contains such an analysis.

3. In compiling the analysis, all comments on a single article have been collated, and then arranged according to the paragraphs or subparagraphs of the article to which the comments refer. Where the comments concerned the article as a whole, and not a particular paragraph of an article, they were analysed under the heading "article as a whole". Where appropriate, the analysis of comments under "article as a whole" contains a summary of the main comments on that article.

4. Where a proposal for the modification of the existing text of the draft convention set forth a draft text to effect such modification, the analysis only reproduces the proposed draft text if it involved a modification of substance. Mere drafting suggestions are neither reproduced nor described in the analysis; however, the name of the Government or organization which made the drafting suggestion is noted at the end of the discussion of the article or paragraph of an article to which the drafting suggestion pertained. The exact nature of the proposal can be ascertained by reference to to the comments of the respondent concerned appearing in document A/CN.9/109.**

Abbreviations

5. The names of the international organizations which commented on the draft convention are abbreviated as follows:

OCTI	Central Office for International Railway Transport, Berne
ICS	International Chamber of Shipping
CMI	International Maritime Committee
CMI/ICC Working Group	Joint Working Group of International Maritime Committee/International Chamber of Commerce on Liability and Insurance***
INSA	International Shipowners' Association
IUMI	International Union of Marine Insurance.

* 25 February 1976.

** Reproduced in this volume, part two, IV, 1, *supra*.

*** The report of this Working Group was submitted by CMI and is reproduced in A/CN.9/109 as part of the comments of CMI.

6. The comments often refer to certain international transport conventions. In the analysis, the titles of these Conventions are abbreviated as follows:

Brussels Convention of 1924	International Convention for the Unification of Certain Rules relating to Bills of Lading. Brussels, 25 August 1924. (League of Nations, *Treaty Series*, Vol. CXX, p. 157; UNCITRAL *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, Vol. II, chap. II)
Brussels Protocol of 1968	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. (UNCITRAL *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*. Vol. II, chap. II)
Warsaw Convention of 1929	Convention for the Unification of Certain Rules relating to International Carriage by Air. Warsaw, 12 October 1929. (League of Nations, *Treaty Series*, Vol. CXXXVII, p. 11)
Hague Protocol of 1955	Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929. The Hague, 28 September 1955. (United Nations, *Treaty Series*, vol. 478, p. 371)
Montreal Protocol No. 4	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. Montreal, 25 September 1975. (ICAO Document 9148)
CMR Convention	Convention on the Contract for the International Carriage of Goods by Road. Geneva, 19 May 1956. (United Nations, *Treaty Series*, vol. 399, p. 189)
CIM Convention	International Convention Concerning the Carriage of Goods by Rail. Berne, 25 October 1962. (United Nations, *Treaty Series*, vol. 241, p. 336)
Athens Convention of 1974	Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974. Athens, 13 December 1974. (IMCO document, Sales No. 75.03.E)

II. Analysis of comments

A. Comments on the draft convention as a whole

1. The majority of the respondents who commented on the draft convention as a whole expressed the view that its provisions were, in general, acceptable (Afghanistan, Austria, Belgium, Czechoslovakia, Denmark, Finland, German Democratic Republic, Germany, Federal Republic of, Hungary, Norway, Niger, Sweden, Ukrainian Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland and United States of America). With the exception of Afghanistan, however, all these respondents indicated that particular problems still existed which were not resolved by the draft in its present form, and suggested appropriate solutions to resolve those problems.[1]

2. The following reasons were given by the respondents mentioned above for their general approval of the draft convention:

(*a*) That the draft convention as a whole reflected a balanced and carefully elaborated compromise between the sometimes conflicting interests of the parties to a contract for the carriage of goods by sea (Belgium, Denmark, Finland, Hungary, Norway and Sweden);

(*b*) That the rules contained in the draft convention relating to the issues dealt with therein were, in general, an improvement on the corresponding rules contained in the Brussels Convention of 1924 (Austria, Belgium, Finland, Germany, Federal Republic of, Norway and United States).

(*c*) That the provisions of the draft convention accorded with the international rules regulating the carriage of goods by other means of transport, and thus facilitated the harmonization of rules regulating the international carriage of goods (Austria, German Democratic Republic, Hungary and Sweden).

(*d*) That the draft convention would facilitate international trade both by resolving certain legal problems currently encountered in the carriage of goods by sea, and by containing provisions capable of accommodating new developments in transport technology (Afghanistan, German Democratic Republic, Germany, Federal Republic of and Hungary).

(*e*) That the draft convention constituted a suitable basis for the adoption of a new convention regulating the carriage of goods by sea (Denmark, Norway, Sweden and United Kingdom).

(*f*) That in the formulation of the draft convention, due consideration had been given to the guidelines for the revision of the Brussels Convention of 1924 set forth in the resolution dated 15 February 1971 of the UNCTAD Working Group on International Shipping Legislation (TD/B/C.4/86, annex I)[2] Czechoslovakia).

3. Some respondents stated their reservations regarding the acceptability of the draft convention as the basis for the formulation of a new convention to replace the Brussels Convention of 1924, and expressed the view that a new convention, if it were based on the provisions of the draft convention, would have an adverse effect on international trade (Netherlands, ICS and IUMI). Although sometimes expressed in general terms, the main reservations shared by these respondents concerned the legal régime for the liability of carriers established by article 5. These reservations are noted in the analysis of the comments on that article.

[1] These observations are noted below, under the respective articles of the draft convention to which they pertain.

[2] This resolution is also reproduced in UNCITRAL Yearbook, Vol. II: 1971, part two, III, annex II.

B. Comments on provisions of the draft convention

PART I. GENERAL PROVISIONS

Article 1. Definitions

Article as a whole

1. Mexico proposed that the draft convention contain a definition of "shipper", since the draft convention already defined the other parties who had a direct interest in the contract of carriage, i.e. "carrier" or "contracting carrier" (article 1, para. 1), "actual carrier" (article 1, para. 2), and "consignee" (article 1, para. 3.[8] Mexico suggested that the definition of the term "shipper" could read as follows: " 'Shipper' means any person who in his own name or in the name of another, concludes with a carrier a contract for carriage of goods by sea".

2. The Philippines proposed that the draft convention should also define the term "charterer", particularly with a view to clarifying whether the term "carrier" included a "charterer".[4] The Philippines proposed the following definition of the term "charterer":

> " 'Charterer' is 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."

3. Czechoslovakia expressed the view that the term "carriage by sea" should be defined in article 1 in such a manner that it also covered carriage on inland waterways accessible to sea-going vessels.

4. The United States suggested that for the sake of clarity the draft convention should include the following definition of "dangerous goods":

> " '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 1, paragraph 1

Definition of "carrier" or "contracting carrier"

5. Hungary expressed its agreement with the definition of "contracting carrier" and approved the distinction drawn between that term and the term "actual carrier".

6. Canada and France proposed that the reference to the "contracting carrier" be deleted. Canada stated that this reference might lead to a construction placing more responsibility on freight forwarders (ship's agents) and might cast doubt on the right of shippers, exercised often in Canada, to conclude contracts of transport directly with carriers who will themselves carry the goods. France noted that deletion of the reference to "contracting carrier" would correspond to the terminology employed in the Athens Convention of 1974 and proposed the following language for 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."

7. The Philippines proposed that "carrier" should be defined separately from "contracting carrier" and "actual carrier" and that the term "carrier" could be defined as follows:

> " 'Carrier' is a person who, for compensation, agrees to undertake to carry goods by sea."

8. Sierra Leone noted the necessity for clarifying whether the term "carrier" also covered agents of the carrier, since the present language of the definition seemed to imply that agents were in fact covered.

9. The United States proposed that the phrase "in whose name" be replaced in this paragraph by the phrase "by whose authority", in order to make it clear that a person acting on behalf of a "carrier" or "contracting carrier" in concluding a contract of carriage must have been authorized to act in such manner.

10. Since on occasion a consignee may conclude a contract of carriage by booking ship's space, INSA suggested that the term "shipper" be replaced by the term "cargo disponent".

Article 1, paragraph 2

Definition of "actual carrier"

11. Hungary expressed its agreement with the definition of "actual carrier" and with the distinction drawn between that term and the term "contracting carrier".

12. Canada proposed deletion of the definition of "actual carrier" on the ground that the legal consequences of a carrier's entrusting to another person the actual carriage of the goods in whole or in part should be left to national law and commercial practice.

13. The Netherlands proposed that "actual carrier" be defined as "the owner of the ship carrying the goods", in order to facilitate identification of the "actual carrier", particularly in cases where there was a chain of consecutive time—and/or voyage charters or where the contracting carrier arranged with a third person the transport of the goods and that person retained yet another person to actually carry the goods.

14. As a consequence of its proposal to delete from paragraph 1 the reference to "contracting carrier", France proposed the following language for the definition of "actual carrier":

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

Article 1, paragraph 3

Definition of "consignee"

15. The Philippines proposed that the definition of "consignee" be completed by a specific reference to the grounds on which such person was "entitled to take delivery of the goods", so as to exclude a sheriff taking delivery of the goods under a court order. The Philippines proposed the following wording:

[8] It may be noted that INSA also suggested that the term "shipper" be defined, if its proposal to redraft article 1, para. 1 by replacing "shipper" with "cargo disponent" were not adopted.

[4] The Federal Republic of Germany proposed that a definition of the term "charter-party" be included in article 2, para. 4. See the discussion below of comments on article 2, para. 4.

" '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."

16. France proposed that the definition should be made more complete and precise, and suggested the following definition based on the 1966 French law on charter-parties and contracts for carriage by sea:

" '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 the arrival [of the goods] when the bill of lading is made out to bearer, and the last endorsee when the bill of lading is made out to order."

17. Canada was of the view that the term "consignee" should cover both persons who were in a position to surrender the bill of lading and persons who, possibly on some other basis, were "entitled to take delivery of the goods". The following definition was proposed:

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

Article 1, paragraph 4

Definition of "goods"

18. The Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and Canada proposed that the words "including live animals" be deleted from the definition on the ground that they were unnecessary. The USSR stated that such a reference was superfluous in the light of article 5, paragraph 5, of the draft convention, which governed in detail the liability of carriers in connexion with the carriage of live animals. ICS advocated an express provision excluding live animals from the definition of "goods" and, consequently, from the coverage of the draft convention. In the view of ICS, carriers may only be willing to undertake carriage of live animals on the basis of special contracts that recognize the unique problems inherent in the transport of live animals. Finland reserved its position as to whether live animals should be considered as "goods" for the purpose of the draft convention.

19. The Netherlands, Canada and ICS advocated modification of the definition of the term "goods" so that passenger luggage, covered by the Athens Convention of 1974, was expressly excluded. The United Kingdom expressed its support for a definition under which "goods" also included luggage not accompanying passengers, since this type of shipment did not fall within the scope of the Athens Convention of 1974.

20. Japan proposed that the definition of "goods" should not extend either to packaging or to containers and similar articles of transport. Several respondents (Canada, Japan as an alternative suggestion, and INSA) expressed the view that only durable, marketable, reusable packaging such as containers should be considered as "goods"; they noted that the carrier should not be held liable under the draft convention for the wear and tear of other types of packaging, which could occur even in the absence of any damage to the packed goods. In this connexion, Canada proposed the following definition:[5]

" '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."

INSA suggested the following definition:

" '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'."

21. The Philippines proposed that the words "if supplied by the shipper" be deleted from the definition, since packaging should be considered as forming part of the "goods" regardless of who had supplied it.

22. The Niger suggested that, if the definition of "goods" contained in article 1, paragraph 4, were retained, provisions should be added specifying that in respect of the calculation of freight charges for goods shipped in containers the deadweight of such containers should be excluded.

Drafting suggestions

23. Suggestions of a drafting nature regarding the text of article 1, paragraph 4 were made by the Philippines, and by OCTI concerning only the French text.

Article 1, paragraph 5

Definition of "contract of carriage"

24. Finland expressed agreement with the definition of "contract of carriage", whereby the draft convention would apply also in cases where no bill of lading was issued. Canada, however, proposed a redraft of the definition under which the term "contract of carriage" would only cover "a contract evidenced by a bill of lading".[6]

25. The Byelorussian SSR, the Ukrainian SSR and the USSR proposed that the paragraph should require that a "contract of carriage" be in writing.

26. France proposed that the definition be completed so as to state that "by virtue of this contract, the consignee may exercise the rights of the shipper and be subject to his obligations". It was noted that in the absence of such a provision, in a case where no bill of lading was issued, the legal position of the consignee depended on the differing rules in national laws.

27. ICS proposed that the definition should exclude certain special contracts that were usually negotiated "at arms' length", such as volume contracts and contracts for the shipment of personal effects, vehicles and experimental cargo. ICS noted that in the latter category of cases it was difficult to establish valuation for insurance purposes by the carrier, and that, there-

[5] This text also reflects the comments by Canada on this paragraph, referred to at paras. 18 and 19 above.

[6] The full text of the Canadian redraft of article 1, para. 5, which also included the proposals mentioned at paras. 29, 30 and 32 below, reads as follows:

" '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."

fore, the best course was to let the shipper decide on the amount of protection he needed in the contract and through insurance coverage.

28. The United States expressed the view that the phrase "specified goods from one port to another where the goods are to be delivered" should be deleted since it cast doubt on whether the definition of "contract of carriage" covered instances where the goods were not "specified" or were to be transported by the carrier beyond the port of discharge.

29. Canada proposed that in the definition the term "port" be replaced by "place", and the Netherlands that "port" be replaced by "port or place". The Netherlands stated that the modification it proposed was intended to ensure that the definition of "contract of carriage" covered those cases where, although the main part of the performance under the contract took place on sea, some part of the performance was to occur on inland waterways.

30. Canada, the Philippines and the United Kingdom proposed that the phrase "where the goods are to be delivered" should be deleted. The United Kingdom held that the phrase was superfluous, while the Philippines observed that a "contract of carriage" may have as its object the exposition, rather than the delivery of goods.

31. INSA favoured replacement of the term "shipper" by the term "cargo disponent", since it was not always the shipper who concluded the contract of carriage.[7]

Drafting suggestions

32. Suggestions of a drafting nature were made by Canada and the Philippines.

Article 1, paragraph 6

Definitions of "bill of lading"

33. Canada stated that the definition of "bill of lading" should show that the bill of lading served at the same time as a receipt for goods shipped, as a document of title and as evidence of the contract of carriage in the absence of a formal contract of carriage. Accordingly, and to stress that the contract of carriage and the bill of lading were different, Canada suggested the following definition:

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

34. The United States noted that the present definition might exclude a straight bill of lading, which was a non-negotiable document that did not have to be surrendered upon delivery of the goods. The United States proposed the following definition to ensure that it covered straight bills of lading:

> " '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 a 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."[8]

35. The Philippines proposed that, at the end of the first sentence of the paragraph, the words "against surrender of the document" be replaced by the words "to the consignee", since in cases when the bill of lading was lost the carrier may deliver the goods to the consignee against a signed receipt and/or against a bond indemnifying the carrier for any possible liability for wrongful delivery.

Article 2. Scope of application

1. The two main questions dealt with in the comments on this article were:

(*a*) The scope of application of the new convention, and

(*b*) Whether parties should have the power to exclude its applicability in appropriate cases.

(a) Scope of application

(i) Summary of comments

2. Many respondents approved of the scope of application as currently defined by this article. However, some respondents noted that to restrict the application of the new convention to carriage of goods "between ports" might make the convention inapplicable in cases where the carriage of goods began or ended at a place other than a port, e.g. when multimodal transport was involved. The majority of respondents who commented on the exclusion of charter-parties from the scope of application of the draft convention approved such exclusion, and suggested the addition of language designed to ensure that the draft convention would not apply to a bill of lading issued by a carrier pursuant to a charter-party when the holder of such a bill of lading was either the charterer or an agent of the charterer.

(ii) Specific comments

3. Hungary and IUMI approved the scope of application of the draft convention as defined in article 2 for the following reasons:

(*a*) The scope of application is wider than that of the Brussels Convention of 1924 and is clearly defined (Hungary);

(*b*) The criteria regulating the scope of application conform in principle with those employed in other international transport conventions (IUMI).

4. Canada stated that in general,

(i) It was opposed to a broadening of the scope of application of the convention into areas of national jurisdiction;

(ii) The convention should apply to the carriage of all goods by sea; and

(iii) The word "port" should be replaced by the word "place" wherever it appeared in the article.

[7] See also the discussion of comments by INSA at para. 10 above.

[8] As an alternative, the United States proposed leaving the definition of "bill of lading" as it now reads but making it clear in the record that a straight bill of lading was "a document other than a bill of lading [issued] to evidence a contract of carriage" covered by article 18 of the draft convention.

5. IUMI noted that the Convention would be given the scope of application defined by article 2 only in the courts of States parties to the Convention; the courts of non-Contracting States would not be bound by the provisions of the Convention.

6. Japan observed that the scope of application of the draft Convention was wider than that of the Brussels Convention of 1924 as modified by the Brussels Protocol of 1968. Conflicts of application could therefore arise between a State party to the new convention and a State party to the Brussels Convention of 1924 as modified by the Protocol of 1968. It suggested that appropriate provisions should be included in the final clauses of the new Convention to eliminate such conflicts.

(b) Power to exclude the Convention

(i) Summary of comments

7. Some respondents accepted the mandatory application of the Convention under this article to all contracts for the carriage of goods by sea. Others expressed the view that the Convention should mandatorily apply only where a bill of lading or other document of title was issued; if no bill of lading was issued, the parties should be given the power to exclude the application of the Convention under specified circumstances.

(ii) Specific comments

8. Japan, the United Kingdom and ICS expressed the view that the mandatory application of the Convention to all contracts for the carriage of goods by sea was undesirable. They noted that there were cases, such as volume contracts, shipments of goods of no commercial value and of special or experimental cargoes, where the shipper neither needed nor desired the protection afforded by the Convention, and where it would be appropriate to allow parties to exclude the application of the Convention. The United Kingdom and ICS suggested that this result might be achieved by:

(i) The addition to this article of paragraph (*a*) set forth below (the United Kingdom);

(ii) The addition to this article of both paragraphs (*a*) and (*b*) set forth below (ICS):

"(*a*) 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."

"(*b*) For the purposes 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."

Article 2, paragraph 1

Introductory clause of the paragraph

9. Finland and Hungary approved the application of the Convention to all contracts for the carriage of goods by sea, including contracts which were not evidenced by bills of lading.

10. Australia stated that the provisions regarding the scope of application should be clarified to ensure that the Convention applied to the sea-leg of a multimodal transport of cargo, and not merely to conventional port to port carriage.

11. Canada suggested that the opening words of this paragraph should be redrafted as follows:

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

12. The Philippines suggested the deletion of the word "two", since carriage of goods by sea may involve ports in more than two States.

Subparagraph (c)

13. Canada considered this subparagraph unnecessary in the light of subparagraph (*b*) of this article and suggested its deletion.

Subparagraphs (d) and (e)

14. In conformity with its proposal that "contract of carriage" be defined in article 1, paragraph 5 as a contract evidenced by a bill of lading, Canada suggested that:

(i) The words "or other document evidencing the contract of carriage" be deleted from subparagraphs (*d*) and (*e*) of this paragraph. Under the Canadian proposal the bill of lading would be the primary document evidencing the contract of carriage, and the terms in the bill of lading would prevail over any contradictory terms found in other documents of transport (e.g., mates receipts and dock receipts).

(ii) Subparagraph (*e*) should be redrafted as follows:

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

15. The Federal Republic of Germany proposed that subparagraph (*d*) be deleted. Since the Convention applied to all contracts for the carriage of goods by sea, irrespective of whether a bill of lading or other document evidencing the contract of carriage was issued, the applicability of the Convention should not depend on the place where a bill of lading or other document evidencing a contract of carriage was issued.

Drafting suggestion

16. A suggestion of a drafting nature, affecting only the French text of article 2, paragraph 1, was made by France.

Article 2, paragraph 2

17. Czechoslovakia proposed that the term "actual carrier" should be added after "carrier" since, under the definitions contained in article 1, the term "carrier" did not cover the "actual carrier".

18. Canada observed that, if the nationality of the ship and of the persons listed in paragraph 1 had no relevance to the applicability of that paragraph, such nationality should also have no relevance to the applicability of any of the other provisions of the draft convention. Since this paragraph might be considered as suggesting that nationality was a factor in determining the applicability of other provisions of the draft convention, Canada proposed that it should be deleted.

Article 2, paragraph 3

19. Canada stated that this paragraph was acceptable.

20. INSA proposed that this paragraph should be deleted because:

(*a*) It was clear that a State would have the power conferred by the paragraph even if the paragraph were deleted, and

(*b*) It was inappropriate to include it in a draft Convention which regulated the international, commercial carriage of goods by sea.

Article 2, paragraph 4

Exclusion of the charterer and his agents from the scope of the term "holder of the bill of lading"

21. The Byelorussian SSR, the Netherlands, the USSR and ICS proposed that the second sentence of this paragraph should be modified to exclude expressly the application of the draft Convention to a bill of lading issued by a carrier pursuant to a charter-party where the holder of the bill of lading was the charterer. It was noted that in such a case the bill of lading did not govern the relations between charterer and carrier (Netherlands), and might be issued only as a receipt under the charter-party (ICS). It was proposed that the following words should be added at the end of the second sentence of the paragraph to secure this result:

(*a*) "Not being the charterer" (Netherlands and ICS).

(*b*) "Unless such holder is a charterer" (Byelorussian SSR).

(*c*) "If he (the holder of the bill of lading) is not the charterer" (USSR).

22. France observed that the term "holder of the bill of lading" should not cover the charterer or his agents and proposed that this term should be replaced by the term "third party holding in good faith".

Other comments

23. The German Democratic Republic observed that while the title of the draft convention suggested that it applied to all carriage of goods by sea, charter-parties were expressly excluded by this paragraph from its scope of application. The German Democratic Republic suggested that this inconsistency should be eliminated by bringing charter-parties within the scope of application of the draft convention.

24. Canada noted that the term charter-party was not defined. The Federal Republic of Germany proposed that the language of the first sentence of the paragraph might be modified to incorporate a definition of a charter-party as follows:

> "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."

25. Canada observed that it was not unknown for the charterer to be also the shipper and the consignee, and this created conflict of interest situations.

26. France expressed concern that the present wording of paragraph 4 could lead to the result that, by means of an endorsement of a bill of lading issued pursuant to a charter-party in favour of an agent of a shipper, the provisions of the charter-party could be made not subject to challenge.

Article 3. Interpretation of the Convention

1. Canada noted that this article was modelled on article 7 of the Convention on the Limitation Period in the International Sale of Goods and stated that it had no objection to the inclusion of this article.

PART II. LIABILITY OF THE CARRIER

Article 4. Period of responsibility

Article as a whole

1. The chief issue which concerned the respondents who commented on this article was whether the extension under this article of the period of responsibility of the carrier for the goods beyond the period of responsibility specified under the Brussels Convention of 1924 was justified. Most respondents approved of this extension. However, the view was also expressed that the exact points of time at which carrier responsibility began and ended under this article needed clarification.

2. It was also observed that provisions should be added to the article relieving the carrier of responsibility during any period of time when, at the port of loading, he was legally required to place the goods in the custody of a third person (e.g. an authority certifying weight or quality).

3. Finland, the German Democratic Republic, Hungary, Sweden, CMI and IUMI approved of the extension of the period of carrier responsibility under this article as compared with the period under article 1 (*e*) of the Brussels Convention of 1924. The following reasons were given:

(*a*) The extended period of responsibility conformed with the period of responsibility stipulated under international conventions dealing with the carriage of goods by other means of transport (Hungary and CMI) and with the practice developing in certain liner trades (IUMI);

(*b*) The period of responsibility established in the Brussels Convention of 1942 had adverse consequences for the shipper, since damage to goods often took place when the goods were in the charge of the carrier before their loading or after their discharge (German Democratic Republic and Hungary);

(*c*) In the liner trade in particular, goods were often in the charge of the carrier before loading or after discharge, and there was at present considerable uncertainty regarding the extent of carrier liability for loss or damage occurring during these periods (CMI);

(*d*) Such extension accorded with a suggestion made in the resolution on bills of lading adopted at the second session of the UNCTAD Working Group on International Shipping Legislation (Czechoslovakia).

4. ICS expressed disagreement with the extension of the period of carrier responsibility on the following grounds:

(*a*) The extension of the period of carrier responsibility would result in insurance being taken out by the carrier, and not by the cargo owner as under the Brussels Convention of 1924, against the risks incurred during the additional periods of carrier responsibility. This transfer of the insurance burden would lead to increased transportation costs and would adversely affect the interests of the cargo owner;[9]

(*b*) The change in the period of responsibility would result in a state of uncertainty as to the extent of carrier liability, leading to expensive litigation;

(*c*) As a result of the state of uncertainty as to the extent of carrier liability, a prudent cargo-owner would continue to insure his goods as if the period of carrier responsibility under the Brussels Convention of 1924 remained in force. Since the carrier would also take out insurance for the additional periods during which he was made responsible under this article, the goods would be doubly insured, and this would lead to increased transport costs.

5. Canada approved of the fact that under this article the carrier was denied the power to vary his period of responsibility.

Drafting suggestion

6. The Philippines made a drafting proposal regarding the title of this article.

Article 4, paragraphs 1 and 2

7. The United States, CMI and ICS noted that under paragraph 1 and 2 the carrier was responsible for the entire period that elapsed between his first taking over the goods and their delivery. In relation to *delivery*, it was noted that, if the law or regulations applicable at the port of discharge required that the goods be handed over to an authority or other third party, the responsibility of the carrier would, under subparagraph 2 (*c*), terminate upon the handing over of the goods to such authority or other third party. However, the article did not relieve the carrier from responsibility if, in the course of *loading*, the law or regulations applicable at the port of loading required that the goods be handed over to such an authority or other third party for some purpose (e.g. for checking their weight or quantity).

8. The following proposals were made for modifying the introductory language of paragraph 2 so as to relieve the carrier from responsibility for the period during which the goods were in the custody of such third party.

(*a*) "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:" (the United States).

(*b*) "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:" (ICS).

9. The Byelorussian SSR and the USSR observed that the words "at the port of loading" appearing in paragraph 1 created uncertainty as to the period of carrier responsibility in cases where the carrier had taken over the goods not at the port of loading, but at some other place (e.g. inland) or at a port of transshipment. They proposed that this uncertainty could be removed by deleting the words "at the port of loading, during the carriage and at the port of discharge" from paragraph 1, leaving the period in which the goods are in the charge of the carrier to be defined solely by paragraph 2.

10. The United Kingdom stated that subparagraph 2 (*a*) did not adequately provide for cases where the carrier had undertaken to deliver the goods outside the port of discharge. Under the present wording, it was uncertain whether the draft convention regulated the liability of the carrier during transit from the port of discharge to the place of final delivery. In order to avoid the possibility of conflict with other transport conventions which might also apply to this stage of the transit, and to grant the parties the power to agree as to the extent of liability, the United Kingdom proposed the following modification to subparagraph (*a*):

> "(*a*) By handing over the goods to the consignee at the port of discharge. 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."

11. Canada proposed that the provisions of paragraphs 1 and 2 could be clarified or amplified as follows:

(*a*) The commencement of the period of carrier responsibility could be clarified by adopting the following as the introductory language of paragraph 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:";

(*b*) Subparagraph 2 (*b*) should be clarified by defining delivery, in the cases therein mentioned, in more specific terms. Under its present wording, the subparagraph would permit the insertion of terms in the contract overriding subparagraph (*a*) by defining delivery in terms other than the handing over of goods to the consignee;

(*c*) The words "this paragraph applies *mutatis mutandis* to the receipt of the goods by the carrier" should be added to paragraph 2.

Article 4, paragraph 3

12. Canada proposed that the meaning given under this paragraph to the terms "carrier" and "consignee" should be modified by redrafting the paragraph as follows:

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

[9] For a fuller explanation of the possible adverse effects of a transfer of the insurance burden, see the analysis of comments on this issue under article 5.

Article 5. General rules (on the liability of the carrier)

Article as a whole

1. Respondents were agreed that article 5, which lays down the basic rules regarding the liability of the carrier, constituted the most important change from the provisions of the Brussels Convention of 1924 covering this issue.

Support for article 5

2. Several respondents while not addressing themselves specifically to article 5, noted that the draft convention was an acceptable and workable compromise that took into account the interests of both shippers and carriers, and the technological advances in the carriage of goods by sea (Austria, Czechoslovakia, German Democratic Republic, Norway and United States).

3. Several respondents stated that they accepted the compromise that article 5 represented as to the allocation of the risks of carriage and the burden of proof between the carrier and the cargo interests, since they recognized that the draft convention could only attain wide acceptance by means of such a carefully worked out compromise (Denmark, Finland, Hungary and Sweden).

4. It was noted that the rules on carrier liability in article 5 were in closer harmony with the international legal régimes established for other international modes of transport than the provisions in the Brussels Convention of 1924 had been, and that therefore the adoption of article 5 would facilitate the development of uniform rules for international multimodal transport (Federal Republic of Germany, Sweden and CMI/ICC Working Group).

5. Several respondents expressed their support for the general principle for burden of proof in article 5, whereby the carrier, unless he presented evidence to the contrary, was presumed to be liable for loss of or damage to the goods in his charge, as well as for delay in delivery (France, Hungary and Mexico).

6. Nevertheless, certain concerns were voiced by some of the respondents supporting article 5 regarding particular effects of the compromise:

(*a*) Denmark noted that a heavier burden would now be placed on carriers;

(*b*) Finland noted that article 5 would lead to increased insurance by carriers against liability (Protection and Indemnity insurance) and that there was no P and I insurance industry in Finland;

(*c*) Sweden noted that it favoured the compromise incorporated in article 5, even though it was likely to result in an over-all increase in transportation costs in the range of 0.5 per cent to 1 per cent of the freight charges.

7. Australia noted its reservation in respect of the provisions of article 5, since it was in the process of examining the economic consequences of these provisions.

Criticisms of article 5

8. There was virtual unanimity, even among respondents criticizing the allocation of the risks of carriage between the carrier and cargo interests in article 5, that the long list of exemptions from liability in article 4, paragraph 2 of the Brussels Convention of 1924 need not be retained, and that, in particular, the defence of fault "in the management of the ship" could be deleted. Only IUMI favoured the retention without change of the allocation of risks as contained in the Brussels Convention of 1924.[10] The CMI/ICC Working Group stated that it opposed the increased allocation of the risks of sea transport to the carrier under article 5, unless it was clear that the draft convention would be as widely ratified as the Brussels Convention of 1924, since otherwise there would be forum shopping and recurrent disputes concerning jurisdiction and applicable law. Criticisms directed at specific points in the legal régime established by article 5 are discussed at paragraphs 9 through 17 below.

A. *Defence of "error in navigation"*

9. Several Governments and organizations advocated that article 5 retain for the carrier the exemption from liability based on "error in navigation", found in article 4, paragraph 2 (*a*) of the Brussels Convention of 1924 (Belgium, Netherlands, United Kingdom, USSR, CMI, CMI/ICC Working Group, ICS and INSA). They noted that their concern extended only to "errors in navigation" taken in a strict sense and that they did not favour retention of the more general defence of "error in the management of the ship". The Federal Republic of Germany and Japan stated that deletion of the traditional defences, such as "error in navigation" and "fire", should be re-examined carefully, particularly with a view to ascertaining that no increase would result in the over-all transportation costs borne by shippers.

10. The United Kingdom, the USSR, ICS[11] and INSA proposed draft texts, to be incorporated in article 5, preserving for carriers the defence of "error in navigation":

(*a*) The United Kingdom proposed the addition to article 5 of the following new paragraph 2 *bis*:

> "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*) The USSR proposed that article 5 should retain the exemption for "error in navigation" by employing the following language:

> "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'.";

(*c*) INSA proposed that article 5 be redrafted so that it would provide for

> "... 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

[10] The position of IUMI is set forth in detail in a brochure entitled "The Essential Role of Marine Cargo Insurance in Foreign Trade" published by IUMI in October 1975.

[11] The draft text by ICS, reproduced at para. 12, below, was also designed to retain the defence of "fire" as found in the Brussels Convention of 1924 and to ease the general burden of proof placed on carriers.

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."

B. *Defence of "fire"*

11. Belgium, the Federal Republic of Germany, the Netherlands, CMI, CMI/ICC Working Group and ICS favoured retention of the "fire defence" found in article 4, paragraph 2 (*b*) of the Brussels Convention of 1924, whereby the carrier was exonerated from liability if the loss or damage arose from "fire, unless caused by the actual fault or privity of the carrier". These respondents expressed concern over the increased burden of risk placed on carriers as a consequence of the modified defence of "fire" in article 5, paragraph 4 of the draft Convention.

12. ICS proposed that the following text should replace article 5, paragraph 1, in order to preserve for carriers the traditional defences of "error in navigation" and "fire", as well as to ease the burden of proof placed on carriers:

"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.

"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 ocurrence giving arise to such loss, or damage, or expense has been caused by the actual fault or privity of the carrier."

C. *Delay in delivery*

13. ICS and IUMI expressed their opposition to the provisions in article 5 holding carriers liable for losses, damages and expenses due to delay in delivery. IUMI argued that the establishment of mandatory (i.e. non-contractual) liability of carriers for delay would lead to considerable litigation, because of the vagueness of the definition of "delay in delivery" in article 5, paragraph 2, i.e. non-delivery "within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case" and the difficulty of deciding on the kinds of damages resulting from delay for which the carrier is to be held liable.

14. It may be noted that the redraft of article 5, paargraph 1, proposed by ICS and reproduced at paragraph 12, above, calls for the deletion of all references to "delay in delivery" in article 5, including the deletion of the present article 5, paragraph 2, defining the term "delay in delivery".

D. *Burden of proof placed on carriers*

15. Some respondents voiced their concern that the general burden of proof rule in article 5, presuming the liability of the carrier unless evidence to the contrary was provided, tended toward the imposition of strict liability on the carrier and that the test in article 5, paragraph 1 for determining whether the carrier met his burden ("... 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") would probably give rise to a great deal of litigation (CMI, ICS, INSA, IUMI and OCTI).

16. CMI proposed that if article 5 were adopted, an express provision should be added stating that carrier liability would only be based on fault or negligence. ICS proposed a redraft of paragraph 1 of article 5, modifying the substance of the burden of proof rule, as well as stating that carrier liability was based on negligence and preserving for the carrier the defences of "error in navigation" and "fire".[12]

17. INSA and OCTI accepted the basis for the burden of proof rule found in article 5, i.e. that to be exonerated from liability the carrier must prove that he, his servants and agents had not been negligent. However, in their view, the focus of the rule should be on whether the carrier, his servants and agents took all reasonably required measures "to avoid the loss, damage or expense", since this was what the carrier would be held liable for if he failed to carry his burden of proof. For this reason, INSA proposed that the clause describing the burden of proof placed on the carrier should read "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", noting that this wording was modelled on articles 18 and 20 of the Warsaw Convention of 1929. Similarly, OCTI proposed that the following sentence be added to article 5, paragraph 1:

"The carrier shall be relieved of his 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."

E. *Possible harmful consequences*

18. Critics of article 5, while noting that precise economic and statistical data would only become available after the convention had been in force for some time, stated that adoption of article 5 would be likely to lead to some or all of the following consequences:

(*a*) The increased liability imposed on carriers would force them to take out increased liability insurance (P and I insurance), which would be reflected in increased freight costs (Germany, Federal Republic of, Japan, Netherlands, United Kingdom, USSR, CMI, ICS, INSA and IUMI);

(*b*) Total transportation costs of shippers would increase, as cargo insurance rates would decrease only to a considerably lesser extent than the increase in the rates for the carrier's liability insurance, because of the cost of recovery actions against the carrier or his liability insurer and the legal uncertainties resulting from the reallocation of risks between carriers and cargo interests (Germany, Federal Republic of, Japan, Netherlands, Sweden, United Kingdom, CMI, CMI/ICC Working Group, ICS and IUMI);

[12] The text of this proposal by ICS is reproduced at para. 12 above.

(*c*) Cargo interests would still take out cargo insurance as they preferred to deal with and be reimbursed by their own insurers directly (Germany, Federal Republic of, Netherlands, Sweden and United Kingdom) or for complete protection "warehouse to warehouse" (IUMI);

(*d*) Under article 5 the shipper was in effect obligated to take out insurance coverage through the carrier, because the carrier would protect himself against his increased liability through additional liability insurance, the cost of which he would include in the freight charge; it would be preferable if the shipper could decide whether to take out cargo insurance and if yes, how much coverage, at what cost and from which cargo insurer (Belgium, Germany, Federal Republic of, Netherlands, United Kingdom, and CMI/ICC Working Group);

(*e*) Article 5 would not, by removing e.g. the defence of "error in navigation", cause carriers to be more careful in their handling of cargo, as the danger of loss or damage to the carrier's own property was already a sufficient deterrent (Netherlands, CMI/ICC Working Group and ICS);

(*f*) The shift from cargo insurance to liability insurance of carriers was likely to hurt the nascent cargo insurance industries in many countries, particularly since carrier liability insurance was concentrated in a small number of maritime countries (Germany, Federal Republic of, Netherlands, United Kingdom, CMI and ICS);

(*g*) Article 5 did not take into account the special conditions of carriage of goods by sea, i.e. the operation of ships without continuous effective control by the shipowner over the captain, the crew and others servicing the ship (Belgium, Japan and INSA).

Proposed additions to article 5

19. Canada suggested that the convention provide that the rights and liabilities of carriers also be extended to their servants and agents. The German Democratic Republic proposed that a general rule be added making carriers liable for the acts and omissions of their servants and agents.

20. Canada noted that it had no objection to the expanded definition of the term "goods" in article 1, paragraph 4 of the draft convention, which included "live animals". Canada was of the view, however, "that the carrier be required to provide a proper ship and to exercise proper care for the goods".

Article 5, paragraph 1

21. Most comments directed specifically at the provisions contained in this paragraph were concerned with the following issues:

(*a*) Use of the terms "loss, damage or expense" to describe the extent of carrier liability;

(*b*) The provision that "the carrier shall be liable . . . if the occurrence which caused the loss, damage or delay took place while the goods were in his charge . . .";

(*c*) The particular problems connected with the imposition of carrier liability for "delay in delivery".

Kinds of damage for which carrier is liable

22. Several respondents noted that practical difficulties were likely to arise, on account of the terminology employed and the distinctions drawn, from the phrase "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, . . ." (Belgium, Canada, Netherlands, United Kingdom).

23. The United Kingdom observed that the distinction drawn between carrier liability for loss of or damage to the goods and for delay in delivery (in article 5, paragraph 1, and in alternatives B, D and E in article 6) would complicate both the settlement of claims and recovery actions.

24. In order to establish a uniform terminology for the convention and to clarify that carrier liability extended both to physical loss of or damage to the goods and to any consequential financial loss, Canada suggested that the phrase at the beginning of paragraph 1 be recast as follows: "the carrier shall be liable for loss of or damage to the goods as well as expense arising from such loss or damage . . ."[13]

25. With a view to preserving the terminology employed in the Brussels Convention of 1924 and conforming to the corresponding provisions in other international transport conventions, Belgium proposed that paragraph 1 of article 5 should commence: "The carrier shall be liable for any loss or damage to the goods and for any harm (loss, damage or expense) resulting from delay in delivery . . .".[14] Similarly, the Netherlands proposed the following language based on article 17 of the CMR Convention: "The carrier shall be liable for loss of or damage to the goods as well as for delay in delivery . . .".

Carrier liable if occurrence causing the loss, damage or delay took place while goods were in his charge

26. Canada, INSA and OCTI expressed doubts regarding the provision in paragraph 1 of article 5 making the carrier liable "if the occurrence which caused the loss, damage or delay took place while the goods were in his charge". It was noted that sometimes it would prove difficult to determine when a particular occurrence took place, or which one of a number of occurrences "caused the loss, damage or delay".

27. INSA proposed that the reference to "the occurrence which caused the loss, damage or delay" be deleted, so that only the time at which the loss, damage or expense was incurred would be relevant. Accordingly, INSA proposed that article 5, paragraph 1 commence 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 . . ."[15]

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[13] Canada also suggested, *inter alia*, that carrier liability for "delay in delivery" be dealt with in a separate paragraph; see discussion and draft proposed by Canada at para. 31, below.

[14] Belgium also suggested a consequential drafting change in the French text of the paragraph.

[15] INSA further proposed an amendment of article 5, para. 1 as to the burden of proof placed on carriers in order to exonerate themselves from liability. See the discussion above on article 5 as a whole, at para. 17.

28. Canada also proposed the elimination, in article 5, pargraph 1, of the reference to "the occurrence which caused the loss, damage or delay", but proposed further that the time at which loss, damage or expense was incurred should be relevant only in cases where there was loss of or damage to the goods:

> "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 . . ."[16]

29. OCTI was of the view that the reference in article 5, paragraph 1 to "the occurrence which caused the loss, damage or delay" should be limited to instances of loss of or damage to the goods. OCTI stated that otherwise cargo interests would have serious practical problems in trying to establish the particular "occurrence" that caused a delay in delivery. Furthermore, in cases where the delay in delivery was caused by an occurrence prior to the time the carrier took charge of the goods, the carrier could still exonerate himself from liability by showing that he, his servants and agents had taken all reasonably required preventive measures.

30. Since, in most cases, where goods are lost or damaged during their transport, the occurrence causing such loss or damage also takes place in the course of such transport, OCTI further proposed that a presumption to this effect be incorporated in a new paragraph 2 of article 5. OCTI explained that in the rare case where the occurrence causing the loss of or damage to the goods did not take place during the carriage, it was reasonable to place the burden of proving this fact (i.e. to rebut the above presumption) on the carrier rather than on the cargo interests who were not in a position to know the details of the carriage. The draft text proposed by OCTI reads 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.
>
> ". . .[17]
>
> "2. When it is proved that the loss (of) 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."[18]

Carrier liability for delay in delivery

31. Canada proposed that the liability of carriers for delay in delivery should be dealt with in a separate paragraph of article 5, specifying the types of damage resulting from delay in delivery for which carriers would be held liable and laying down a special rule for the exoneration of carriers from liability:

> "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".

32. CMI, while favouring the imposition of carrier liability for delay in delivery, stated that compensation on this ground should be limited to direct and reasonable losses that the carrier could reasonably have foreseen at the time he concluded the contract of carriage. IUMI, opposed to the creation of carrier liability for delay in delivery, noted that if such liability were included in the new convention, it should be limited to losses that the carrier could reasonably foresee as probable consequences of the delay in delivery.

Other comments

33. Austria noted expressly its support for the general burden of proof rule contained in this paragraph.

34. Canada and Sierra Leone noted that if the definition of "carrier" in article 1, paragraph 1, encompassed the servants and agents of the carrier, then there was no need to refer to them in article 5, paragraph 1.[19]

Drafting suggestions

35. Suggestions of a drafting nature were made by Canada, and by OCTI affecting only the French text of this paragraph.

Article 5, paragraph 2

36. Canada proposed that this paragraph should be redrafted so as to clarify whether or not it encompassed frustration of the contract of carriage by an extended delay in the delivery of the goods, and so as to add a special rule covering cases where the location of the delayed goods was known.

37. Canada and IUMI expressed their concern that the definition of "delay in delivery" in terms of non-delivery "within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case", would, in the absence of an agreement in writing regarding the time of delivery, lead to litigation. Canada proposed the following new text for this paragraph:

> "3. For the purpose of paragraph 2[20] 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."

38. INSA stated that this paragraph should make it clear that the carrier was permitted to call at ports

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[16] Canada further proposed that liability for delay in delivery be dealt with in a separate paragraph and that the time at which the delay took place should not as such be decisive in the determination of carrier liability for delay in delivery. See the discussion at para. 31 below.

[17] OCTI further proposed at this point an amendment of article 5, para. 1, as to the burden of proof placed on carriers in order to exonerate themselves from liability. See the discussion above on article 5 as a whole, at para. 17.

[18] OCTI proposed the following *prima facie* evidence rule as an alternative, in case its suggestion, discussed at para. 29 above, were not adopted:

> "When it is proved that the loss (of) 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."

[19] It may be noted that Canada advocated the addition of a general rule to the convention whereby the rights and liabilities of carriers were also extended to their servants and agents (see discussion above of proposed additions to article 5, at para. 20).

[20] This reference is to the new paragraph proposed by Canada to deal with carrier liability for delay in delivery (see the discussion above on article 5, para. 1, at para. 31).

en route to take on or discharge cargo without incurring liability for delay in the delivery of the goods of any particular shipper. INSA therefore proposed that the following sentence be added at the end of article 5, paragraph 2:

"The term 'delay' does not include the time used during voyage for loading or discharging the goods."

Article 5, paragraph 3

39. Canada stated that the paragraph was acceptable. Nigeria suggested that the person entitled to take delivery of the goods should be able to treat the goods as lost only after the delay in delivery amounted to 90 days, instead of 60 days as now provided for in this paragraph.

40. ICS proposed the addition of the following sentence at the end of this paragraph, in order to deal with the special case where, although the goods could not be delivered within a period of 60 days after the due date for delivery, their whereabouts were known to the carrier:

"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."[21]

41. Japan proposed the addition of a provision, requiring the person who had treated the goods as lost pursuant to this paragraph to give to the carrier any necessary assistance to dispose of the goods on reasonable terms if it should subsequently turn out that the goods were not in fact lost.

Article 5, paragraph 4

42. The comments on this paragraph fell into one of the following general categories:

(*a*) Some respondents accepted the paragraph as constituting part of the over-all compromise on carrier liability incorporated in article 5 (Denmark, Finland, Hungary and Sweden);[22]

(*b*) The basic principle in this paragraph, that the carrier is liable only if "the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents", was, by implication, accepted by Canada, the German Democratic Republic and OCTI when they only proposed modifications of this paragraph not affecting this basic principle;

(*c*) Some respondents favoured retention of the defence of "fire" found in the Brussels Convention of 1924 (Belgium, Germany, Federal Republic of, Netherlands, CMI, CMI/ICC Working Group, ICS and IUMI);[23]

(*d*) Some respondents took the view that carrier liability for fire should be governed by the general rule in article 5, paragraph 1 (Austria, Czechoslovakia and Mexico) or by a modified article 5, paragraph 4, placing the basic burden of proof on the carrier (France, Nigeria, Philippines and Sierra Leone).

Inclusion of carrier liability for fire in the general rule on carrier liability in article 5

43. Criticism of article 5, paragraph 4, focused on the special burden of proof rule contained therein, whereunder the carrier is held liable for loss or damage from fire only if "the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents". Several respondents noted that thus rule placed an excessive burden on shippers and consignees which they would generally find impossible to meet in practice, since they were not aboard the ship at the time of the fire and could not know when and how the fire developed (Austria, Czechoslovakia, France, Mexico and Nigeria). It was further noted that the carrier knew and had control over the events that occurred on board the ship, and that therefore it would be more equitable to require that in order to be exonerated from liability for loss or damage from fire the carrier had the burden of proving that due care had been exercised (Austria, Mexico, Nigeria, Philippines and Sierra Leone).

44. Accordingly, Austria, Czechoslovakia and Mexico proposed that this paragraph be deleted and that carrier liability for fire should be governed by the general rule in article 5, paragraph 1, stating that to be freed from liability the carrier had the burden of proving "that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

45. In the same vein, though not suggesting deletion of article 5, paragraph 4, Nigeria and Sierra Leone proposed its amendment so that, in the case of fire, the carrier had the burden of proving that due care had been exercised by him, his servants and agents. Similarly, the Philippines proposed that this paragraph read as follows:

"In case of fire, the carrier shall be liable unless he proves that he, his servants or agents took all necessary measures to prevent the fire."

46. France proposed retention of the basic compromise incorporated in article 5, paragraph 4, as to the burden of proof, with the addition, however, of a provision requiring the carrier to show that the ship was properly equipped for fire prevention and that all necessary steps were taken to avoid the fire and to reduce its consequences. France proposed the following wording for article 5, 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."

Other comments

47. Canada proposed that the opening phrase of the paragraph should read: "In case of damage, loss

[21] It may be noted that Canada, while finding article 5, para. 3 acceptable, suggested that the special case of non-delivered goods whose whereabouts were known should be dealt with in the paragraph of article 5, defining "delay in delivery". See the discussion above on article 5, para. 2, at para. 36.

[22] The comments accepting the article 5 compromise as to the allocation of risks between carrier and shipping interests are considered in the discussion above on article 5 as a whole, at paras. 3-4.

[23] The comments advocating retention of the "fire" defence in the Brussels Convention of 1924 for the exoneration of carriers from liability are considered in the discussion above on article 5 as a whole, at paras. 11-12.

or delay caused by fire," instead of "In case of fire", since the carrier incurred liability for fire only if loss of or damage to the goods, or delay in delivery, occurred as a consequence of the fire. In order to stress that this paragraph constituted an exception to the general rule on burden of proof found in article 5, paragraph 1, OCTI proposed the modification of the opening phrase in paragraph 4 to read "In case of fire, the carrier shall only be liable . . .".

48. The German Democratic Republic suggested consideration of the addition in this paragraph of a reference to the "actual carrier".

Article 5, paragraph 5

49. The Byelorussian SSR, Canada and the USSR proposed the deletion of this paragraph. They were of the view that the paragraph was unnecessary, since in cases where there was loss, damage or delay during the carriage of live animals attributable to the "special risks inherent in that kind of carriage," the carrier would be freed from liability pursuant to the general rule in article 5, paragraph 1, as the carrier would be able to prove "that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences". However, Canada proposed the addition of a provision to article 5, paragraph 1, requiring that the carrier furnish a ship properly equipped to carry the particular cargo and that he exercise due care for the goods.

50. Hungary proposed deletion of the second sentence in this paragraph, which establishes a special burden of proof rule and presumption regarding carrier liability for loss, damage or delay in the carriage of live animals. Thus, although paragraph 5 would still relieve the carrier from liability if the loss, damage or delay resulted from the special risks inherent in the carriage of live animals, the carrier would bear the burden of establishing this fact under the general burden of proof rule in article 5, paragraph 1.

51. INSA proposed modifying the second sentence of paragraph 5 so that if the carrier proved compliance with special instructions given by the shipper concerning the live animals, it would then be presumed that any loss, damage or delay in the delivery of the live animals was due to the "special risks inherent in that kind of carriage" and that therefore the carrier was not liable. Paragraph 5 as modified by INSA reads as follows:

> "With respect 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, 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."

52. While ICS was of the view that the Convention should not regulate the carriage of live animals,[24] it proposed that in case the Convention did cover the carriage of live animals, article 5, paragraph 5 should be reworded as follows:

> "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."[25]

Drafting suggestion

53. OCTI proposed a drafting change affecting only the French text of the paragraph.

Article 5, paragraph 6

54. The comments on this paragraph were concerned primarily with the provision that the carrier was only freed from liability for "reasonable measures to save property at sea" and with the effect of the paragraph on the possible obligation of the carrier to make a general average contribution.

Carrier exemption from liability for "reasonable measures to save property at sea

55. The Byelorussian SSR, Canada, the Ukrainian SSR, the USSR and INSA expressed reservations regarding the rule in this paragraph exonerating carriers from liability only for "reasonable measures" taken to save property at sea. They stressed that there would be serious practical difficulties in endeavouring to determine whether particular measures taken at sea were or were not "reasonable", with the consequence that the issue would often be litigated.

56. The USSR and INSA noted that, at the time he decided upon the measures to be taken, the master of a cargo vessel would often not know whether he would be saving lives or only property. INSA observed further that it was only after the rescue operation was completed that the value of the cargo risked by the carrier could be compared with the value of the property saved. The Byelorussian SSR and the USSR stated that this provision would have an adverse effect on compliance by masters of cargo vessels with the traditional rules of navigation calling for assistance to ships in distress.

57. The Byelorussian SSR and the Ukrainian SSR noted the need for clearly delineating the criteria that were to be used to determine whether a measure taken to save property at sea was "reasonable" for the purpose of article 5, paragraph 6. INSA proposed that the word "reasonable" be deleted from this paragraph. INSA further proposed, as a less preferable alternative, that in order to recover, the shipper or the consignee should be required under this paragraph to prove that the measures taken by the carrier to save property at sea were "deliberately unreasonable", and proposed the following wording:

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

[24] See the discussion above on article 1, para. 4, at para. 18.

[25] It may be noted that the redraft of article 5, para. 5 suggested by ICS makes no reference to carrier liability for delay in delivery. For the position of ICS opposing the imposition of carrier liability for delay in delivery, see the discussion above on article 5 as a whole, at paras. 13-14.

there is no proof that in salving the property the carrier acted deliberately unreasonably."

58. ICS proposed that under paragraph 6 the carrier should also be exempted from liability for the consequences of labour disputes and of delay resulting from time taken to provide needed medical attention for ill or injured persons on board the cargo ship, even if their lives were not in danger. ICS recommended that article 5, paragraph 6 should read 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."

Effect on general average or salvage contribution by carrier

59. The United Kingdom observed that the present wording of paragraph 6 seemed to free the carrier from his obligation to make a contribution in general average or salvage when the type of loss or damage to the cargo interests for which the carrier was normally obligated to make a contribution in general average or salvage resulted from "measures to save life" or "reasonable measures to save property at sea". To make it clear that in such a case the carrier remained bound to make the appropriate general average or salvage contribution, the United Kingdom proposed that this paragraph should commence:

"The carrier shall not be liable, except in general average and salvage, for loss, damage . . ."

60. Sierra Leone stated that the convention should contain a provision ensuring that shippers and consignees were protected against the consequences of general average acts by carriers. It noted that such mandatory protection in the convention was preferable to leaving to the terms of the contract of carriage or to national law the possible obligation of the carrier to contribute in general average.

Drafting suggestion

61. The United States suggested a drafting change for this paragraph.

Article 5, paragraph 7

62. The Federal Republic of Germany proposed the deletion of this paragraph, since it was of the view that specific international agreements, such as the 1910 Brussels Convention on Collisions,[26] or the principles of the applicable national law should govern the interrelationship of claims that the cargo interests may have against the carrier under this Convention and of claims that they may have against other persons.

Drafting suggestions

63. Suggestions of a drafting nature regarding the text of article 5, paragraph 7 were made by Canada, and by OCTI affecting only the French text of this paragraph.

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

Article 6. Limits of liability

Article as a whole

1. The majority of respondents preferred formulation of the limits on the liability of carriers in terms of the single criterion of the weight of the goods (i.e. alternatives A and B) rather than in terms of the dual criteria of weight and "package or other shipping unit" (alternatives C, D and E). Among respondents preferring alternative A or B, the majority preferred alternative A, and among respondents preferring alternative C, D or E, the majority preferred alternative D.

2. Some respondents observed that a final choice among the alternatives could not be made until the monetary amounts for the limits of liability had been determined.

3. Many respondents proposed that the monetary limits of liability should be defined in terms of the special drawing rights of the International Monetary Fund, rather than in terms of "gold francs".

Alternative A

4. Denmark, Finland, Fiji, Hungary,[27] Norway, Sweden[28] and the United Kingdom expressed a preference for alternative A, for the following reasons:

(*a*) The method contained in alternative A was simple (Denmark, Finland and the United Kingdom), particularly in that it established the same limits for all cases of carrier liability, including liability for delay (Hungary and the United Kingdom), and specified only the single criterion of weight for setting the limit (United Kingdom);

(*b*) The criterion of weight for setting the limit had been adopted in certain other transport conventions, i.e., the CIM, CMR and Warsaw Conventions. Its adoption in the convention would lead to uniformity, and lessen difficulties in formulating uniform rules for combined transport (Norway and Sweden);

(*c*) The additional criterion of the "package or other shipping unit" for setting the limit contained in alternatives C, D and E was unclear, and had been given differing interpretations in national laws and judicial decisions (Norway and Sweden). The criterion of weight gave rise to fewer disputes (Fiji);

(*d*) The criterion of "package or other shipping unit" could produce differing, unexpected and arbitrary limits of liability in respect of the same consignment of goods depending on the way the goods were packed (Finland, Norway and Sweden), and in many countries the application of this criterion to goods carried in containers was still unsettled (Norway);

(*e*) The objection that adoption of the criterion of weight would result in the shipper or consignee of cargo with low weight but high value receiving inadequate compensation could be met by:

(i) The insurance of such goods (Finland); or

(ii) A provision such as article 10 (3) of the draft TCM convention[29] which reads as follows: "The minimum gross weight of such goods shall be deemed to be . . . kilos." (Norway);

[27] Hungary expressed an equal preference for alternative C.
[28] Sweden expressed a second preference for alternative B.
[29] E/CONF.59/17.

(*f*) Inquiries among interested commercial circles in Scandinavia had shown that adoption of the criterion of weight for setting the limits of carrier liability would resolve most problems connected with damage to general cargo, and that the increase in price to be paid in the form of insurance would be negligible (Norway).

Alternative B

5. Austria, the German Democratic Republic,[30] Japan[31] and OCTI expressed a preference for alternative B, for the following reasons:

(*a*) The limit of carrier liability for delay in delivery should in general be less than the limit in the case of liability for loss of or damage to goods, and alternative B provided a separate and appropriate limit for delay in delivery (Austria and OCTI);

(*b*) Adoption of alternative B, and the criterion of weight contained therein, would be in harmony with other transport conventions, e.g. the CIM and CMR Conventions (Austria and OCTI);

(*c*) Adoption of the single criterion of weight for setting the limits of liability was simple and practical (Japan);

(*d*) If the criterion of "package or other shipping unit" was used for setting the limits of liability, the limit of liability could vary depending on the number of shipping units within which a consignment of goods was packed (Austria);

(*e*) The objection that adoption of the criterion of weight would result in the shipper or consignee of cargo with low weight but high value receiving inadequate compensation could be met by the incorporation of a provision under which the shipper could exclude the limits of liability by declaring the nature and value of the goods (e.g. as under article 4, para. 5, of the Brussels Convention of 1924) (Japan).

6. France observed that, despite its preference for alternative D, it would have no serious objection to the adoption of alternative B, if it appeared that the majority favoured a method of defining the limits of liability solely by reference to the criterion of weight. It noted that alternative B was acceptable since it contained a special limitation in regard to liability for delay defined by reference to the freight.

7. On the issue as to whether the limit of carrier liability for delay under subparagraph (*b*) should be the freight or double the freight, Austria observed that there were precedents for both, and that therefore either limit would be acceptable.

8. Sweden noted that its second choice was alternative B.[32]

9. OCTI proposed that subparagraph (*b*) of alternative B should be redrafted in order to clarify that the limit of liability set under that subparagraph did not apply to cases of loss of or damage to the goods occasioned by delay; all cases of loss of or damage to the goods would be covered solely by the limit set under subparagraph (*a*). The following new text of subparagraph (*b*) was proposed:

"(*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."

10. OCTI observed that the French text of paragraph (*a*) of alternative B was more detailed than the corresponding English text, and suggested that the English text should be redrafted to accord with the French text, as follows:

"1. (*a*). The liability of the carrier for *loss, damage or expense resulting from* loss or damage to *the* goods according . . ."

Alternative C

11. Hungary expressed a preference for alternative C,[33] for the reason that this alternative established the same limits for all cases of carrier liability, including liability for delay in delivery.

12. Mexico noted that alternative C gave rise to problems in the calculation of the limits of liability.

Alternative D

13. The Byelorussian SSR, France, the Federal Republic of Germany, the Ukrainian SSR, the USSR, the United States,[34] and INSA expressed a preference for alternative D. In regard to the two variants for the limit of liability under subparagraph (*b*) of this alternative, the United States preferred variant Y, and the other respondents mentioned above preferred variant X.

14. The following reasons were given for the preference of alternative D:

(*a*) Adoption of the criterion of weight alone did not produce satisfactory results (France). If the monetary limit per kilo of gross weight of the goods lost or damaged were fixed at a comparatively low figure, shippers or consignees of cargo of high value but low weight would receive inadequate compensation (Germany, Federal Republic of, and INSA). If the monetary limit were fixed at a high figure, liability would be unlimited in the case of low value cargoes. The adoption of dual criteria, such as in alternative D, produced fairer results (INSA);

(*b*) By adopting dual criteria for setting the limits of liability, alternative D maintained the compromise achieved by article 2 of the Brussels Protocol of 1968 between the adoption of the criteria of weight alone (as in certain conventions regulating other modes of transport) and the adoption of the criterion of package or unit (as in article 4, para. 5, of the Brussels Convention of 1924) (France). The dual criteria also resulted in more equitable compensation being awarded where cargo was lost or damaged, since both the weight of the cargo and the value of the units of cargo could be relied on by claimants (INSA);

(*c*) Alternative D was preferable to alternative C in that it set a special limit for carrier liability for delay in delivery defined by reference to the freight (France

[30] The German Democratic Republic was of the view that the rules contained in alternative B should be supplemented by the rule contained in alternative C, para. 2 (*a*) which provides for the case where a container, pallet or similar article of transport is used to consolidate goods.

[31] Japan also expressed a preference for alternative E.

[32] The first choice of Sweden was alternative A.

[33] Hungary expressed an equal preference for alternative A.

[34] The preference by the United States was expressed in the light of its belief that the majority of States favoured alternative D.

and INSA). The limit of liability for delay should be based on principles different from those on which the limit of liability for loss of or damage to the goods was based (INSA).

15. The Federal Republic of Germany observed that its preference for alternative D was based on the assumption that the monetary limit per kilo to be adopted would not be very much higher than the 30 francs Poincaré specified in article 2 (*a*) of the Brussels Protocol of 1968. It noted that, although alternative A was preferable on the grounds of its simplicity, it would be acceptable only if a much higher monetary limit per kilo was adopted. Since no final choice of a method of limitation could be made until the monetary limits had been determined, and since the monetary limits were likely to be finally determined only at the diplomatic conference which would consider the draft convention, the Federal Republic of Germany suggested that all the alternatives should be retained in the draft and placed before the diplomatic conference.

16. INSA made the following proposals in regard to paragraph 1 (*a*) of alternative D:

(*a*) The language should be modified in order to clarify whether, when some packages or shipping units of different weight in the same consignment were lost or damaged, in determining the limits of liability account should be taken separately of each package or unit, or only of the aggregate of the goods lost or damaged;

(*b*) The words "his servants or agents" should be added after the word "carrier" in order to extend the limits of liability to the servants and agents of the carrier acting within the scope of their duties.

17. Mexico noted that alternative D gave rise to problems in the calculation of the limits of liability.

Alternative E

18. Japan,[35] Mexico and Sierra Leone expressed a preference for alternative E.

19. Mexico gave the following reasons for its preference:

(*a*) The provisions contained in this alternative were, in contrast to those contained in alternative A, comprehensive; and

(b) Unlike the provisions of alternatives C and D, the provisions contained in this alternative did not give rise to difficulties in the calculation of the actual amounts of liability.

Paragraphs applying to all alternatives under article 6

Definition of limits in terms of special drawing rights

20. Belgium, Denmark, Fiji, Finland, Germany, Federal Republic of, the Netherlands, Norway and Sweden proposed that the monetary limits of liability should be defined in terms of the special drawing rights of the International Monetary Fund, and not in terms of "gold francs" as was currently the case. Belgium, the Federal Republic of Germany, Sweden and the International Civil Aviation Organization (ICAO) drew attention to the fact that article VI of the Montreal Protocol No. 4 to amend the Warsaw Convention of 1929 defined the limits of liability of the air carrier in terms of special drawing rights. ICAO also noted that the Montreal Protocol No. 4 permitted States not members of the International Monetary Fund to declare that the limit of liability was to be fixed in terms of Poincaré francs. It was noted that definition in terms of special drawing rights would have the following advantages:

(*a*) It would prevent fluctuations in the monetary limits of liability arising from fluctuations in the price of gold (Fiji and Norway);

(*b*) It would prevent difficulties arising from the disappearance of an official gold price, the working of the unit of account as a numeraire, and the calculation of exchange rates in the absence of official parties (the Netherlands).

Definition of limits in terms of "gold francs"

21. Hungary and the Philippines approved the definition of the monetary limits of liability in terms of "gold francs" as defined in these paragraphs. Hungary observed that definition in such terms eliminated the effect of inflation in reducing the limits of liability.

Conversion of the unit of value into national currency

22. The following proposals were made in regard to the rules for converting the "gold franc" into a national currency:

(*a*) Fiji proposed that the conversion of the "gold franc" into a national currency should be made on the basis of the official value of that currency in relation to the "gold franc" as at the time the loss occurred. If the conversion were made, as under the rule set forth at present, on the date of a judgement or arbitral award, delays in legal or arbitration proceedings would affect the amount recoverable;

(*b*) The German Democratic Republic proposed that this paragraph should be redrafted in order to cover the case where a dispute as to loss or damage did not proceed to litigation or arbitration, but was settled between the parties. The following text was proposed for this purpose:

> "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."

23. Japan noted that clarification was required of the formula for conversion of the international standard into national currencies.

Observations not addressed to a specific alternative

A. *The level of the monetary limits of liability*

24. ICS and IUMI proposed that the monetary limits of carrier liability should be set at a low level, for the following reasons:

(*a*) If the monetary limits were set at a high level, a greater proportion of the insurance of the cargo would be covered through the liability insurance of the carrier rather than through the cargo insurance of the shipper. However, carrier liability insurance for a relatively high total amount was more expensive than cargo insurance

[35] Japan also expressed a preference for alternative B.

for the exact value of each consignment of cargo. The result would therefore be a rise in transportation costs (ICS, citing UNCTAD secretariat study TD/B/C.3/120, para. 189);

(*b*) The setting of a high monetary limit in this context would result in excessive exposure of the carrier to liability (ICS and IUMI). The likelihood of a high monetary limit leading to such excessive exposure was accentuated by the rules of liability contained in article 5, under which the carrier would be held liable for the total loss of the goods in many cases (IUMI);

(*c*) A high monetary limit would result in the shipper of low value goods subsidizing the shipper of high value goods (ICS);

(*d*) A low monetary limit would reduce recourse actions by cargo insurers (IUMI);

(*e*) A high monetary limit would 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 (ICS).

25. Hungary and the United Kingdom noted that a final choice among the alternatives could not be made until the precise amounts of the monetary limits of liability in the various alternatives had been decided. Finland regarded the limits contained in the Brussels Protocol of 1968 as appropriate. The Federal Republic of Germany observed that a figure of 30 Poincaré francs, or a slightly higher figure, would be acceptable, but that the final figure should be left to be decided by the diplomatic conference which would consider the draft convention. Norway also suggested that the final figure should be left to the determination of the diplomatic conference.

B. *The formulation of limits of liability when goods are carried in containers*

26. Czechoslovakia proposed that provision should be made regulating the limits of carrier liability where goods were transported in containers, pallets, or similar articles of transport.

27. Hungary observed that, if a method of defining the limits of liability adopting the criteria of "package or other shipping unit" were made applicable when goods were carried in containers, it would be necessary to ensure disclosure of the number of shipping units within a container, since the aggregate number of the units within a container might be considerable. However, this problem would not arise if a limitation based on the criterion of weight were adopted.

28. The Niger noted that it preferred those alternatives which dealt with the problems which arose when goods were carried in containers, since such carriage was of special importance to a land-locked State.

29. CMI noted that some of the difficulties encountered in using the criterion of package or unit for the purpose of limiting carrier liability when goods were carried in containers could be resolved by making the packages within the container rather than the container itself the relevant units, provided such packages were enumerated in the bill of lading.

C. *Declaration by the shipper of the nature and value of the goods*

30. Hungary, the Philippines and the USSR proposed that the rules contained in article 6 as to the limits of liability should include a provision similar to that contained in article 4, paragraph 5 of the Brussels Convention of 1924 or article 2 (*a*) of the Brussels Protocol of 1968 under which a shipper could exclude the prescribed limits of liability by declaring to the carrier the nature and value of the goods.

D. *Absence of choice between the various alternatives*

31. Belgium, Czechoslovakia and Nigeria deferred making a choice among the various alternatives to a later stage in the consideration of the draft convention. The Philippines stated that all the alternatives were void under Philippine law as being against public policy, since they limited the liability of the carrier to a fixed amount without any condition and without the consent of the shipper or consignee. However, it noted that a formulation which limited the carrier's liability to a specified amount would be valid under Philippine law, unless the shipper declared that the goods had a higher value and paid a higher freight rate. It therefore proposed the following formulation:

> "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."

Alternatively, the Philippines proposed the adoption of article 4, paragraph 5 of the Brussels Convention of 1924.

32. Canada expressed the view that none of the five draft alternatives were satisfactory in that they:

(*a*) Did not provide a satisfactory solution to the uncertainties of gold as a monetary unit of measure;

(*b*) Did not resolve the uncertainties created by various court decisions as to the meaning of "package" or of liability relating to a "unit of weight"; and

(*c*) Did not enable the carrier to grasp fully the scope of his liability at the time he concluded a contract of carriage.

Canada stated that it had given consideration to the possibility of using the insured value of the cargo, or a mandatory declared value of the cargo, as a limit of liability, but had found that this might require the shipper to reveal information to the carrier which the shipper regarded as confidential. Canada suggested that, in regard to goods of undeclared value, a formula relating the limits of liability to the amount paid as freight deserved further examination.

33. Belgium noted that the Belgian maritime interests were not opposed to a simpler limitation formula than the one containing the double criteria of unit and weight adopted in the Brussels Protocol of 1968, provided that the simpler formula did not substantially increase the limits of liability.

34. The Netherlands proposed that a provision for calculating the value of the goods, such as the one contained in article 2 (*b*) of the Brussels Protocol of 1968, should be added to article 5 or 6.

35. The United Kingdom proposed that provision should be made either in article 6 or article 24 that, when the cargo interest had paid salvage, and sought to recover from the carrier because of the carrier's fault, the recovery should not be subject to the limits of liability prescribed in this article.[36]

36. The CMI observed that a provision defining the limits of liability should have the following features:

(*a*) The definition of such limits should be clearer than the definition at present contained in the Brussels Convention of 1924 and should establish the limits of liability in a manner preventing disputes and litigation;

(*b*) The criterion of "package or unit" should be supplemented by the criterion of weight in the method adopted to set the limits of liability in order to improve the position of claimants in regard to heavy units;

(*c*) Liability for loss arising from delay in delivery should always be limited to such direct and reasonable loss as, at the time of entering into the contract of carriage, could reasonably have been foreseen by the carrier as a probable consequence of the delay in delivery, and should in any event be limited to an amount not exceeding the freight;

(*d*) The aggregate liability of the carrier for loss, damage or delay should be restricted to the limit that would apply for total physical loss of the goods in respect of which liability was incurred (e.g. as in alternative B, para. 1 (*c*), alternative D, para. 1 (*c*), and alternative E, para. 1 (*c*)).

37. IUMI observed that:

(*a*) If a liability for delay in delivery were imposed, that liability should be limited to the amount of the freight in all cases where there was no physical loss of or damage to the cargo. However, clarification was needed as to whether "freight" means the freight for the whole cargo, for all the goods covered by the bill of lading, or for the cargo delayed. IUMI suggested that the interpretation that "freight" in this case meant only freight for the cargo delayed appeared to be more in conformity with a possible limitation per kilo of gross weight of the goods lost or damaged;

(*b*) In considering the limits of liability, the overall limit of liability of the carrier under the International Convention relating to the Liability of Owners of Seagoing Ships, Brussels, 10 October 1957, should be examined.

Article 7. Actions in tort

Article as a whole

1. CMI and the International Labour Organisation expressed particular support for the provisions of paragraph 2 whereby, in actions brought against them, the servants and agents of the carrier were entitled to the same defences and limitations on liability as the carrier, provided that they acted within the scope of their employment.

2. The United Kingdom suggested that consideration be given to adding a reference to the "actual carrier" whenever the term "carrier" appeared in this article.

Article 7, paragraph 1

3. Canada and ICS observed that the phrase "whether the action be founded in contract or in tort" did not cover all classes of actions. In order to ensure that this paragraph applied to all possible classes of actions, Canada suggested replacement of the phrase "or in tort" by "or otherwise", while ICS proposed, for the same reason, that the words "or otherwise" be added at the end of the present text.

Drafting suggestions

4. Suggestions of a drafting nature, regarding the French text only of article 7, paragraph 1, were made by France and OCTI.

Article 7, paragraph 2

5. Canada noted that in this paragraph the person entitled to the same defences and limitations on liability as the carrier was identified as "a servant or agent of the carrier". Canada pointed out that, on the other hand, for the purpose of determining "the period during which the goods are in the charge of the carrier", article 4, paragraph 3, referred to "the servants, the agents or other persons acting pursuant to the instructions ... of the carrier". Canada proposed that the same wording should be used in both articles to refer to "servants or agents".[37]

Article 7, paragraph 3

6. Canada noted that this paragraph was acceptable.

Article 8. Loss of right to limit liability

Extension of circumstances in which right to limit liability is lost

1. France, the German Democratic Republic and Hungary proposed that this article should be modified to provide that, in addition to the case where the carrier lost the right to limit his liability under the first sentence of the article, he also lost the right to limit his liability when damage had been caused:

(*a*) By the act of a servant or agent of the carrier, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result (the German Democratic Republic and Hungary);

(*b*) By the act of a servant or agent of the carrier acting within the scope of his employment, such act being done with the intent to cause the damage, or recklessly and with knowledge that the damage would probably result (France).

It was observed by France and Hungary that, since in most cases a carrier acted through servants or agents, acts by the carrier himself of the kind entailing loss of

[36] This proposal is covered by the new text proposed by the United Kingdom for article 24. This new text is set forth in the discussion on that article, at para. 3.

[37] It may be noted that Canada proposed a redraft of article 4, para. 3, reading in the relevant part, "the servant or agent of the carrier". See the discussion above on article 4, para. 3, at para. 12.

the right to limit liability under this article would be very rare. Loss of the carrier's right to limit his liability would therefore in practice occur infrequently under the article as currently drafted, and the shipper would be insufficiently protected. France also noted that its proposed modification as to the loss of the carrier's right to limit his liability would be in accord with the rules contained in the Warsaw Convention of 1929 as modified by the Hague Protocol of 1955.

2. Austria observed that the very limited scope of the circumstances under which the right to limit liability was lost under this article was unfair to the person entitled to the goods. Austria proposed that:

(*a*) The carrier should lose the right to limit his liability when damage resulted from an act of gross negligence on his part, or an act of gross negligence on the part of his servants or agents; and

(*b*) The servants or agents of the carrier should lose the right to limit their own liability when damage resulted from an act of gross negligence on their part.

Restriction of circumstances in which right to limit liability is lost

3. The Byelorussian SSR, the Ukrainian SSR and the USSR proposed that the words "or recklessly and with knowledge that such damage would probably result" should be deleted from:

(*a*) The first sentence of the article (the Byelorussian SSR);

(*b*) From both the first and the second sentence of the article (the Ukrainian SSR and the USSR).

The following reasons were given for this proposal:

(i) "Recklessness" had basically the same meaning as "negligence". Since the liability of the carrier under article 5 was based on negligence, the result in practice might be that the carrier lost the right to limit his liability in every case that negligence was proved (the Ukrainian SSR and the USSR);

(ii) Retention of the phrase "and with knowledge that such damage would probably result" would lead in practice to the loss by the carrier of the right to limit his liability in many cases, because it would be very difficult for a carrier to prove that the probability of damage was beyond his knowledge (the Byelorussian SSR and the USSR). The phrase would also create various problems of interpretation (the Ukrainian SSR).

Other comments

4. Canada, the United Kingdom and OCTI noted that this article provided that the carrier and his servants or agents lost the right to limit their liability when "damage" resulted from an act or omission on their part of the kind specified in the article. Since under article 5, paragraph 1, the carrier was liable not merely for "damage" to the goods, but "for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery", it was proposed that the two articles should be brought into harmony by substituting the words "loss, damage and delay" (the United Kingdom) or the words "loss, damage or expense" (OCTI) for the word "damage" where the latter word appeared in the English text of article 8. OCTI also suggested that the word "*dommage*" in the French text of article 8 should be replaced by the word "*préjudice*".

5. Canada proposed that the article should be redrafted by deleting the second sentence thereof, and by modifying the first sentence so as to provide that both the carrier and his servants or agents lost the right to limit their liability if it were proved that the damage resulted from an act or omission on their part of the kind specified in the first sentence.

6. ICS and IUMI accepted the formulation in this article of the circumstances in which the right to limit liability was lost by carriers and by their servants and agents, i.e. when they caused the damage by an intentional or reckless act or omission.

Article 9. Deck cargo

Article 9, paragraph 1

1. The comments on this paragraph were concerned mainly with the definition therein of the circumstances under which the carrier was authorized to carry the goods on deck, and with the liability of the carrier when he carried goods on deck pursuant to such authorization.

2. Canada noted that carriers could be expected to establish lower freight rates or to offer discounts for authorized carriage on deck and observed that carriers would be able to give preferential treatment to large shippers, e.g. in the assignment of space under deck.

Authorization for carrier to carry goods on deck

3. ICS and IUMI expressed support for the three possible sources of carrier authorization to carry goods on deck that were mentioned in this paragraph. IUMI was of the view that paragraph 1 was sufficient to accommodate the existing insurance practice under which no distinction was made whether containers were carried on deck or below deck. ICS proposed that for the sake of clarity the following sentence should be added at the end of the present text of the paragraph: "Shipment in containers shall be deemed to constitute agreement to carriage on deck". INSA noted that clarification was needed as to whether the three sources of carrier authorization referred to in this paragraph were independent alternatives so that any one of them would be sufficient authorization for the carrier.

4. The German Democratic Republic proposed that this paragraph be changed so that carriage of goods on deck would require an express agreement of the shipper and the carrier to this effect in all cases except where the goods were carried in containers.

5. Hungary proposed that the meaning of the term "usage" be defined more precisely in this paragraph and noted that in the context of carriage on deck the term "binding custom" was often used. The Byelorussian SSR, the Ukrainian SSR and the USSR proposed that, in order to clarify which were the applicable "statutory rules or regulations" referred to in paragraph 1, a phrase such as "of the country of the port of loading" be added at the end of the paragraph.

Carrier liability for authorized carriage on deck

6. Canada, Czechoslovakia, Hungary, Japan and the Netherlands proposed that article 9 should address itself to the possible liability of carriers for loss, damage or delay in the delivery of goods that the carriers had carried on deck in accordance with the provisions of article 9, paragraph 1. They noted that, under the present wording of article 9, carrier liability for authorized carriage on deck was unclear, particularly in the light of article 9, paragraph 3, which specifically dealt with carrier liability for unauthorized carriage on deck.

7. Czechoslovakia, Hungary and the Netherlands proposed that the general rules of articles 5, 6 and 8 on the liability of carriers should also apply to authorized carriage of goods on deck. Czechoslovakia noted further that if it were intended that carrier liability be modified in the case of authorized carriage on deck, such modification should be spelled out clearly in article 9.

8. Japan proposed that a provision be added to article 9, paragraph 1, stating that in the case of authorized carriage on deck the carrier was relieved of liability for loss, damage or delay in delivery that resulted from the special risks inherent in carriage on deck, if he proved that the loss, damage or delay in delivery could be attributed to these special risks.

Drafting suggestions

9. Suggestions of a drafting nature regarding the text of article 9, paragraph 1, were made by Canada, and by OCTI as to the French text only.

Article 9, paragraph 2

10. The Byelorussian SSR and the USSR proposed that in all cases where goods were carried on deck pursuant to an authorization under article 9, paragraph 1, the bill of lading should indicate that the goods were being carried on deck, since this fact was of great interest to shippers and consignees. They noted that this requirement could be added either to article 9 or to article 15.

11. Canada expressed uncertainty as to the meaning of the word "statement" in article 9, paragraph 2, referring to an agreement by the shipper and the carrier to carry goods on deck, but assumed that it did not include printed clauses. Canada proposed deletion of the reference in this paragraph to "other document evidencing the contract of carriage" since it doubted the enforceability against third parties of a statement in such document.

Article 9, paragraph 3

12. The Byelorussian SSR, Canada, Hungary, the Netherlands, the USSR and IUMI observed that this paragraph was drafted in an unclear manner and should therefore be redrafted.

13. In the view of the Byelorussian SSR and the USSR, the redraft should make articles 6 and 8 on the limitation of carrier liability applicable also to carrier liability for loss, damage or delay in delivery attributable solely to the unauthorized carriage of the goods on deck. On the other hand, the Netherlands assumed that, in addition to the general rules on the limitation of carrier liability in articles 6 and 8, this paragraph imposed a separate liability on carriers for loss, damage or delay in delivery resulting from the special risks of carriage on deck in cases where the carrier lacked authorization to carry the goods on deck.

14. Hungary expressed its opposition to an interpretation or formulation of article 9, paragraph 3, which would free the carrier from liability resulting solely from the special risks of carrying cargo on deck. IUMI stated that the legal consequences of a carrier issuing an under-deck bill of lading and then carrying the goods on deck, particularly in the light of the common law of deviation, would be uncertain.

Article 9, paragraph 4

15. Canada, the Netherlands and ICS proposed that this paragraph be deleted.

16. In the view of Canada and the Netherlands, the general principle of article 8 on loss of the carrier's right to limit his liability was adequate to cover the case where goods were carried on deck despite an express agreement by the shipper and the carrier for carriage under deck.

17. ICS observed that the presumption in this paragraph, that "carriage of goods on deck contrary to express agreement for the carriage under deck" always involved the intention or degree of recklessness required under article 8, was not justified.

Article 10. Liability of contracting carrier and actual carrier

Article as a whole

1. The German Democratic Republic and Hungary approved of the provisions of article 10. The German Democratic Republic, while approving in particular of the provisions relating to the joint liability of contracting carriers and actual carriers contained in this article, proposed that these provisions should be further clarified.

2. France proposed that the term "contracting carrier", appearing in the title and the body of the article, should be replaced by the term "carrier" in order to make the article conform to the definition of "carrier" proposed by France for article 1, paragraph 1.[38]

3. Canada made the following observations:

(*a*) That the premises formulated by it for evaluating the draft Convention led to the view that an international convention on the carriage of goods by sea should contain no reference to third parties to whom the carrier, under national contract law, may choose to delegate some of his obligations under a contract of carriage. Accordingly, Canada proposed that the article be deleted;

(*b*) That even if reference to delegation to actual carriers of performance of the carriage were deleted, a provision should be included making the carrier personally liable notwithstanding the fact that he had not personally performed part or all of the carriage;

(*c*) That if the reference in the draft Convention to both contracting carriers and actual carriers were, however, retained, the provisions of this article would result in the following benefits:

[38] For the definition of "carrier" proposed by France, see the discussion above on article 1, para. 1, at para. 6.

(i) Recourse by cargo interests against carriers would be simplified, since one party (the contracting carrier) was responsible under this article for the entire carriage;

(ii) As a consequence of (i) above, the contracting carrier would be likely to reach a prompt settlement with a claimant;

(iii) An indemnity which a contracting carrier, against whom a claim had been made, might seek from an actual carrier was likely to be determined more easily because of the direct contractual relationship between them.

Article 10, paragraph 1

4. Czechoslovakia and Hungary stated that the relationship between this paragraph and article 11, paragraph 2, needed reconsideration. Hungary stated that the two paragraphs appeared to be in conflict, and proposed that article 11, paragraph 2, should therefore be deleted.

5. The Netherlands proposed that the first sentence of this paragraph should be redrafted to bring it into conformity with the definition of "actual carrier" as "the owner of the ship carrying the goods", proposed by the Netherlands in relation to article 1, paragraph 2.[89] The sentence as redrafted would read as follows:

"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."

Article 10, paragraph 2

6. The Netherlands proposed that, for the reason given at paragraph 5 above in support of its proposal to redraft paragraph 1 of this article, paragraph 2 should be redrafted by replacing the words "for the carriage performed by him" by the words "for the carriage by his ship".

Article 10, paragraph 3

Voluntary assumption by carrier of obligations not imposed by the convention

7. Czechoslovakia and France observed that, where a carrier had by special agreement with the shipper assumed obligations not imposed by the convention, these obligations should be binding even if the goods were carried by an actual carrier. Czechoslovakia proposed that the article should require the carrier to ensure that the actual carrier also assumed such additional obligations. France proposed that the non-performance of such obligations by the actual carrier should entail the loss of the carrier's right to limit his liability, and that the following language should accordingly be added at the end of 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."

8. IUMI noted that paragraph 3 expressly contemplated the case where the contracting carrier assumed, by special agreement with the shipper, obligations not imposed by the convention. IUMI proposed that the convention should not deal with this issue, which should be left to be resolved by contract.

Article 10, paragraph 4

9. Czechoslovakia proposed that consideration should be given to the possibility of extending the joint and several liability of the contracting carrier and the actual carrier to cases where it was not possible to ascertain whether the loss, damage or delay occurred during carriage performed by the contracting carrier, or by the actual carrier.

Article 11. Through carriage

Article as a whole

1. Several respondents expressed reservations regarding paragraph 2 of this article, which permitted the contracting carrier to escape liability "for loss, damage or delay in delivery caused by events occurring while the goods are in the charge of the actual carrier" (Czechoslovakia, France, the German Democratic Republic, Hungary and the United States). It was noted that article 11, paragraph 2, may not be consistent with article 10, paragraph 1, under which the contracting carrier remained responsible for the entire carriage.

2. Canada proposed that article 11 be deleted, because of its conflict with the provisions of article 10 and because of the practical problems inherent in gaining jurisdiction over and enforcing judgements against actual carriers. Canada noted that the problem which article 11 sought to resolve could in any event be dealt with by means of consecutive contracts of carriage covering the different contemplated segments of the carriage by sea.

3. The Netherlands proposed introduction of the term "successive carrier" to identify the person who may be entrusted with performance of part of the carriage, pursuant to the provisions of article 11, paragraph 1. The Netherlands proposed the following new text for article 11, distinguishing the "successive carrier" from the "actual carrier" already referred to in article 10:

"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 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."

4. France proposed that wherever the term "contracting carrier" appeared in this article, it should be

[89] For the definition of "actual carrier" as "the owner of the ship carrying the goods" proposed by the Netherlands, see the discussion above on article 1, para. 2, at para. 13.

changed to "carrier", in order to make the article conform to the definition of "carrier" proposed by France for article 1, paragraph 1.[40]

Article 11, paragraph 1

5. The Byelorussian SSR and the USSR proposed that the scope of this paragraph be clarified by stressing that it was only applicable to cases where the contract of carriage contained an express stipulation by the contracting carrier that he shall be obligated to perform only a specifically designated part of the carriage and that the other parts of the carriage shall be performed by one or more actual carriers. The USSR accordingly proposed that article 11, paragraph 1, should commence as follows: "Where a contract of carriage contains a special reservation that the contracting carrier shall perform only a specifically stipulated part of the carriage covered by the contract, . . .".

Article 11, paragraph 2

6. France, the German Democratic Republic, Hungary and the United States proposed the deletion of this paragraph, and Czechoslovakia suggested its reconsideration, on the grounds that article 11, paragraph 2, was contradictory to the rule in article 10, paragraph 1, under which the contracting carrier was responsible for the whole carriage even if part or all of the carriage was entrusted by him to one or more actual carriers.[41] France noted that to permit the contracting carrier to avoid his liability for the whole carriage by simply stipulating in the contract of carriage that he will in fact only perform part of the carriage would render article 10 ineffective.

7. As a less preferable alternative to the deletion of article 11, paragraph 2, the United States proposed that this paragraph be amended so that the contracting carrier could only escape from his responsibility for the whole carriage if the actual carrier who was to perform part of the carriage was named in the contract of carriage.

PART III. LIABILITY OF THE SHIPPER

Article 12. General rule

1. Japan proposed that this article should provide that a shipper was obliged to indemnify a carrier for any loss, damage or expense incurred by the carrier as a result of the consignee's failure to take delivery of the cargo within a reasonable time.

2. Canada observed that, if the Convention imposed on the shipper the duty specified in the sixth premise formulated by Canada for evaluating the draft Convention,[42] it was opposed to the addition to this article of a detailed provision regarding the liability of the shipper.

3. INSA observed that the rule on the liability of the shipper contained in this article was formulated differently from the rule on the liability of the carrier contained in article 5, paragraph 1, in the following two respects:

(*a*) Article 12 stated negatively that the shipper was not liable for loss or damage sustained by the carrier, actual carrier or ship, unless "fault or neglect" was proved on the part of the shipper or his servants or agents. Article 5, paragraph 1, however, stated positively that the carrier was liable for loss or damage to the goods, unless the carrier proved an absence of negligence on his part. INSA therefore proposed that the rule on shipper liability contained in this article should be formulated in the same manner as the rule on carrier liability contained in article 5, paragraph 1;

(*b*) Under article 12, the shipper could avoid liability by proving absence of "fault or neglect" on his part, or on the part of his servants or agents. In particular, in the course of proving absence of "fault or neglect", the shipper was not obliged to identify the particular occurrence causing the loss or damage to the carrier. Under article 5, paragraph 1, however, the carrier could avoid liability only by proof that he had not been negligent in taking measures to avoid the particular occurrence which had caused the loss, damage or expense, and to avoid the consequences of that occurrence; i.e. he had to identify the particular occurrence causing the loss or damage. INSA therefore proposed that article 5, paragraph 1, be redrafted to conform with article 12.[43]

4. Canada proposed that this article 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."

Article 13. Special rules on dangerous goods

Article as a whole

Definition of the term "dangerous goods"

1. Canada and the United States were of the view that the Convention should contain a definition of the term "dangerous goods". Canada proposed that "dangerous goods" should be defined with reference to the London Convention for the Safety of Life at Sea of 1960.

2. The United States proposed the following definition:

> " '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."

3. ICS proposed that, in order to protect carriers in cases where hazardous or polluting substances were shipped without disclosure by the shipper of their true nature, hazardous or polluting substances should, for

[40] For the definition of "carrier" proposed by France, see the discussion above on article 1, para. 1, at para. 6.

[41] It may be noted that Canada proposed deletion of article 11 a a whole. (See the discussion at para. 2 above.)

[42] This premise reads as follows: "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 characteristcs of the goods which might bear upon the manner in which they would be loaded, handled, stowed, cared for and discharged." Canada observed that article 17, para. 1, possibly gave effect to this premise.

[43] The new draft proposed by INSA for article 5, para. 1, is set forth in the discussion on that article, at para. 27.

the purposes of article 13, be treated as dangerous goods.[44]

Proposed additions to article 13

4. The Netherlands proposed that this article include a provision dealing with the scope and limits of the liability of actual carriers (and successive carriers[45]) when the contracting carrier fails to disclose to such other carriers information that he has regarding the dangerous nature and character of the goods or the precautions that are to be taken.

5. INSA proposed the introduction of provisions delineating the carrier's right to freight when dangerous goods are disposed of, prior to their arrival at the port of destination, in accordance with the provisions of article 13. INSA favoured a scheme under which the carrier, in cases where he was aware of the danger at the time he concluded the contract of carriage, would only be entitled to the proportion of the freight that corresponded to the distance the goods had in fact been carried prior to their disposal; in cases where the carrier lacked such knowledge at the time of contracting, he would be entitled to recover the freight in full. INSA observed that such a distinction in the carrier's right to the freight was justified, since the carrier could knowingly assume the risk involved in the carriage of dangerous goods and allow for this risk when setting the freight rate only if he was aware of the dangerous character of the goods.

6. The United Kingdom suggested that consideration be given to whether reference should be made in this article not only to the "carrier", but also to the "actual carrier".

Article 13, paragraph 1

The requirement that the shipper always mark dangerous goods as such

7. Finland, the United Kingdom and ICS proposed that this paragraph be modified so that an absolute, unqualified obligation was placed on the shipper to mark dangerous goods as such. It was suggested that this aim could be attained by deleting the phrase "whenever possible" in the second sentence of this paragraph, a phrase which in any event was difficult to apply in practice.

8. Finland observed that under the IMCO regulations governing the transport of dangerous goods,[46] shippers were always obligated to label dangerous goods so as to identify their dangerous character. The United Kingdom noted that resolution of questions concerning the shipper's failure to mark dangerous goods as such, on the basis of allegations that under the particular circumstances it was physically not possible or feasible to so mark them, should be left to the applicable national law.

9. Canada proposed deletion of the second sentence in this paragraph, dealing with the shipper's obligation to specially mark dangerous goods, since in its view the paragraph should focus on the obligation of the shipper to advise the carrier of the particular characteristics of the dangerous goods which could have a bearing upon the proper manner of transporting them.[47]

The requirement that the shipper always inform the carrier of the precautions to be taken

10. Canada and ICS proposed that article 13, paragraph 1, should require that in every case the shipper inform the carrier of "the precautions to be taken" when he placed dangerous goods in the charge of the carrier. Accordingly, they proposed deletion of the phrase "if necessary" from the first sentence in this paragraph.

11. Canada pointed out the uncertainties engendered by the phrase "if necessary" appearing in this paragraph; it was not clear whether the "if necessary" qualification of the shipper's duty to inform the carrier of the precautions to be taken related to the character of the danger, the experience of the shipper, the experience of the carrier, or the customs of the trade. Canada proposed the following text for article 13, paragraph 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."

12. In order to protect carriers against negligent or dishonest shippers, ICS proposed that article 13, paragraph 1, should 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."

13. INSA proposed the following new language for the paragraph in order to clarify that it also applied to the shipper's servants and agents:

> "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."

Drafting suggestion

14. OCTI made a suggestion of a drafting nature affecting only the French text of the paragraph.

Article 13, paragraph 2

Imposed duty on shipper to inform carrier of precautions to be taken

15. For the purpose of harmonizing this paragraph with paragraph 1 of article 13, the Netherlands, the

[44] For the redraft of article 13, para. 1, by ICE incorporating this proposal, see the discussion below article 13, para. 1, at para. 12.

[45] For the proposal by the Netherlands to introduce the concept of "successive carrier", see the discussion above on article 11 as a whole, at para. 3.

[46] IMCO International Maritime Dangerous Goods Code.

[47] For a redraft of article 13, para. 1, suggested by Canada and incorporating this proposal, see para. 11 below.

Philippines and the United States proposed that the shipper, in order to be exonerated from liability for damages or expenses attributable to his shipment of dangerous goods, be obligated to advise the carrier of the necessary precautions to be taken in connexion with the transport of such goods. It may be recalled that under article 13, paragraph 1, the shipper has the duty to "inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken".

16. The Philippines proposed a redraft of both sentences in paragraph 2, the Netherlands and the United States redrafts of its second sentence only, all designed to reach the result indicated under paragraph 15 above:

(*a*) The Philippines; new text for article 13, paragraph 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 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."

(*b*) The Netherlands; new text for beginning of second sentence of article 13, paragraph 2:

"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 . . ."

(*c*) The United States; new text for beginning of second sentence of article 13, paragraph 2:

"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 . . ."

Carrier may dispose of dangerous goods only when they pose danger to ship or other cargo

17. Canada and INSA proposed that the carrier's right under paragraph 2 of article 13 to dispose of dangerous goods, without any obligation to pay compensation, be restricted to cases where these goods in fact posed a danger to the ship or to other cargo or property. They noted that a similar restriction was already contained in article 13, paragraph 3, for cases where the carrier knew of the dangerous nature and character of the goods when he accepted them for shipment.

18. Canada proposed the following language for article 13, paragraph 2, which would permit the carrier to dispose of dangerous goods which endangered life or property regardless of any knowledge of the dangerous nature or character of these goods on the part of the carrier:

"The carrier may at any time unload, destroy or render innocuous, as the circumstances may 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."[48]

19. INSA proposed that, in addition to limiting the right of the carrier to dispose of dangerous goods without incurring any liability to cases where these goods presented a danger to the ship or to other cargo, article 13, paragraph 2, should be modified by deleting the phrase "as the circumstances may require" from its first sentence. In the view of INSA the carrier should be left free to decide upon the manner of protecting the ship and other cargo when disposing of the goods posing an acute danger to them. INSA disagreed with any rule requiring that the manner of disposing of dangerous goods correspond to the actual, objective circumstances of the case, since, when acting in an emergency situation, the carrier might not always be able to assess accurately the protective measures that "the circumstances may require".

Drafting suggestion

20. The United States made a drafting suggestion regarding this paragraph.

Article 13, paragraph 3

21. Parallel with its proposal to modify article 13, paragraph 2, the Philippines proposed the addition of the phrase "and the precautions to be taken" to the provision in paragraph 3 describing the requisite knowledge on the part of the carrier that would bring paragraph 3 into operation. In order to emphasize that the carrier enjoyed only a limited immunity under paragraph 3, since when he accepted the goods for shipment he knew that they were dangerous goods, the Philippines further proposed that the carrier should be able to dispose of such goods under the protection of this paragraph solely if the goods posed an "actual" danger. Article 13, paragraph 3, as redrafted by the Philippines, reads as follows:

"Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character and the precautions to be taken, become 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."

22. INSA proposed that the phrase "as the circumstances may require" be deleted from this paragraph, for the reasons advanced by INSA when it proposed that this phrase be deleted from article 13, paragraph 2.[49]

23. Canada proposed that article 13, paragraph 3, should be redrafted to provide that the carrier, his servants or agents shall not incur liability for disposing of dangerous goods, unless the necessity for disposing of such goods was attributable to their failure to observe the needed precautions indicated by the shipper or to an act or omission covered by article 8.

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[48] It should be noted that Canada also suggested amendment of article 13, para. 3, making the carrier liable in certain cases when he unloaded, destroyed or rendered innocuous dangerous goods. See the discussion below on article 13, para. 3, at para. 23.

[49] See the discussion above on article 13, para. 2, at para. 19.

Proposed addition to part III of the draft convention

24. INSA proposed the addition to part III of the draft convention of a provision regulating the relations between the carrier, shipper and consignee in cases where the consignee failed to accept the goods at the port of discharge, and setting forth the legal consequences of such non-acceptance. INSA stated that such provision should specify that, in cases where the consignee did not claim the goods or refused to take delivery, the carrier may, after having notified the shipper, discharge the cargo and place it in a warehouse or other suitable place at the consignee's risk and expense.

PART IV. TRANSPORT DOCUMENTS

Article 14. Issue of bill of lading

Article as a whole

1. France proposed that the term "contracting carrier" appearing in paragraphs 1 and 2 be replaced by the term "carrier" in order to make the article conform to the definition of "carrier" proposed by France for article 1, paragraph 1.[50]

Article 14, paragraph 1

2. Canada proposed that this paragraph should be redrafted as follows:

> "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."

3. ICS proposed that the words "When the goods are received in the charge of the contracting carrier or the actual carrier . . ." should be replaced by the words "When the goods are received into the custody of the carrier within the port area . . .", in order to bring the article into harmony with the modification to article 4, paragraph 2, proposed by ICS.[51]

Article 14, paragraph 2

4. Canada proposed that the first sentence of this paragraph be deleted since article 15, paragraph 1 (*j*), already covered the issue dealt with in that sentence. It proposed that paragraph 2 should consist of the second sentence of this paragraph, redrafted as follows:

> "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

Article as a whole

Detailed list of required particulars in bill of lading

1. ICS proposed deletion of the whole of article 15, because in its opinion the content of bills of lading should be left to the constantly changing commercial requirements, and shippers and consignees were sufficiently protected by the provisions of article 16 of the draft convention. It added that adoption of article 15 would restrict innovation in shipping and commercial documentation.

2. Japan was of the view that the long list in article 15, paragraph 1, of particulars that had to appear on every bill of lading was unnecessary and that existing commercial practice should determine the content of bills of lading. IUMI stated that article 15, paragraph 1, called for too many particulars in bills of lading and suggested that only particulars that were commercially necessary should be required.

Permissive flexibility in documentation

3. The United States favoured inclusion in the convention of a provision that the bill of lading may be prepared by computer or by means of some other system of electronic or automatic data processing.

4. It may be noted that the Montreal Protocol No. 4 amending the Warsaw Convention of 1929, in its article III,[52] permits the substitution for the standard air waybill of "any other means which would preserve a record of the carriage to be performed".

Article 15, paragraph 1

Proposed additions to the list of required particulars in bills of lading

5. The Byelorussian SSR, Mexico, the Ukrainian SSR and the USSR proposed that the bill of lading be required to contain an appropriate indication whenever the goods were carried on deck. It was noted that knowledge of the fact that the goods were being carried on deck was important for shippers and consignees, particularly because article 9 of the draft convention established special rules regarding carrier liability for carriage of goods on deck. Mexico proposed that the requirement that the bill of lading indicate any on-deck carriage of the goods be added to this paragraph as subparagraph (*m*); the Ukrainian SSR proposed incorporation of this requirement in article 15, paragraph 2; and the Byelorussian SSR and the USSR proposed that this requirement could appear either in article 9 or in article 15.

6. Czechoslovakia proposed that article 15, paragraph 1, should require that the bill of lading contain an appropriate indication if the goods were carried in containers, pallets or similar articles of transport.

7. The Philippines proposed the addition of a new subparagraph (*m*) to this paragraph, requiring that the following information also appear on bills of lading: "The invoice or estimated value of the goods". The Philippines noted that this proposal was related to the amendment proposed by it for article 6.[53]

Proposed amendment to subparagraph (a)

8. The Federal Republic of Germany proposed that under subparagraph (*a*) the carrier be given the choice of including in the bill of lading either "the number of packages or pieces" or "the weight of the goods". It observed that often the carrier could not reasonably check the weight of the goods and that in such a case, under the present wording of subparagraph (*a*), the carrier either would not insert any notation as to weight in the bill of lading or would include the weight as

[50] For the definition of "carrier" proposed by France, see the discussion above on article 1 at para. 6.

[51] See the discussion above on article 4, para. 2, at para. 8.

[52] The text of article III is reproduced in the ICAO comment appearing in document A/CN.9/109 (reproduced in this volume, part two, IV, 1, *supra*).

[53] For the amendment of article 6 suggested by the Philippines, see the discussion above on article 6, at para. 31.

furnished by the shipper, accompanied, however, with a reservation pursuant to article 16, paragraph 1. The Federal Republic of Germany noted further that both the omission from the bill of lading of any indication as to weight and the addition of a reservation authorized under article 16, paragraph 1, might render a bill of lading "unclean" for documentary credit purposes.

Proposed amendment to subparagraph (b)

9. INSA suggested that, if its proposal to modify the definition of the term "goods" in article 1, paragraph 4, so as to exclude packaging other than containers[54] were adopted, subparagraph (*b*) of article 15 should be redrafted to read: "The apparent condition of the goods or their packaging". It explained that the change was designed to clarify that, in the case of packed goods, the carrier was only obligated to note the apparent condition of the packaging.

Proposed amendments to subparagraph (f)

10. Canada and ICS expressed doubts regarding subparagraph (*f*), under which the carrier was required to indicate on the bill of lading "the date on which the goods were taken over by the carrier at the port of loading", and they suggested its deletion. Canada observed that a carrier could attempt to reduce his period of responsibility under the convention by inserting a later date for his having taken over the goods than was actually the case. ICS noted that the carrier could not comply with this provision when he received a consignment over a number of days or when he was issuing a "shipped" bill of lading.

11. Fiji proposed that under subparagraph (*f*) the carrier should also be required to indicate the place where he had taken over the goods, so that the subparagraph would read:

> "The port of loading under the contract of carriage and the date and place on which the goods were taken over by the carrier at the port of loading."

Proposed amendment to subparagraph (h)

12. ICS observed that subparagraph (*h*), by implying that there may be more than one original bill of lading, ran counter to the current trend in shipping practice towards issuing only one original of the bill of lading.

Proposed amendment to subparagraph (j)

13. The Philippines and the United States were of the view that subparagraph (*j*), in permitting the carrier to sign the bill of lading in one of the ways listed therein only "if the law of the country where the bill of lading is issued so permits", was unduly restrictive. The Philippines proposed that the carrier should be able to utilize one of the listed methods for signature if that method was permitted by "the law or usage of the country where the bill of lading is issued." The United States proposed that the carrier be permitted to sign the bill of lading in a manner specified in subparagraph (*j*) "if not prohibited by the law of the country where the bill of lading is issued."

Proposed amendment to subparagraph (k)

14. ICS noted that subparagraph (*k*) could create difficulties in practice if the cargo were resold.

[54] See the discussion above of comments on article 1, para. 4, at para. 20.

Proposed deletion of subparagraph (l)

15. The Philippines proposed deletion of subparagraph (*l*) since it merely repeated the obligation for the inclusion of a statement in the bill of lading that was imposed by article 23, paragraph 3.

Drafting suggestions

16. Suggestions of a drafting nature regarding the text of article 15, paragraph 1, were made by France, the Philippines and OCTI. Drafting suggestions affecting only the French text were made by OCTI as to the introductory clause of article 15, paragraph 1, and as to subparagraph (*f*), and by France as to subparagraph (*k*). The Philippines made a drafting suggestion concerning subparagraph (*k*).

Article 15, paragraph 2

17. ICS proposed that the words "and the date or dates of loading" appearing at the end of the first sentence in this paragraph be deleted, since in the case of a "shipped" bill of lading it was not appropriate to inquire about the loading date.

18. The Ukrainian SSR proposed that article 15, paragraph 2, should require the carrier to note on the bill of lading that the goods would be carried on deck.[55]

Article 15, paragraph 3

19. Japan stated that the consequences under this paragraph of the omission of one or more of the particulars that the carrier had to include in the bill of lading pursuant to the provisions of article 15, paragraph 1, needed clarification.

20. The Philippines proposed that this paragraph include, as sanction against a carrier who issued a bill of lading which did not contain all the particulars required under article 15, paragraphs 1 and 2, a provision denying to such a carrier the article 6 limitation on carrier liability. The Philippines proposed the following language for article 15, paragraph 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, but shall deprive the carrier of the benefits provided for in article 6".

Article 16. Bills of lading: reservations and evidentiary effect

Article as a whole

1. The United States observed that the article was, in general, satisfactory, subject to its observation on paragraph 1 thereof.

2. Canada noted that, although the article provided a penalty for failure to comply with the provisions of article 15, paragraph 1, subparagraphs (*b*) and (*k*), it was not possible to decide whether the penalty was sufficient because of the unclear drafting of the article.

Article 16, paragraph 1

3. The Byelorussian SSR, the USSR and INSA noted that this paragraph implied, but did not expressly provide, that the carrier was entitled to enter a reservation on the bill of lading as to those particulars concerning the goods the accuracy of which he had reason-

[55] For proposals that the bill of lading should be required to indicate that the goods were carried on deck, see the discussion above of comments on article 15, para. 1, at para. 5.

able grounds to suspect, or which he had no reasonable means of checking. They therefore proposed that the paragraph should clearly provide that the carrier had the right to enter a reservation in such a case.

4. Belgium and INSA noted that the imposition of an obligation on the carrier to make special note of any reasonable grounds for suspecting that the particulars concerning the goods contained in the bill of lading did not accurately represent the goods, and to make special note of the absence of reasonable means of checking such particulars, was undesirable for the following reasons:

(*a*) It would make documentation complex, and delay the dispatch of goods (Belgium);

(*b*) The concept of "grounds for suspicion" in terms of which the obligation was formulated seemed to lack clarity and would be difficult to apply in practice (INSA, citing the fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading, A/CN.9/96/Add.1, para. 37),*

(*c*) In order to satisfy this obligation, carriers would in practice draft standard sets of reservations which they would insert in bills of lading. A cargo interest making a claim against a carrier would thus have, in addition to the burden of proving that the loss or damage occurred while the goods were in the charge of the carrier, the burden of disproving such reservations and the grounds or inaccuracies noted by the carrier (INSA).

5. The United States proposed a modification to paragraph 1 in order to clarify that, in the case of particulars contained in a bill of lading covering shipment of goods in a sealed container, opening and counting the contents of the container could not be regarded as a reasonable means of checking such particulars. It proposed the following modified text for paragraph 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, *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."

6. The Netherlands proposed that, since a reservation such as "weight unknown" would often be inserted in bills of lading because the carrier frequently had no means of checking the weight as stated by the shipper, it would be desirable if a pre-printed reservation such as "weight unknown" were considered a "special note" under paragraph 1.

7. Canada observed that the sanctions imposed under this paragraph on a carrier who failed to comply with its provisions were unclear.

Drafting suggestions

8. OCTI made two drafting suggestions concerning the French text of this paragraph.

Article 16, paragraph 2

9. INSA proposed that the phrase ". . . or its packaging" should be added after the phrase "apparent condition of the goods" in the two instances where the latter phrase appeared in this paragraph. It observed that this addition would harmonize the language of this paragraph with the modification, proposed by INSA to the language of article 15, paragraph 1 (*b*).[56]

Article 16, paragraph 3

Subparagraph (b)

10. France and INSA proposed that the words "including any consignee" should be deleted from subparagraph (*b*) for the following reasons:

(*a*) The words were unnecessary (France and INSA), particularly because it was not important that the term "third party" in that subparagraph cover the final endorsee of an "order" bill of lading, or the bearer of a bearer bill of lading (France);

(*b*) In the case of a non-transferable bill of lading, a consignee named on the bill of lading could not be considered a third party since he could exercise the rights of the shipper on the bill of lading (France);

(*c*) In the case of a non-transferable bill of lading with a named consignee, the consignee might be the same person as the shipper. It was undesirable to accord such a shipper-consignee the rights given to a "third party" under this subparagraph (France).

France therefore proposed the adoption of the following wording contained in article 1, paragraph 1 of the Brussels Protocol of 1968:

> "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 16, paragraph 4

11. Japan, ICS and INSA proposed the deletion of this paragraph. The following reasons were given for this proposal:

(*a*) The provisions of the paragraph depriving the carrier of his lien over the cargo for unpaid freight, for the sole reason that the bill of lading did not indicate that freight was payable, were unduly harsh (INSA);

(*b*) The second sentence of the paragraph had unsatisfactory results in certain cases, e.g. where a bill of lading was issued as a receipt pursuant to a charter-party and did not set forth the freight at the express wish of the charterer. If such a bill of lading was later transferred to a third party by the charterer, it would be reasonable to allow the carrier to recover the freight from such third party and to exercise a lien over the cargo for unpaid freight (ICS). ICS proposed the retention of the present rule under which the carrier only lost his right to the freight through a "freight prepaid" notation on the bill of lading.

* Reproduced in UNCITRAL Yearbook, Vol. VI: 1975, part two, IV, 2.

[56] For the modification proposed by INSA, see the discusslon above on article 15, para. 1 (*b*), at para. 9.

Drafting suggestion

12. A suggestion of a drafting nature concerning this paragraph was made by the Philippines.

Article 16, paragraphs 2, 3 and 4

13. Canada observed that these paragraphs 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*

Article as a whole

Regulation of letters of guarantee

1. The comments on this article were primarily concerned with the question of whether the draft convention should contain provisions regulating the use of "letters of guarantee" (also known as "letters of indemnity"), given by shippers to carriers in order to induce them to issue "clean" bills of lading. Canada, Hungary, Japan, the United States, USSR, CMI and IUMI expressed their dissatisfaction with the régime established by article 17 for governing the legal effect of such letters of guarantee.

2. It was proposed by Canada, Hungary, CMI and IUMI that the convention should not deal with letters of guarantee and that therefore paragraphs 2, 3 and 4 of this article be deleted. Canada observed that, since letters of guarantee were intended to bring about the issue of bills of lading which would be misleading to subsequent holders of those bills of lading as to the condition of the goods, such letters would be held invalid in most cases as being in violation of public policy (*ordre public*). CMI noted that paragraphs 2, 3 and 4 could be taken as legal recognition of letters of guarantee, while Hungary and IUMI noted that these provisions would lead to a great deal of litigation. Hungary further noted that the convention could not preclude claims by shippers based on guarantees in other international rules designed to ensure that the carrier would issue a "clean" bill of lading.

3. Japan and the USSR proposed deletion of paragraphs 3 and 4 of article 17. Japan was of the view that these two paragraphs were contrary to established commercial practice concerning letters of guarantee and would make it more difficult for shippers to obtain financing by means of documentary credits. The USSR suggested that the questions dealt with in paragraph 3 of article 17 should be left to national law and that those dealt with in paragraph 4 should be left to the general rule in article 8 on loss of the carrier's right to limit his liability.

Deletion of phrase "including any consignee"

4. France and INSA proposed deletion of the phrase "including any consignee" wherever it appeared in paragraphs 2, 3 and 4 of article 17.[57]

Article 17, paragraph 1

5. Canada observed that the interrelationship between this paragraph and article 16, paragraph 1, dealing with reservations by the carrier on the bill of lading needed clarification. In the view of Canada, article 17, paragraph 1, was intended to govern relations between the carrier and the shipper, while article 16 paragraph 1 was concerned with relations between the carrier and the holder of the bill of lading.

Drafting suggestions

6. Suggestions of a drafting nature were made by the United Kingdom regarding the English text and by OCTI regarding the French text of article 17, paragraph 1.

Article 17, paragraph 2

Drafting suggestions

7. Suggestions of a drafting nature, affecting only the French text of article 17, paragraph 2, were made by France and OCTI.

Article 17, paragraph 3

8. The Byelorussian SSR, Japan, the United States, the USSR, CMI, ICS and INSA proposed the deletion of this paragraph.

9. The following reasons were given in support of deletion:

(*a*) The relationship between the carrier and a shipper giving a letter of guarantee to the carrier should be left to be determined by the applicable national law (Byelorussian SSR, the United States, USSR and INSA);

(*b*) The provisions in paragraph 3 were unjust and undesirable since they placed the shipper who initiated the deception of the third party holder of the bill of lading in a better position than the carrier (CMI and INSA); furthermore, when the carrier issued a "clean" bill of lading in reliance upon a letter of guarantee from the shipper, it might be assumed that as a rule the intent was to defraud a third party holder of the bill of lading, so that under the provisions of this paragraph letters of guarantee would not be valid against shippers (INSA);

(*c*) The paragraph did not sufficiently protect consignees against fraudulent collusion between the shipper and the carrier (the United States);

(*d*) The paragraph was contrary to well-established commercial practice and was likely to cause problems for shippers seeking documentary credit financing (Japan).

Article 17, paragraph 4

10. The Byelorussian SSR, Japan, the USSR, ICS and INSA proposed that this paragraph be deleted.

11. The Byelorussian SSR, the USSR, ICS and INSA were of the view that the special case dealt with in this paragraph was already adequately covered by the general rule in article 8 regarding loss by the carrier of the right to limit his liability under the Convention. ICS observed that the only case covered by article 17, paragraph 4, and not covered by article 8, involved the situation where the carrier was the innocent victim of his dishonest employee.

12. Japan noted that paragraphs 3 and 4 of article 17 were contrary to established commercial prac-

[57] France and INSA also suggested that the phrase "including any consignee" be deleted from the text of article 16, paragraph 3 (*b*). For the reasons advanced by France in support of its proposal to delete this phrase, see the discussion above on article 16, paragraph 3, at paragraph 10.

tice and would cause difficulties for shippers endeavouring to obtain financing.

Drafting suggestion

13. OCTI made a suggestion of a drafting nature affecting only the French text of article 17, paragraph 4.

Article 18. Documents other than bills of lading

1. The German Democratic Republic proposed that the provisions of this article should apply only to the case where a document other than a bill of lading was issued *at the request of the shipper*, and proposed that the article should be re-drafted as follows:

"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."

2. The German Democratic Republic also proposed that, in order to take account of developments in international transport, the article should be supplemented by provisions covering the legal effect of documents other than bills of lading, as follows:

"(*a*) The carrier shall be obliged for delivering goods to the consignee as named in this document at the port of destination.

"(*b*) 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.

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

3. Canada proposed that this article be deleted, because:

(*a*) It created uncertainty as to the validity of the "other documents" contemplated therein, and the status of such documents in relation to the Convention; and

(*b*) The issue dealt with under this article was already adequately covered under article 23, paragraph 3.

4. ICS proposed that, if article 4, paragraph 2 of the draft Convention were not amended as proposed by it,[58] article 18 should be redrafted as follows:

"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."

5. INSA observed that the issuance of a document evidencing the conclusion of a contract of carriage, and the taking over of goods by a carrier under such a contract, were separate acts, and that the conclusion of a contract did not by itself constitute evidence of the taking over of goods. It therefore proposed that the scope of the article should be restricted to cases where the document issued evidenced not only the contract of carriage, but also the taking over of goods by the carrier, and proposed the following modified text:

"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."

[58] For the proposed amendment by ICS to article 4, para. 2, see the discussion above on article 4, para. 2, at para. 8.

PART V. CLAIMS AND ACTIONS

Article 19. Notice of loss, damage or delay

Article 19, paragraph 1

1. Canada and Finland expressed reservations concerning the requirement that, to enjoy the benefit of the rebuttable presumption set forth in this paragraph, the consignee must give written notice to the carrier of the loss or damage "not later than at the time the goods are handed over to the consignee". Finland was of the view that this time period may be too short to protect adequately the interests of consignees.

2. Canada proposed that article 19, paragraph 1, be modified as follows, so as to clarify that it became applicable only when the carrier delivered the goods in one of the ways specified in article 4, paragraph 2:

"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."

3. France proposed deletion of the words "if any" appearing at the end of this paragraph, since the presumption as to the condition of the goods when taken in charge by the carrier could arise only if a document of transport describing the goods was in fact issued.

Article 19, paragraph 2

4. The Byelorussian SSR, Fiji, the Ukrainian SSR and the USSR expressed their disagreement with the use of the phrase "completion of delivery" to denote the commencement of the period within which the consignee was obliged to give to the carrier written notice of non-apparent loss or damage.

5. The Byelorussian SSR, the Ukrainian SSR and the USSR observed that in paragraph 5 of article 19 the commencement of the time period for giving notice, and in paragraph 1 of article 19 the end of such period, were identified in terms of the "handing over" of the goods to the consignee. They therefore proposed that in article 19, paragraph 2, the phrase "after the completion of delivery" be replaced by the phrase "after the handing over of the goods to the consignee".

6. Fiji proposed that article 19, paragraph 2 be clarified so as to make it clear that, as a rule, the notice in writing required therein had to be given by the consignee within 10 days after his acceptance of the goods from the carrier. Fiji noted that the only exception to this rule should be the case where, pursuant to article 4, paragraph 2 (*c*), the carrier handed over the goods to a port authority or other third party.

7. Finland expressed the view that the 10-day period specified in article 19, paragraph 2, for giving

written notice might be too short to protect adequately the interests of consignees.

8. INSA proposed that, to avoid possible ambiguity, a provision be added clarifying that in this paragraph the term "days" denoted "consecutive days."

9. Canada stated that the provisions of article 19, paragraph 2, were acceptable.

Article 19, paragraph 3

10. Canada stated that the provisions of article 19, paragraph 3, were acceptable.

Article 19, paragraph 4

11. Canada stated that the provisions of article 19, paragraph 4, were acceptable.

Article 19, paragraph 5

12. Canada and Finland approved of the provision in this paragraph making liability to pay compensation for delay in delivery conditional upon the giving of written notice by the consignee to the carrier "within 21 days from the time that the goods were handed over to the consignee".

13. ICS, which was opposed to imposition under the draft Convention of carrier liability for delay in delivery,[59] suggested that if such liability were retained, the words "servants or agents" should be added at the end of paragraph 5.

14. INSA proposed that, to avoid possible ambiguity, a provision be added clarifying that in this paragraph the term "days" denoted "consecutive days".

Article 19, paragraph 6

15. Canada proposed that this paragraph be deleted so as to avoid any inconsistency with the provisions contained in article 19, paragraphs 1 to 5.

16. The Byelorussian SSR and the USSR proposed modification of article 19, paragraph 6, with a view towards making a timely written notice given by the consignee to the contracting carrier equally effective as to an actual carrier who performed part of the carriage.

Article 20. Limitation of actions

Article as a whole

Nature of the claims to be covered by the provisions on limitation of actions

1. The United States proposed that the provisions on limitation of actions contained in this article should be made applicable only to claims against the carrier for cargo loss or damage, and not to non-carriage causes of action, because non-carriage causes of action fell outside the scope of the Convention and should be governed by the applicable national law.

2. The United Kingdom proposed that the provisions on limitation of actions contained in this article should not apply to defeat a counter-claim by the cargo interest against the carrier where the former sought 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.[60]

3. Japan proposed that the provisions on limitation of actions contained in this article should be extended to cover claims against the carrier for misdelivery made in good faith in reliance upon a letter of guarantee issued by a bank.

Drafting suggestion

4. The United States proposed that articles 20 to 22 should be examined with a view to eliminating possible inconsistencies in the use of terms therein.

Article 20, paragraph 1

Length of the limitation period

5. Canada, France, Japan, the Netherlands, the United Kingdom, the United States, CMI, ICS, INSA and OCTI proposed that the period of limitation under this paragraph should be one year. The following reasons were given:

(*a*) If it became necessary in a particular case to extend the period of one year, e.g. for the purpose of continuing discussions between the parties for the settlement of the dispute, under the provisions of paragraph 3 the period could be extended (CMI, INSA and OCTI);

(*b*) The period of one year, which currently prevailed under article 3, paragraph 6 of the Brussels Convention of 1924, had not created difficulties (France and CMI);

(*c*) A one-year period would promote the prompt resolution of disputes, which was desirable in commercial relations (France and ICS);

(*d*) The period of one year was sufficient for cargo interests either to negotiate a settlement with a carrier, or to institute legal or arbitral proceedings against him (INSA);

(*e*) Adoption of the period of one year would bring the Convention into harmony with the CMR and CIM Conventions in regard to the limitation period (ICS and OCTI);

(*f*) The adoption of a limitation period longer than one year would provide no guarantee that claimants would act within such longer period (CMI).

6. Austria, Hungary, Mexico, the Niger, Sierra Leone and Sweden[61] proposed that the period of limitation under this paragraph should be two years. The following reasons were given:

(*a*) A two-year period provided greater protection to cargo interests (Mexico);

(*b*) Experience with the period of one year which currently prevailed under article 3, paragraph 6 of the Brussels Convention of 1924 had shown that a one-year period was often too short for the purposes of negotiation and the institution of legal proceedings (Sweden);

[59] For the view of ICS regarding the imposition of carrier liability for delay in delivery, see the discussion above on article 5 as a whole, at paragraphs 13 and 14.

[60] This proposal is incorporated in the new text proposed by the United Kingdom for article 24. This new text is set forth in the discussion below on that article, at para. 3.

[61] The preference of Sweden was expressed subject to its further proposal on the limitation provisions noted at paragraph 7 below.

(*c*) Although under paragraph 3 the period of one year could be extended, cargo interests and their insurers had sometimes experienced difficulties in obtaining an extension in the manner specified in that paragraph (Sweden);

(*d*) The current solution of having a one-year period, with the possibility of extending that period, was unsatisfactory, since there were differences in national laws concerning the possibility of an extension, and the kinds of permissible extension (Hungary);

(*e*) Adoption of the period of two years would bring the draft convention into harmony with the Warsaw Convention of 1929 in regard to the limitation period. The period of limitation specified in the Warsaw Convention was of special relevance because of certain similarities between carriage of goods by sea and carriage of goods by air, e.g. the distances involved in the carriage (Hungary);

(*f*) Under subparagraph (*b*) of this paragraph, the period of limitation could commence to run on the ninetieth day after the contract was made. Since the contract might have been made long before the carriage commenced, a two-year period of limitation would be more satisfactory than a one-year period (Austria).

7. Sweden observed that the limited consequence of the non-delivery of notice of loss or damage under article 19, paragraph 1, of the draft Convention was sometimes abused by cargo interests who did not inform carriers of claims until the limitation period had almost ended. Sweden accordingly proposed that the adoption of a limitation period of two years should be qualified by a provision requiring cargo interests to inform carriers of their claims within a shorter period than two years in order to retain their rights of action.

8. Nigeria proposed the adoption of a limitation period of two years for the institution of arbitral proceedings.

Subparagraphs (a) *and* (b)

9. Canada observed that it preferred the wording of article 3, paragraph 6, of the Brussels Convention of 1924 to the wording of subparagraphs (*a*) and (*b*) of paragraph 1. It noted, however, that subparagraph (*b*) probably covered a type of action not covered by article 3, paragraph 6, of the Brussels Convention of 1924, e.g. failure by the carrier to perform the contract of carriage by not taking control of the goods.

10. Austria observed that, although subparagraph (*b*) was intended to cover a case of total loss of the goods, it was unclear how the words ". . . or, if he has not done so, the time the contract was made" could apply to a total loss. Austria noted that, if the carrier had not taken over the goods, there could be no total loss.

11. The United Kingdom noted that in the circumstances covered by subparagraph (*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 20, paragraph 3

12. The Byelorussian SSR and the USSR proposed that the language of this paragraph should be modelled on the language of article 22, paragraph 2 of the Convention on the Limitation Period in the International Sale of Goods.[62]

13. CMI approved of the inclusion of a provision enabling the parties to extend the period of limitation by agreement.

Article 20, paragraph 4

14. Canada proposed that this paragraph should be deleted in conformity with its proposals for the deletion of article 1, paragraph 2,[63] and article 10.[64]

Article 20, paragraph 5

15. Austria proposed that this paragraph should be deleted for the following reasons:

(*a*) The rule contained in the second sentence of the paragraph, specifying a minimum period within which an action for indemnity could be brought, might be inconsistent with the obligations undertaken by a State under other international conventions. The second sentence should therefore be deleted;

(*b*) If the second sentence were deleted, the first sentence would only state a truism.

16. CMI approved of the minimum period specified under this paragraph for the bringing of an action for indemnity.

Article 21. Jurisdiction

Article as a whole

Proposals to delete article 21

1. The Byelorussian SSR, the Ukrainian SSR and the USSR proposed the deletion of article 21 since they were of the view that questions of jurisdiction should be left to national law for settlement. The USSR observed that article 21 created uncertainty for defendants by giving a number of options to plaintiffs in selecting a forum, and that its provisions might violate certain agreements between States concerning jurisdiction over disputes involving organizations in those States.

2. INSA proposed the deletion of article 21 in order to preserve the long-standing international practice of resolving problems of jurisdiction on the basis of the parties' agreement as to the proper forum. INSA observed that, under paragraph 1, the plaintiff was given the unilateral option of choosing any one of four other fora, even in cases where the parties had agreed in advance on a particular forum.

3. On the other hand, Canada expressed its support for the options given to plaintiffs under this article and observed that the article would satisfactorily resolve many jurisdictional disputes before various national courts.

[62] A/CONF.63/15. Article 22, para. 2 of that Convention 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."

[63] For the proposal of Canada to delete article 1, paragraph 2, see the discussion above on article 1, paragraph 2, at paragraph 12.

[64] For the proposal of Canada to delete article 10, see the discussion above on article 10, at paragraph 3 (*a*).

Opposition to limiting jurisdiction to contracting States

4. Finland and Sweden proposed that jurisdiction should not be limited to "contracting States." They observed that such a limitation would cause problems when only a small number of States were bound by the convention, e.g. immediately upon its entry into force. Sweden also noted that if an action was brought in a non-contracting State, that State could disregard the provisions of article 21, particularly if the contract of carriage had some clear connexion with that State. Accordingly, Sweden proposed that the word "contracting" be deleted where it appeared before the word "State" in paragraphs 1, 2 (*a*) and 3 of article 21.

Proposed addition to article 21

5. Austria suggested that consideration be given to the possible addition to article 21 of provisions dealing with the recognition and enforcement of judgements delivered by courts in contracting States having jurisdiction under the terms of this article.

Drafting suggestion

6. The United States proposed that the terminology used in articles 20, 21 and 22 be harmonized.

Article 21, paragraph 1

To give options to plaintiff only if no competent court designated in contract of carriage

7. The German Democratic Republic proposed that, generally, jurisdiction over disputes arising from a contract of carriage should be vested either in the court specified in that contract or in the court having jurisdiction over the dispute pursuant to an agreement between the States where the parties had their residence or place of business. In cases where the above general rule did not apply, the German Democratic Republic proposed that the plaintiff be given the option of choosing among the courts at the port of loading, at the port of discharge, and at the principal place of business of the carrier.

8. As a less preferable alternative to the deletion of article 21, the Byelorussian SSR and the USSR proposed that the options for the plaintiff listed in subparagraphs (*a*) to (*d*) of article 21 should be made applicable only if no competent court had been specified in the contract of carriage.

To limit the options given to plaintiff

9. ICS proposed that subparagraphs (*b*), (*c*) and (*d*) of paragraph 1, or at least two of these subparagraphs, be deleted, since their retention would create uncertainties for defendants and would lead to forum shopping.

Proposals concerning the introductory clause of paragraph 1

10. The Netherlands proposed replacement of the phrase "legal proceeding arising out of the contract of carriage" by the phrase "legal proceeding arising under this Convention", in order to clarify that disputes concerning the freight charges were not covered.

11. Japan proposed the addition of a provision to paragraph 1, specifying that when the plaintiff was authorized to "bring an action in a contracting State", the action had to be brought in a court having jurisdiction over the place described in the applicable subparagraph of paragraph 1, under the procedural law of the State concerned.

Proposals concerning particular subparagraphs

12. Belgium and INSA observed that subparagraph 1 (*b*) could lead to judicial proceedings being brought in courts that were far from the ports of loading and discharge, or the principal place of business of the carrier. Belgium referred to the possibility that, under subparagraph 1 (*b*), a carrier who concluded a contract of carriage through an agency could be sued at a place where he merely had an agency and consequently could not properly protect his interests, and proposed that subparagraph 1 (*b*) be redrafted on the model of article 17 of the Athens Convention of 1974.[65]

13. The United States proposed the following new text for subparagraph 1 (*e*): "such additional place as may be designated for that purpose in the contract of carriage".

Article 21, paragraph 2

Proposals to delete paragraph 2[66]

14. The Netherlands proposed deletion of this paragraph, on the ground that it dealt with questions of procedural law which should be left to national legislation for resolution.

15. INSA observed that paragraph 2 would create difficulties both in States that recognized the sovereign immunity of State-owned vessels, and in States whose national legislation did not permit *in rem* actions.

Scope of paragraph 2

16. The United Kingdom proposed that the scope of this paragraph be expanded so as to confer jurisdiction also on the court of a contracting State which legally arrested a sister ship of the carrying vessel.

17. Canada and the United Kingdom doubted whether it was correct to describe the courts having jurisdiction under the first sentence of subparagraph 2 (*a*) as "the courts of any port in a contracting State". They noted that national courts were not always established with jurisdiction limited to a specific area within the State and that, in any event, the jurisdiction of courts was rarely restricted to port areas. Canada proposed that subparagraph 2 (*a*) be redrafted to provide that any court in a contracting State, which legally arrested the carrying vessel, thereby acquired jurisdiction. For the same reason, the United Kingdom proposed replacement of the above-quoted description by the words "the courts of a contracting State in any of whose ports . . .".

18. The USSR observed that if paragraph 2 of article 21 were retained, it should be made clear that State-owned vessels were excluded from its scope.

[65] The relevant provision in article 17, paragraph 1 (*d*) of the Athens Convention of 1974, reads as follows: "a court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State."

[66] It may be recalled that several respondents proposed the deletion of article 21; see the discussion above on article 21 as a whole, at paras. 1-2.

Delete provision in subparagraph 2 (a) on mandatory removal of actions

19. Belgium and the Federal Republic of Germany proposed the deletion of the second sentence in subparagraph 2 (*a*) dealing with the mandatory removal of actions, commenced by the legal arrest of the carrying vessel, at the petition of the defendant provided specified conditions were met. They observed that this provision may be contradictory to article 7 of the Brussels Convention on the Arrest of Sea-Going Ships of 1952, which did not grant defendants the option of removing an action to another court. The Federal Republic of Germany also observed that, due to differences in national laws on procedure, removal of actions brought in one State to another State was not practicable.

Other comments on provision in subparagraph 2 (a) on mandatory removal of actions

20. Austria observed that the provision in the second sentence of subparagraph 2 (*a*), forcing the plaintiff to remove an action, properly commenced by the legal arrest of the carrying vessel, upon the petition of the defendant if the defendant furnished sufficient security, might cause procedural difficulties in some States.

21. Finland proposed the addition of provisions clarifying the method to be followed by plaintiffs in removing actions and the effect of such removals on the limitation of actions.

Drafting suggestion

22. OCTI made a suggestion of a drafting nature affecting only the French text of subparagraph 2 (*b*).

Article 21, paragraph 3

Modifications of the language in the first sentence

23. The Netherlands proposed replacement of the phrase "no legal proceedings arising out of the contract of carriage" by the phrase "no legal proceedings arising under this Convention", in order to clarify that disputes concerning the freight charges were not covered.

24. The United States proposed that the words "paragraphs 1 and 2 of this article" be modified so as to read "paragraph 1 or 2 of this article". The United States observed that the current language had the unintended result of limiting the applicability of the provision to instances where the carrying vessel had been legally arrested.

Rule on possible provisional or protective measures

25. The Philippines proposed the deletion of the second sentence in paragraph 3 concerning possible provisional or protective measures by courts other than the one having jurisdiction over the action pursuant to paragraph 1 or 2 of this article. The Philippines observed that this provision might result in the issuance of conflicting orders by courts in different contracting States.

26. Canada, while noting that it had no objection to the added measure of protection accorded to claimants by the second sentence of paragraph 3, observed that the scope of the "provisional or protective measures" referred to therein was unclear, and that this provision might be inconsistent with paragraph 4 of article 21, which was designed to eliminate multiple law suits between the same parties on the same grounds.

Article 21, paragraph 4

27. Canada proposed that this paragraph be deleted, since it involved questions that should be left to the applicable national law. Furthermore, the paragraph could create difficulties for plaintiffs if sufficient security could not be obtained in any one jurisdiction.

28. The United States proposed that the words "paragraphs 1 and 2 of this article", appearing in subparagraph 4 (*a*), be replaced by the words "paragraph 1 or 2 of this article". The United States observed that the current language had the unintended result of limiting the applicability of subparagraph 4 (*a*) to instances where the carrying vessel had been legally arrested.

Article 21, paragraph 5

29. Canada proposed the deletion of this paragraph, because it concerned issues that should be left to the applicable national law. Canada observed that this provision might be impossible to apply due to the existence of national laws on jurisdiction that did not permit modification by agreement of the parties.

Article 22. Arbitration

Article as a whole

1. The Byelorussian SSR, the Ukrainian SSR, the USSR and INSA proposed the deletion of this article.[67] They observed that paragraph 1 gave an excessive number of options to the plaintiff as to the place at which he could institute arbitration proceedings. The retention of this article would therefore result in a decline in the use of arbitration clauses in bills of lading, and in resort to arbitration for the resolution of disputes relating to carriage of goods by sea. Such a decline would be undesirable, since arbitration was simpler, speedier and less expensive than judicial proceedings.

2. As an alternative to the deletion of this article, the Ukrainian SSR and the USSR proposed that the article should be modified so as to provide that the options given to the plaintiff as to the place of arbitration would be subject to any terms contained in an arbitration clause or agreement contained in a contract of carriage.

3. Canada observed that this article was acceptable, but should be supplemented by provisions dealing with the following issues:

(*a*) Whether the institution of judicial proceedings constituted an absolute waiver of the right to institute arbitral proceedings; and

(*b*) Whether recourse to courts for obtaining security prior to the institution of arbitration proceedings was to be permitted.

To give options to plaintiff only if no place specified in contract of carriage

4. The German Democratic Republic proposed that the place at which arbitration proceedings might be instituted should be determined in accordance with its proposals for determining the court in which legal proceedings might be instituted, i.e. it should be the place specified in the contract of carriage, or the place determined pursuant to an agreement between the States where the parties had their residence or place of busi-

[67] The USSR and INSA noted that some of their comments on article 21 were also applicable to article 22.

ness. Where the above general rule did not apply, the plaintiff should only be given the option of choosing among the port of loading, the port of discharge, and the principal place of business of the carrier.

Article 22, paragraph 2

5. Belgium observed that subparagraph (*a*) (iii) could lead to arbitration proceedings taking place far from the ports of loading and discharge, or the principal place of business of the carrier. Belgium referred to the possibility that, under subparagraph (*a*) (iii), a carrier who concluded a contract of carriage through an agency could be forced to submit to arbitration at a place where he merely had an agency and consequently could not properly protect his interests. Belgium proposed that subparagraph (*a*) (iii) be redrafted on the model of article 17 of the Athens Convention of 1974.[68]

6. The United States proposed that subparagraph (*b*) should be redrafted as follows:

"Any *additional* place *that may be* designated *for that purpose* in the arbitration clause or agreement".

Article 22, paragraph 4

7. Sierra Leone proposed the deletion of this paragraph, on the ground that the Convention should not interfere with an agreement between the parties, prior to a dispute, as to the procedure for arbitration.

Drafting suggestion

8. The United States proposed that the terminology used in articles 20, 21 and 22 be harmonized.

PART VI. DEROGATIONS FROM THE CONVENTION

Article 23. Contractual stipulations

Article 23, paragraph 1

1. Sierra Leone proposed that this paragraph be deleted, since the parties to a contract of carriage should be permitted to exclude by agreement some or all provisions of the Convention.[69]

2. Canada proposed that the final sentence in this paragraph, dealing with "clauses assigning benefit of insurance", be deleted. It noted the danger inherent in listing a single example of the cases covered by the general provisions contained in the first two sentences of this paragraph.

3. France proposed replacement of the words "any other document evidencing the contract of carriage" in the first sentence of paragraph 1 by the words "any other document relating to carriage", in order to avoid possible overlap in the scope of the terms used in that sentence.

Article 23, paragraph 2

4. Canada stated that it had no objection to this paragraph on the assumption that its scope would be limited to providing the carrier with the benefit of an economic or commercial opportunity.

Article 23, paragraph 3

5. Japan and ICS were of the view that this paragraph was unnecessary and therefore proposed its deletion. Canada, however, stated that it found the paragraph acceptable.

6. Sierra Leone proposed that this paragraph be supplemented by a provision establishing clearly that the convention applied to a bill of lading which made no reference to the convention and did not contain stipulations derogating from the provisions of the convention.

Article 23, paragraph 4

7. Canada and Japan proposed the deletion of this paragraph. Japan observed that its provisions would not prove to be of practical utility.

8. Canada observed that the second sentence of this paragraph, entitling the plaintiff to recover for costs incurred by him in exercising his rights under paragraph 4, gave rise to several problems:

(*a*) The scope of the costs for which the plaintiff was entitled to reimbursement was unclear;

(*b*) The provision that the costs "shall be determined in accordance with the law of the court seized of the case" would often result in no recovery of costs, since under a number of national laws legal costs could not be recovered by successful claimants;

(*c*) The provision seemed to foresee the deliberate insertion by carriers of clauses in bills of lading which were null and void while providing only a limited sanction, and even that only if the shipper or consignee instituted legal action;

(*d*) The provision appeared to infringe on the right of national courts to decide on the award of costs.

For these reasons, Canada proposed that paragraph 4 be deleted.

Article 24. General average

1. Belgium and the Netherlands proposed that this article should be redrafted to ensure that it did not override Rule D of the York-Antwerp Rules. The Netherlands proposed the following new text:

"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."

2. Japan observed that the combined effect of the second sentence of this article and article 5, paragraph 1, would be to undermine a fundamental principle of general average by permitting a cargo interest to recover from a carrier a contribution to general average necessitated by the result of an error in naviga-

[68] The relevant provision in article 17, para. 1 (*d*) of that Convention is reproduced in the discussion above on article 21, at para. 12, foot-note 1.

[69] For similar proposals to exclude certain contracts from the scope of application of the Convention, see the discussion above on article 2, at paras. 7-14.

tion. Japan therefore proposed that the second sentence of this article be reconsidered.

3. The United Kingdom observed[70] that this article required modification for the following reasons:

(*a*) One method by which the cargo interest might resist making a general average contribution was to plead the "equitable defence" that the carrier should not profit from a wrong done by him through benefiting from a general average contribution from the cargo interest. This method of protecting the interests of the cargo owner was not reflected in the present wording of article 24 and might, therefore, by implication, be excluded;

(*b*) The article did not take account of the fact that:

(i) The "provisions in the contract of carriage or national law regarding general average" to which the Convention applied related not to the principle of general average but to the *adjustment* of general average; and

(ii) The provisions should also apply to claims in salvage.

The United Kingdom proposed the following new text:

"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."

4. The United Kingdom also proposed that, since this article did not derogate from the Convention, it should be removed from part VI of the draft convention ("Derogations from the Convention") and be placed under part II ("Liability of the carrier"), either as a part of article 5, or, preferably, as a separate article.

5. Canada observed that:

(*a*) A convention on the carriage of goods by sea should not give greater prominence to general average than given to it by private law, and that article 24 would give it such greater prominence;

(*b*) As presently drafted, the article was not sufficient to protect a cargo owner's contribution in general average whenever there was no loss of or damage to his cargo, and while only suggesting that the carrier may be responsible for indemnifying the cargo owner, the article did limit the amount by which a carrier would indemnify a cargo owner;

(*c*) Although the view held in Canada was that there were no difficulties with the present wording of article 5 of the Brussels Convention of 1924,[71] the inclusion of the second sentence of article 24 seems to have been prompted by a contrary view.

Article 25. Other conventions

Article 25, paragraph 1

1. The Philippines proposed the deletion of this paragraph, since it was of the view that this Convention alone should govern carriage of goods by sea. Alternatively, the Philippines proposed that the scope of this paragraph be limited by adding at its end the words "not in conflict with the provisions of this Convention".

2. Canada expressed its opposition to the provision in this paragraph whereby the Convention was made subordinate to contrary provisions in international conventions dealing with limitations on the liability of owners of seagoing ships.

Proposal for a new paragraph 1 bis

3. The United Kingdom proposed that a new paragraph be added to article 25, providing that no liability arose under the Convention where the carriage was subject to the provisions of the Athens Convention of 1974. The United Kingdom noted that the latter Convention applied to luggage which accompanied passengers.

Article 25, paragraph 2

4. Canada stated that the provisions contained in this paragraph were acceptable.

5. ICS proposed that the Brussels Convention on Civil Liability in the Field of Maritime Carriage of Nuclear Material of 1971 be added to the conventions referred to in subparagraph 2 (*a*) and 2 (*b*).

6. Austria proposed that the phrase "provided that such law is in all respects favourable to persons who may suffer damage as either the Paris or Vienna Convention", appearing in subparagraph 2 (*b*), be deleted. Austria observed that it was sufficient to establish that the operator of a nuclear installation was liable in accordance with the applicable national law, since the comparison now called for under subparagraph 2 (*b*) was sometimes impossible to make and, in any event, the provisions of national law were always more favourable to the claimant than the provisions of the draft convention or of the international conventions referred to in paragraph 2.

Drafting suggestion

7. France made a suggestion of a drafting nature affecting only the French text of subparagraph 2 (*a*).

[70] The proposal of the United Kingdom concerning the effect of the limitation provisions (article 20) on certain claims in general average is noted in the discussion above on article 20, at para. 2. The proposal of the United Kingdom that article 6 should not apply to cargo claims in respect of general average contribution and salvage is noted in the discussion above on article 6 at para. 35. The new text proposed by the United Kingdom for article 24 which is set forth at para. 3 also incorporates the above proposals on articles 6 and 20.

[71] The relevant part of article 5 of the Brussels Convention of 1924 reads as follows:

"Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average."