IV. INTERNATIONAL LEGISLATION ON SHIPPING

1. *Report of the Working Group on International Legislation on Shipping on the work of its fourth (special) session (Geneva, 25 September-6 October 1972) (A/CN.9/74)* *

CONTENTS

* 12 October 1972.

INTRODUCTION

1. The Working Group on International Legislation on Shipping was established by the United Nations Commission on International Trade Law (UNCITRAL) at its second session held in March 1969. The Working Group was enlarged by the Commission at its fourth session and now consists of the following 21 members of the Commission: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Nothern Ireland, United Republic of Tanzania, United States of America and Zaire.

2. The Working Group at its third session (31 January to 11 February 1972) considered the following subjects: I. The period of carrier's responsibility (before and during loading, during and after discharge); II. Responsibility for deck cargoes and live animals; III. Clauses in bills of lading confining jurisdiction over claims to a selected forum; IV. Approaches to basic policy decisions concerning allocation of risks between the cargo owner and the carrier.[1] At the close of the third session, the Working Group noted that it had been unable to take final action on some of the subjects assigned to it for consideration at that session, and that it would be advisable to hold a special session to complete work on those remaining subjects, with priority given to the basic question of the carrier's responsibility.[2] UNICTRAL at its fifth session (10 April to 5 May 1972) requested the Secretary-General to convene a special session of the Working Group in Geneva for two weeks, if feasible in the autumn of 1972, for the

[1] Report of the Working Group on International Legislation on Shipping on the work of its third session, held in Geneva from 31 January to 11 February 1972 (A/CN.9/63, UNCITRAL Yearbook, vol. III: 1972, part two, IV) (herein cited as Working Group report on third session).

[2] Working Group, report on third session, para. 72.

completion of its work on areas left unfinished by it at its third session.[3]

3. Accordingly, the Working Group held its fourth (special) session in Geneva from 25 September to 6 October 1972.

4. Twenty members of the Working Group were represented at the session.[4] The session was also attended by observers from Mexico and the following intergovernmental and non-governmental organizations: the United Nations Conference on Trade and Development (UNCTAD), the Inter-Governmental Maritime Consultative Organization (IMCO), the International Institute for the Unification of Private Law (UNIDROIT), the International Chamber of Commerce, the International Chamber of Shipping, the International Union of Marine Insurance and the International Maritime Committee.

5. The Working Goup, by acclamation, elected the following officers:

Chairman: Mr. José Domingo Ray (Argentina)
Vice Chairman: Mr Stanislaw Suchorzewski (Poland)
Rapporteur: Mr Mohsen Chafik (Egypt)

6. The documents placed before the Working Group were:

(*a*) Provisional agenda and annotations (A/CN.9/WG.III/WP.8);

(*b*) Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier —working paper by the Secretariat (A/CN.9/WG.III/WP.6);

(*c*) Arbitration clauses—working paper by the Secretariat (A/CN.9/WG.III/WP.7);

(*d*) International legislation on shipping—report of the Working Group on the work of its third session (31 January to 11 February 1972) (A/CN.9/63); *

(*e*) Responsibility of ocean carriers for cargo: bills of lading—report of the Secretary-General (A/CN.9/63/Add.1); **

(*f*) Replies to the questionaire on bills of lading, and studies submitted by Governments for consideration by the Working Group (A/CN.9/WG.III/WP.4/Add.1/Vols.I-III).

7. The Working Group adopted the following agenda:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda
4. Consideration of the substantive items selected by the third session of the Working Group to be dealt with by the special session
5. Future work
6. Adoption of the report.

8. The Working Group used as its working documents the following working papers, which are annexed to this report:

Annex I. Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier—working paper by the Secretariat (A/CN.9/WG.III/WP.6) * and

Annex II. Arbitration clauses in bills of lading—working paper by the Secretariat (A/CN.9/WG.III/WP.7). **

9. The Working Group took action on the following subjects: I. Basic rules governing the responsibility of the carrier; II. Arbitration clauses; III. Future work.

I. Basic rules governing the responsibility of the carrier

A. *Introduction*

10. The resolution of UNCITRAL defining the subjects to be examined by the Working Group concluded that the examination of rules and practices concerning bills of lading:

> "should mainly aim at the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others, should be considered for revision and amplication: ...
>
> "(*b*) the scheme of responsibilities and liabilities, and rights and immunities, incorporated in articles III and IV of the Convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;
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> "(*c*) burden of proof...".[5]

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* UNCITRAL Yearbook, vol. III: 1972, part two, IV.

** *Ibid.*, Annex.

[3] Report of the United Nations Commission on International Trade Law on the work of its fifth session (1972) (herein cited UNCITRAL, report on fifth session (1972)), *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717), para. 51, UNCITRAL Yearbook, vol. III: 1972, part one, II, A.

[4] All members of the Working Group were represented at the session with the exception of Zaire.

* Reproduced in this Yearbook, part two, IV, 2, below.

** Reproduced in this Yearbook, part two, IV, 3, below.

[5] Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971) (hereinafter referred to as UNCITRAL, report on fourth session (1971)), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 18* (A/8417), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A. The resolution of UNCITRAL, in defining the field of work, quoted the resolution adopted in 1970 by the UNCTAD Working Group on International Shipping Legislation. "Convention" in the resolution refers to the International Convention for the Unification of Certain Rules Relating to Bills of Lading (League of Nations, *Treaty Series*, Vol. CXX, p. 157, No. 2764, reproduced in Register of Texts of Conventions and Other Instruments concerning International Trade Law, vol. II, ch. II, 1 (United Nations publication, Sales No. E.73.V.3)), often referred to as the Brussels Convention of 1924. The substantive provisions are often referred to as the Hague Rules.

11. Under the programme of work established by this Working Group, the Secretary-General was requested to prepare a report that would include an analysis of "alternative approaches to the basic policy decisions that must be taken in order to implement the objectives... with special reference to establishing a balanced allocation of risks between cargo owner and the carrier..." [8] the analysis thus requested was set forth in the report of the Secretary-General which was considered by the Working Group at its third session.[7]

12. The Working Group at its third session considered alternative approaches to achieving the objectives set forth in the UNCITRAL resolution (para. 10, *supra*). The discussions of the varying considerations are summarized in the report of the session.[8] The report concluded as follows:

> "70. In conclusion, most representatives were of the view that further work should proceed along the following lines:
>
> "(*a*) Retention of the principle of the Hague Rules that the responsibility of the carrier should be based on fault;
>
> "(*b*) Simplification and strengthening of the above principle by, e.g., the removal or modification of exceptions that relieved the carrier of responsibility for negligence or fault of his employees or servants (see articles IV (2) (*a*) and (*b*));
>
> "(*c*) Simplification and unification of the rules on burden of proof; to this end careful consideration should be given to the proposal in paragraph 269 of the report of the Secretary-General.
>
> "71. It was noted that many representatives had reservations or doubts concerning some of the foregoing principles and that other representatives felt that further information was needed before final decisions could be taken. It was agreed that the above should be considered further."

13. Accordingly, further consideration of this subject was given priority at the present session of the Working Group. The working paper prepared by the Secretariat to assist in such consideration[9] proposed texts based, in the alternative, on the structure of the Brussels Convention of 1924 (the Hague Rules) and on the approach of conventions governing international transport of goods by air, rail and road.[10]

B. *Unified, affirmative rules on carrier's responsibility*

14. The Working Group compared the approach of the Brussels Convention of 1924 (the Hagues Rules) with that of other conventions governing international transport of goods with regard to the statement of the responsibility of the carrier.

15. It was noted in the working paper prepared by the Secretariat[11] that the Brussels Convention deals specifically with various aspects of the carrier's duties. Thus article 3 (1) states that the carrier shall exercise due diligence to (*a*) make the ship seaworthy; (*b*) properly man, equip and supply the ship, and (*c*) make specified parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation. These obligations, under article 3 (1), apply "*before and at the beginning* of the voyage". As a consequence it has been held that the carrier's responsibility under this provision (e.g., as regards the seaworthiness of the ship) does not extend throughout the voyage. Article 3 (2) sets forth a more general rule that the carrier shall properly and carrefully handle, care for, and perform other specified duties as to the cargo, but this obligation is subject to various exceptions in article 4. For example, article 4 (2) (*a*) relieves the carrier of responsibility for neglect or fault of the master and other agents and servants of the carrier "in the navigation or in the management of the ship"; article 4 (2) (*b*) relieves the carrier of responsibility for the fault of certain of his agents or servants in case of loss or damage to cargo resulting from fire.[12]

16. Some representatives observed that, in contrast to the Brussels Convention, other conventions governing international transport of goods state the responsibility of the carrier in more affirmative and unified terms. With regard to the provision in article 3 (1) it was noted that the carrier's duty to make the ship seaworthy should extend throughout the voyage.

17. Some members of the Working Group expressed the view that any changes from the structure and approach of the Brussels Convention should be made with caution. These provisions have been the subject of extended experience and interpretation which should not be discarded.

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[6] This programme of work was approved by the Commission at its fourth session, UNCITRAL, report on fourth session (1971), para. 22, UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

[7] Report by the Secretary-General on the "Responsibility of ocean carriers for cargo: bills of lading", A/CN.9/63/Add.1 (hereinafter referred to as report of the Secretary-General. The first three parts of the report of the Secretary-General were addressed to the first three topics considered by the Working Group at its third session, as listed in para. 2, above. Part four, "Approaches to the basic policy decisions concerning allocation of risks between the cargo owner and the carrier", appears at paras. 150-269 of the report (A/CN.9/63/Add.1; UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex).)

[8] Working Group, report on third session (A/CN.9/63, paras. 58-71; UNCITRAL Yearbook, vol. III: 1972, part two, IV).

[9] The working paper (A/CN.9/WG.III(IV)/WP.6) appears as annex 1 to this report; reproduced in this volume, part two, IV, 2 below.

[10] The Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention); the International Convention Concerning the Carriage of Goods by Rail (CIM); and the Convention on the Contract for the International Carriage of Goods by Road (CMR). The relevant provisions of these conventions were discussed in the report of the Secretary-General, at paras. 215-235.

[11] A/CN.9/WG.III/WP.6, paras. 6-11.

[12] Removal of responsibility for certain agents or servants results from the phrase in article 4 (2) (*b*): "the *actual* fact or *privity* of the carrier". See report of the Secretary-General (at paras. 163-166) and the working paper (A/CN.9/WG.III(IV)/WP.6), para. 8.

18. Some members also suggested that the above-mentioned exceptions in article 4 (2) (*a*) and (*b*) were, at least in part, justified. The exception in article 4 (2) (*a*) for fault of agents or servants of the carrier in "navigation ... of the ship" was appropriate in view of the special problems of maritime transport, and the catastrophic losses that could result from collision at sea. Some of there representatives noted, however that they did not support retention of the exception in article 4 (2) (*a*) for responsibility for fault in "management of the ship", because this exception had led to ambiguities and conflicts in relation to the carrier's obligation of due care for the cargo. But in any event, it was stated that an exception for no navigational fault should be preserved.[13] In support of this view it was stated that legal responsibility for acts of the carrier's agents is based on a fault in choosing the agent. However, ocean carriers do not have a free choice of the maritime employees and during the voyage the carrier does not control navigational operations by the captain, pilot and crew. It was also noted that the legal situation with respect to navigational faults under the Brussels Convention was definite and clear. On the other hand, making the carrier liable for fault in cases of collision, shipwreck, stranding or sinking would lead to protracted and expensive litigation. Consequently the shipper would still need to be protected by cargo insurance; such double protection for the shipper would add to the total cost of carriage. One representative pointed out that the effect of deleting these exceptions might be virtually to abolish general average, a practice of very long standing. Furthermore, carriers would be less likely to give guarantees to salvors on behalf of the cargo for claims against the cargo. Consequently there was a risk that in some circumstances salvage operations might not be undertaken in cases where they now would be. Another representative expressed doubt that there was any connexion between the proposed rules on liability and the operation of general average and salvage.

19. Some members also stressed the importance of retaining the exception in article 4 (2) (*b*), which relieves the carrier of liability for fault of certain of his agents or servants when cargo is lost or damaged because of fire. It was stated that ship-board fires often originate from the cargo, which may be subject to spontaneous combustion; and in many cases the cause of the fire is impossible to determine.

20. It was also stated that the transfer to the carrier of responsibility for fault with respect to navigation and fire would materially increase the costs of the carrier with resulting increases in freight rates which would not be fully offset by reductions in the shipper's cargo insurance. Some representatives suggested that insurance of concentrated risks was, as a practical matter, more costly over-all than when these risks were shared among a large number of cargo insurers.[14] On the other hand, some representatives suggested that the insurance of concentrated risks would lead to a reduction in insurance costs.

21. One member of the Working Group favouring in general a presumed fault rule mentioned that investigations made in his country indicated that a deletion of the navigational error and fire exceptions would result in a substantial transfer of risks from cargo insurers, to liability insurers, perhaps so as to double payment for cargo claims from liability insurers. The magnitude of this redistribution between the two groups of insurers made it difficult to assess the economic consequences thereof, but the risk for an increase of the over-all costs of insurance could not be entirely disregarded and might deserve further consideration.

22. Most members of the Working Goup expressed the view that ocean carriers should be responsible for loss or damage to cargo that results from the fault of the carrier or of his agents or servants. The exceptions from the principle found in the Brussels Convention of 1924 responded to conditions of ocean transport in an earlier day which no longer exist due to improvement in ships, in navigation and in communication. In their view, the Brussels Convention of 1924 preserved rules, prepared by the ocean carriers in their own interest, which shippers had lacked the strength to oppose. Attention was also drawn to the high cost of cargo insurance which resulted from the restricted responsibility of ocean carriers; it was observed that these costs interfered with the access of commodities to world markets. Doubt was expressed concerning the suggestion that increasing the responsibility of the carrier for loss or damage to cargo would increase the over-all costs of carriage. If was recalled that similar fears had been expressed in connexion with increased responsibility of air carriers, but that these fears did not materialize. In this connexion, it was noted that techniques of distributing risks through insurance had been thoroughly developed and that the insurance industry was competitive. Consequently the ocean carriers and the insurers of the carriers and of cargo would be able to cope with changes in the rules governing carrier liability.

C. *The "catalogue of exceptions"*

23. Consideration was also 'given to paragraphs (*c*) through (*p*) of article 4 (2)—the so-called "catalogue of exceptions". It was noted that these 14 paragraphs constituted an attempt to set forth circumstances in which the carrier would not be considered to be at fault, and thus did not have effect that was independent of the general principle that the carrier would only be responsible for fault.

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[13] One proposal (A/CN.9/WG.III(IV)/CRP.9) suggested the the inclusion of the following:

"In the case of shipwreck, stranding or collision the carrier will not be liable when the incident arises or results from a fault or neglect of the captain, [a member of] the crew or pilot in a navigational operation".

[14] One representative stated that, after careful study, it had been estimated in his country that freight rates would increase by 1-2 per cent while cargo insurance premiums would decrease by 5-10 per cent; in general the former was around twice the latter so that the net effect of the changes proposed would be an increase in the costs to shippers of 0.5 to 1 per cent of the freight rate.

24. It was generally agreed that this attempt was not satisfactory, since it was not possible to describe fully or accurately the circumstances constituting fault or lack of fault in the numerous situations that arise in ocean carriage; consequently these exceptions had produced uncertainty and litigation.

25. There was general support for eliminating the "catalogue of exceptions", with the possible exception of paragraph (1), "saving or attempting to save life or property at sea". It was noted that the principle of paragraph (1) could be considered at the next session of the Working Group in connexion with "deviation" under article 4 (4), which also deals with the saving or attempting to save life at sea.

D. *Unified rule on burden of proof*

26. The report of the Secretary-General, considered by the Working Group at its third session, analysed the rules of the Brussels Convention on burden of proof and the relevant case law.[15] It was noted that the Brussels Convention had dealt specifically with questions of burden of proof in only a few limited situations, and that courts had reached conflicting conclusions with respect to many of the Convention's provisions. Attention was also directed to problems that had arisen when fault by the carrier concurred with some other cause to produce loss or damage. The rules on burden of proof in this situation were subject to widespread conflict and uncertainty; it was suggested that a unified rule should be established to deal with this problem.[16] As has been noted (para. 12, *supra*), most representatives at the third session supported "simplification and unification of the rules on burden of proof".[17]

27. At the present session, there was general support for implementing the above objective. It was observed that usually the carrier is in a better position than the shipper to know and present evidence concerning the circumstances leading to loss or damage to the goods, and consequently that he should bear the burden of proving that the loss resulted from circumstances other than his own fault or neglect. On the other hand, it was noted that in some circumstances it would be difficult for the carrier to establish the cause of loss, and that this would be particulary true where the loss results from fire (see para. 19, *supra*).

E. *Drafting Party*

28. The Working Group concluded that the foregoing discussions indicated sufficient basis for agreement so that a Drafting Party should be constituted to prepare a text expressing the rules on the carrier's responsibility and on burden of proof on a unified and affirmative basis. Accordingly, a Drafting Party was constituted[18] which, after having considered the subject presented the following report:

PART I OF THE REPORT OF THE DRAFTING PARTY: CARRIER'S RESPONSIBILITY

1. Discussion in the Working Group supported the approach that articles 3 and 4 for the 1924 Brussels Convention dealing with the basic question of the carrier's responsibility should be revised to state an affirmative rule of responsibility based on fault and a unified burden of proof rule. The Drafting Party herewith proposes legislative texts to implement these objectives and to achieve a compromise text.

2. Most members of the Drafting Party expressed the view that there should be no qualification of these basic principles, and that consequently all the specific exemptions contained in article 4 (2) should be deleted. On the other hand, some members were of the view that some or all of the substance of articles 4 (2) (*a*) and (*b*) should be retained. In the interest of reaching agreement on a compromise text shall would be generally acceptable, the Drafting Party has formulated the text, set out below, which establishes the affirmative general rule of responsibility based on fault and sets out a unified burden of proof rule subject to a qualification with respect to loss or damage resulting from fire (see para. 3 (2) below).

3. Accordingly the Drafting Party recommends that the following text be placed before the Working Group:

"(1) The carrier shall be liable for all loss of or damage to goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article [ ], unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

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

"(3) Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce

[15] Report of the Secretary-General, paras. 166-177, 236-237 and 256-269.

[16] Report of the Secretary-General, paras. 167-171 and 267 and the working paper by the Secretariat (A/CN.9/WG.III/WP.6) at paras. 12-18.

[17] Working Group, report on third session, para. 70, quoted above in the text at para. 12. A general statement as to reservations and doubts concerning the conclusions reached at the third session is also quoted at para. 12 above.

[18] The Drafting Party was composed of the representatives of Argentina, Egypt, France, India, Japan, Nigeria, Norway, Spain, United Republic of Tanzania, United Kingdom of Great Britain and Northern Ireland, Union of Soviet Socialist Republics and the United States of America. The Drafting Party elected as Chairman Mr. E. Chr. Selvig (Norway).

loss or damage, the carrier shall be liable only for that portion of the loss or damage attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss or damage not attributable thereto."

4. The Drafting Party recommends the foregoing text as a compromise of the divergent views on the subject of carrier's responsibility.

5. The text prepared by the Drafting Party would replace articles 3 (1) and 3 (2) and articles 4 (1) and 4 (2) of the Brussels Convention of 1924.

6. The Drafting Party further recommends that the question of "saving or attempting to save life or property at sea" (article 4 (2) (1)) be considered at the February 1973 session, in connexion with the consideration of "deviation" under article 4 (4), which also, *inter alia*, deals with saving or attempting to save life or property at sea.

F. *Consideration of the report of the Drafting Party*

29. In introducing the foregoing report of the Drafting Party, it was observed that the proposed provision had been developed by the Drafting Party in a spirit of compromise. It was noted that some members had preferred a text that would contain no exceptions from the general rule of paragraph (1), while other members had preferred that the text include specific exceptions from carrier responsibility for both fire and navigational error. In spite of these divergent views, members of the Drafting Party, in order to secure general agreement, had joined in recommending the compromise text set forth in the report. This text included no exception for navigational fault but in paragraph (2) set forth a special rule on the burden of proof in case of fire.

30. It was also observed that, although questions might be raised as to certain of the provisions in the proposal, the text presented by the Drafting Party achieved remarkable simplification and clarification of complex and ambiguous provisions of the Brussels Convention. Accordingly, the Drafting Party had been of the opinion that it was not desirable to retain the exemplification of exonerations in the "catalogue of exceptions" (cf. paras. 23-24). Furthermore, the Drafting Party had considered that a general rule based on presumption of fault made it unnecessary to list the most important obligations of the carrier in article 3 (1) and (2) of the Convention since, according to the general rule, the carrier would have to perform all his obligations under the contract of carriage with due care.

31. Some members of the Working Group indicated dissatisfaction with the rule of paragraph (2) which, in cases of fire, placed on the shipper the burden of proving that the carrier was at fault. It was suggested that the carrier was in a better position than the shipper to present evidence concerning the cause and handling of a fire in the course of carriage, and that it would be so difficult for the shipper to prove his case that the recommended provision was tantamount to the exception set forth in article 4 (2) (*b*) of the Brussels Convention.

32. One representative stated that although, in the spirit of compromise, he could accept a special provision dealing with the burden of proof in the case of fire, the burden placed upon the shipper should be ameliorated with respect to certain circumstances that are known only by the carrier. Consequently, consideration should be given to the following substitute for paragraph (2):

"However, if the loss or damage is caused by fire, the carrier shall not be liable if the proves that the ship had adequate means to prevent it, and that when the fire occurred, he, his agents and servants took all reasonable measures to avoid the fire and to reduce its consequences, unless the claimant proves the fault or neglect of the carrier, his agents or servants."

Another representative stated that, although he supported the compromise text, if another text should be prepared he would prefer the above proposal.

33. Other representatives noted that loss by fire and explosion presented special problems that justified special treatment; fire in the course of ocean carriage usually originates with the cargo, which may be subject to spontaneous combustion. In addition, it is difficult for the carrier to establish the precise origin or a fire.

34. Some representatives stated that the proposal for an exception in the case of navigational fault should have been adopted. Others stated that they were opposed to such an exception, and had accepted the special provision of paragraph (2) dealing with burden of proof in cases of fire as part of an over-all compromise on the general issue of special exceptions in favour of the carrier. If an exception for navigational fault should be included they would not be able to support the compromise provision with respect to burden of proof in cases of fire.

35. One representative objected to the provisions of paragraph (3) dealing with concurrent causes of loss or damage. The concluding proviso presented difficulties by stating the carrier's burden in negative terms and, in general, placed on the carrier a heavy burden of proving the amount of the loss or damage that was not attributable to his fault.

36. Most members of the Working Group indicated their support for the substance of the compromise text on carrier's responsibility that had been developed by the Drafting Party.

37. In this connexion, it was noted that the Working Group may wish to consider specific aspects of the compromise text in the light of further facts that may become available with respect to the practical consequences of the proposed rules, their effect on general average and salvage operations, and the relationship between these provisions and the future action of the Working Group with respect to unit limitation of liability.

II. Arbitration clauses

A. *Introduction*

38. The resolution adopted by UNCITRAL at its fourth session listed "jurisdiction" among the subjects to be examined by the Working Group.[19] The report of the Secretary-General (A/CN.9/63/Add.1; UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex) pursuant to the programme of work established by the Working Group, included a section on "Clauses of bills of lading confining jurisdiction over claims to a selected forum"; this examination included choice of judicial forum clauses (paras. 75-126) and arbitration clauses (paras. 127-148).

39. The Working Group at its third session considered alternative approaches with respect to adding provisions to the Brussels Convention of 1924 (The Hague Rules) (*a*) on the choice of places where judicial and arbitration proceedings may be brought, and (*b*) on assuring that the Hague Rules would be applied in such proceedings. A preliminary draft on choice of forum clauses was adopted by the Working Group,[20] according to which the plaintiff in an action retains certain options as to where he can bring his suit, notwithstanding the inclusion in the bill of lading of a clause specifying where suit may be brought. On the other hand, after a claim has arisen, any place designated in an agreement between the parties would be effective.

40. The Working Group, at its third session, also discussed the question of arbitration clauses (report, paras. 50-57). Consideration was given to proposals set forth in the report of the Secretary-General and to proposals made by members of the Working Group during the course of the session. There was general support within the Working Group for inclusion of a provision in the Hague Rules that would deal with the place where arbitration may be held and that would assure that the Hague Rules would always be applied in arbitration proceedings. However, there was insufficient time at the third session to complete action on the subject and the Working Group decided to defer action until the present session (report, para. 57).

B. *Consideration of arbitration clauses at fourth session*

41. At the present session, the Working Group gave further consideration to the subject of arbitration clauses in bills of lading. A working paper prepared by the Secretariat [21] analysed alternative provisions which consisted of the proposals made by members of the Working Group at the third session,[22] and proposals set out in the report of the Secretary-General (paras. 136, 141, 147).

42. The six proposals set out in the Secretariat working paper (designated therein as draft proposals A through F) contained certain common characteristics but diverged widely with regard to a number of important aspects of the subject. Common characteristics of all the proposals were (*a*) that under all of them there would be no impediment to the power of the parties after a dispute has arisen to agree on any place where arbitration might be held, and (*b*) that the rules of the Convention shall apply to all arbitration proceedings. All but one of the draft proposals embodied the principle of the validity of arbitration clauses in bills of lading. On the other hand, the draft proposals diverged with respect to the manner of determining the place for arbitration; there were significant differences with respect to the extent to which the bill of lading could determine the place for arbitration, and the effect of the designation of the place by an arbitral body.

43. The Working Group discussed the various approaches embodied in draft proposals A through F. It was agreed, to begin with, that once a dispute under a contract of carriage has arisen the parties should be free to agree to arbitrate the dispute and to specify the site of the arbitration proceedings; such agreements for the settling of a current dispute would not present those elements of adhesion contracts that usually characterize the contract of carriage. The Working Group also generally agreed that any provision on arbitration that might be added to the Convention should provide that the Convention must be applied in all arbitration proceedings.

44. Most representatives expressed views that favoured the addition of a provision to the Convention permitting the inclusion of arbitration clauses in bills of lading. Many representatives stated that their support of such a provision in the Convention depended on the extent to which the claimant would be assured a convenient place for arbitration. These representatives generally favoured the approach taken by the Working Group at its third session with respect to choice of forum clauses; this approach was followed in draft proposal E set out in the Secretariat working paper (para. 20). Such an approach would give the claimant the option of choosing the place of arbitration from among several places specified in the Convention, including the States within whose territories were located the port of loading and the port of discharge. However, in the view of other representatives difficulties might arise, particulary for land-locked States, if the permissible places for arbitration were confined to the States of the ports of loading and discharge.

45. Some representatives favoured the approach of draft proposals A and B. A convention provision following this approach would permit the designation in the bill of lading either of a specific place where arbitration must take place, or of an arbitral body which would, in turn, designate the place of arbitration. It was indicated by one of these representatives that in the context of international trade, concern with the

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[19] UNCITRAL, report on fourth session (1971), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

[20] Working Group, report on third session (A/CN.9/63), para. 39, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[21] A/CN.9/WG.III/WP.7. The working paper is annexed to this report as annex 2, reproduced in this volume, part two, IV, 3, below.

[22] Working Group, report on third session, paras. 54-56.

adhesion adamant in contracts of carriage should not be given undue importance since, in the case of liner transport, there is a trend toward increasing consultation between ship owners and cargo owners.

46. Some other representatives indicated their initial support for the approach taken in draft proposal F. Under this approach arbitration would be permitted only in cases where, after the dispute has arisen, the parties agree to arbitrate. The parties could then choose any place as the site of the arbitration proceedings. It was indicated by these representatives that the contract of carriage must still be considered to be an adhesion contract; the party which drafts the contract should not have the freedom to impose on the shipper a place for arbitration which would in most cases be inconvenient for the shipper or consignee. In the view of these representatives, this serious problem could be avoided if the possibility or arbitrating the dispute were left to the specific agreement of the parties once the dispute arose. In this connexion, one representative pointed out that in any discussion aimed at resolving the problem the interests of the developing countries, and in particular of small break-bulk shippers, must be taken into account.

C. *Drafting Party*

47. It was generally agreed that, although differing views had been expressed on a solution to the problems presented by the subject of arbitration clauses, there was sufficient basis for agreement to warrant referring the subject to the Drafting Party. The Drafting Party having considered the subject, presented the following report:

PART II OF THE REPORT OF THE DRAFTING PARTY ARBITRATION CLAUSES

1. The Drafting Party considered the addition to the Brussels Convention of 1924 of a provision on arbitration clauses. A number of differing views on the subject were expressed by members of the Drafting Party. However, in the course of the discussion it was possible to reach a general consensus which is reflected in the legislative text set out in paragraph 2 below.

2. The Drafting Party recommends the following provision on arbitration clauses.

Proposed draft provision

"(1) Subject to the rules of this article, any clause or agreement referring disputes that may arise under a contract of carriage to arbitration shall be allowed.

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

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

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

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

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

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

"(3) The arbitrator(s) or arbitration tribunal shall apply the rules of this Convention.

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

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

Notes on the proposed draft revision

3. With respect to paragraph (2) of the proposed draft provision, the Drafting Party discussed the issue of whether arbitration proceedings should be brought only in States which are parties to the Convention. Under such a requirement the plaintiff would be able to choose from among the places set out in paragraph (2), but only if the place chosen was within a State party to the Convention (Contracting State). A majority of the members of the Drafting Party favoured a solution that would require that arbitration proceedings be brought in a Contracting State but that this requirement should come into being only after a substantial number of States have become parties to the Convention. A formulation reflecting this view was put forward by a member of the Drafting Party. It reads as follows:

"(6) The word "State" within the meaning of this article shall be deemed to mean "Contracting State" at such time as [ ] States of which [ ] shall each have a total tonnage of not less than [ ] tons of shipping, have become parties to this Convention."

The Drafting Party approves the substance of this proposed text, but recommends that its specific wording and place in the text should be given further consideration at a later stage.

4. The Drafting Party notes that in paragraph (2) of the proposed draft provision it is intended that the plaintiff shall, in exercising his option, have the choice of any of the places specified in subparagraphs (*a*) and (*b*).

D. *Consideration of the report of the Drafting Party*

48. The Working Group considered the above-quoted report of the Drafting Party. The report of the Drafting Party, including the proposed draft provision, received the approval of the majority of the Working Group.

49. Some representatives stated that they had agreed to the compromise reached by the Working Group, although they preferred the approach taken in draft proposal F above. In this connexion, several observations were made by these representatives. It was indicated that among the choices provided in paragraph (2) of the draft proposal was one under which the plaintiff can select the place that may have been specified in the bill of lading (para. (2) (*b*)). The possibility of making this choice would give a plaintiff carrier the opportunity to choose a place, inserted by him in the bill of lading, that may oblige a cargo owner defendant to have to defend in a place that is inconvenient for him. Some representatives reserved their position with respect to paragraph (2) (*b*) of the proposed draft provision. It was also observed that the use of the words "plaintiff" and "defendant" are not satisfactory in the context of arbitration as they could be applied to both the carrier and the cargo owner, without distinction. It might be desirable to substitute terms that would more appropriately indicate the roles of the parties in the dispute. Some representatives also observed that "due process of law" must be followed in both the procedure of arbitration and in the selection of arbitrators; the arbitror or arbitration body should not be appointed before the occurrence of the event which caused the claim to arise. These representatives explained that some of these points were issues of public policy.

50. However, other representatives reminded the Working Group that the text of the draft provision on arbitration clauses was the result of a careful compromise among initially divergent positions. It was pointed out that the plantitiff is usally the cargo owner and that paragraph (2) of the proposed draft provision provide the plantiff with a number of choices or places where arbitration proceedings could be brought. These include places (e.g., the States of the port of loading and the port of discharge) which normally are convenient for the cargo owners and are fair to both parties since they are related to the carriage or goods.

51. It was emphasized that the place designated in the bill of lading would only be one of the choices available to the plaintiff. The availability of all the choices specified in article 2 is assured by paragraph (4) of the proposed draft provision under which, *inter alia*, any attempt to reduce the number of choices available to the plaintiff in paragraph (2) would be null and void (*supra*, para. 47).[23]

52. These representatives stated that they continued to be of the opinion that provisions on arbitration, if any, should be based on giving full effect to arbitration clauses and agreements contained in contracts of carriage, provided the contract stipulates that the substantive rules of the Convention shall be applied in all arbitration proceedings, and that arbitration proceedings shall be held in States parties to the Convention. In the view of these representatives the provisions contained in the present proposed draft provision may give rise to serious difficulties in shipping operations.

III. Future work

53. The Working Group considered topics for future work as set forth in item 5 of the annotations to the provisional agenda (A/CN.9/WG.III/WP.8). The annotations noted that the Working Group, at its third session,[24] had decided that the remaining topics listed in the resolution adopted by UNCITRAL at its fourth session should be taken up at the February 1973 session of the Working Group.[25]

54. Those subjects, which will be considered in a report by the Secretary-General, are the following: (1) trans-shipment; (2) deviation; (3) the period of limitation; (4) definitions under article I of Convention ("carrier", "contract of carriage", "ship"); (5) elimination of invalid clauses in bills of lading; (6) unit limitation of liability.

55. It was generally agreed that the subjects which are most closely related to the basic question of carrier's responsibility should be taken up first. Accordingly, priority should be given to unit limitation of liability, trans-shipment, and deviation.

56. Attention was drawn to the recommendation made by UNCITRAL at its fifth session [26] that the Working Group should keep in mind the possibility of preparing a new convention instead of merely revising and amplifying the Brussels Convention of 1924. Accordingly, the Working Group agreed that the "Memorandum concerning the structure of a possible new convention on the carriage of goods by sea", [27] submitted by a member of the Working Group should be discussed at the fifth session of the Working Group.

57. One representative suggested that, in considering its future work, the Working Group should bear in mind a number of other possible subjects for examination, including charter parties as they bear on liability questions resolved in this draft, a maritime arbitration code, *in rem* jurisdiction and attachment proceedings as they bear on the draft on jurisdiction, clauses other limitation of liability systems such as those contained in certain other maritime conventions as they bear on the package or unit limitations, and rules concerning combined transport contracts. Another representative had reservations concerning the examination of these subjects and considered that the Working Group should first study the other subjects relating to the contract of carriage of goods by sea which are not enumerated in the

[23] One representative suggested that the intent of the provision would be clearer if, at paragraph 2, line 2, the work "either" should be inserted between the words "at" and "one".

[24] Working Group, report on the third session, para. 73, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[25] UNCITRAL, report on the fourth session (1971), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

[26] UNCITRAL, report on the fifth session (1972), para. 51, UNCITRAL Yearbook, vol. III: 1972, part one, II, A.

[27] A/CN.9/WG.III(IV)/CRP.1.

UNCITRAL resolution. It was suggested by another representative that questions regarding the definition of servants and agents should be studied by the Working Group. The observer for UNCTAD informed the Working Group that the subject of charter parties would be discussed by the UNCTAD Working Group on International Shipping Legislation at its next session; he also informed the Working Group of the interest taken by UNCTAD in the subject of the combined transport of goods. The observer for the International Maritime Consultative Organization (IMCI) reported that the revision of the 1957 Convention on the limitation of the liability of shipowners had been placed on the agenda of his organization; the observer of UNIDROIT noted his organization's continuing interest in the subject of the combined transport of goods.

58. The Working Group decided that its fifth session, to be held in New York, will meet from 5 to 16 February 1973. It was agreed that a working period of two weeks would be more effective than the three-week period that had been initially projected for this session.

2. *Working paper by the Secretariat, annex I to the report Working Group (A/CN.9/74:* approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier*

CONTENTS

* 12 October 1972.

INTRODUCTION

1. At its third session, held in Geneva from 31 January to 11 February 1972, the Working Group commenced consideration of the last and most general item on its agenda, approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier. The report of the Working Group[1] on this matter concluded as follows:

"70. In conclusion, most representatives were of the view that further work should proceed along the following lines:

"(*a*) Retention of the principle of the Hague Rules that the responsibility of the carrier should be based on fault;

"(*b*) Simplification and strengthening of the above principle by (e.g.) the removal or modification of exceptions that relieved the carrier of responsibility for negligence or fault of his employees or servants (see articles IV (2) (*a*) and (*b*));

"(*c*) Simplification and unification of the rules on burden of proof; to this end careful consideration should be given to the proposal in paragraph 269 of the report of the Secretary-General.

"71. It was noted that many representatives had reservations or doubts concerning some of the foregoing principles and that other representatives felt that further information was needed before final decisions could be taken. It was therefore agreed that the above should be considered further."

2. Most representatives at the third session of the Working Group expressed the view that a special session for consideration of the remaining topics should be held, with priority given to the basic question of carrier responsibility. The Commission at its fifth session (A/8717, para. 51) * approved such a special session and noted that "the Working Group should give priority in its work to the basic question of the carrier's responsibility . . .".

3. This working paper is prepared to assist the Working Group in its consideration of this priority question.[2] The underlying considerations have already been fully developed in documents that have been previously submitted to the Working Group: the report of the Secretary-General entitled "Responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/63/Add.1) ** (hereinafter referred to as report of the Secretary-General) and the report of the UNCTAD secretariat entitled "Bills of lading" (TD/B/C.4/ISL/6/Rev.1) (hereinafter referred to as the report of the UNCTAD secretariat). This Working Paper describes and discusses changes in the Hague Rules that would implement a general policy of carrier liability for fault and a unified burden of proof formula.[3] Parts I, II and III examine alternative approaches for implementing the above objectives within the basic framework of the Hague Rules. Part IV considers ways in which these objectives might be implemented through provisions designed to parallel existing international air, rail and road carrier conventions.

I. DISCUSSION DIRECTED TO THE IMPLEMENTATION OF A GENERAL POLICY OF CARRIER LIABILITY FOR FAULT

A. *Introduction*

4. The provisions of the Hague Rules which bear the major burden of allocating the risk of cargo loss and damage between the cargo owner and carrier are found in articles 3 and 4 of the Brussels Convention of 1924. Article 3 sets out the carrier's obligations to cargo:

"1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

"(*a*) Make the ship seaworthy;

"(*b*) Properly man, equip and supply the ship;

"(*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation.

"2. Subject to the provisions of article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Article 4 (1) and (2) set out a variety of exceptions to the carrier's article 3 obligations.[4]

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* UNCITRAL Yearbook, vol. III: 1972, part one, II, A.

** *Ibid.*, part two, IV, annex.

[1] Report of the Working Group on International Legislation on Shipping on the Work of its third session, held in Geneva from 31 January to 11 February 1972 (hereinafter referred to as report of the Working Group) (A/CN.9/63, UNCITRAL Yearbook, vol. III: 1972, part two, IV).

[2] In the course of the third session of the Working Group some members expressed their hope that the Secretariat would be able to prepare a working paper for use by the Working Group in its consideration of this subject. The Secretariat indicated that every effort would be made to respond to this request. The Secretariat acknowledges assistance from Robert Hellawell, Professor of Law, Columbia University.

[3] Several specific exceptions to carrier liability for fault are not treated in this paper because they have been considered in earlier reports to the Working Group: live animals (art. 1 (*b*)); deck cargo (art. 1 (*b*)); and provisions dealing with the carrier's period of responsibility (art. 1 (*e*)). Two other widely enacted provisions of maritime law which might be considered to exonerate a carrier from liability for the consequences of its fault are also omitted from this paper. One of these provisions is the limitation of liability provisions (art. 4 (5)) of the Brussels Convention of 1924 containing the package or unit limitation. A study on this subject will be part of a report of the Secretary-General that will be presented to the fifth session of the Working Group. Another such provision is the over-all limitation of shipowners' liability incorporated in the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships (1957). For a description of the nature of the over-all shipowners' limitation see report of the Secretary-General, para. 201.

[4] *Article 4*

"1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article 3. Whenever loss or damage has resulted from

(*Continued on next page.*)

5. Part IV of the report of the Secretary-General analyses these provisions and their varying interpretations. It describes in some detail the extent to which the Hague Rules depart from the fault principle, approved by a majority of the Working Group. To summarize briefly, articles 3 and 4 for the most part hold carrier liable to the shipper for loss or damage to cargo caused by fault of the carrier and its employees. There are two major exceptions to this: error in navigation and management of the ship (art. 4 (2) (*a*)) and fire (art. 4 (2) (*b*)).

B. *Means to implement general policies considered by the third session of the Working Group*

(1) *Navigation and management*

6. The report of the Working Group concluded that work should include "simplification and strengthening of the fault principle" by (e.g.), "the removal or modification of exceptions that relieved the carrier of responsibility for negligence or fault of his employees or servants (see article[s] 4 (2) (*a*) . . .".) This is the provision which relieves carrier of liability for negligent navigation or management of the ship. The various considerations underlying the conclusion that this provision should be removed are set out in the report of the Secretary-General and need not be repeated here.[5]

7. If the Working Group decides that carriers should be liable to shippers for damage caused by negligent navigation or management, it should consider whether implementation of this policy can be accomplished simply by deleting article 4 (2) (*a*) or whether an affirmative provision should also be added. It should be noted here that if article 4 (2) (*a*) is deleted it is possible that courts would reach the result intended by the Working Group without any such affirmative provision. Thus, as described in the report of the Secretary-General (paras. 244-245), when a claimant proves that cargo was delivered to the ship in good condition and returned at destination in damaged condition, the carrier normally has the burden of proving that it comes within some particular exemption. With article 4 (2) (*a*) removed a carrier at fault with regard to navigation or management could not fit within any exemption provision and, therefore, would probably be held liable. However, as was mentioned earlier, the structure of the Brussels Convention sets out the carriers' obligations in article 3 and the exceptions to those obligations in article 4. There is now, of course, no obligation in article 3 (or elsewhere in the Brussels Convention) as to navigation and management, and consequently the intended result of carrier's liability would be left somewhat speculative by the mere deletion of article 4 (2) (*a*). A specific obligation on navigation and management in article 3 would be in accord with the structure of the Convention and would eliminate any doubt as to the outcome. A new article 3 (3) might read as follows:

> "3. The carrier shall properly and carefully navigate and manage the ship."

(2) *Fire*

8. The other provision of article 4 which is inconsistent with the general principle of carrier liability for fault is section 2 (*b*), the fire provision. As is explained more fully in the report of the Secretary-General (paras. 163-166) the import of section 2 (*b*) is that the negligence of carrier's employees, leading to a fire, will not necessarily result in carrier liability; the fault must be that of the carrier itself. In the case of corporate shipowners some decisions have held that only the negligence of a senior employee or officer will result in carrier liability.[6] But whether or not all cases would so draw the line, it is clear that the shipowner will not be held responsible for the negligence of all of his employees. There does not appear to be any peculiarity to loss or damage from fire which demands this unique rule. Policy considerations seem about the same for fire losses as for other types of losses. That is, considerations of insurance, economics, fairness and friction, as discussed in the report of the Secretary-General (paras. 246 and 178-214) all seem to bear on liability for fire loss in about the same manner as on liability for other types of losses. It should be pointed out, however, that it is often difficult or impossible for the carrier to establish the cause of shipboard fires. At the third session of the Working Group it was asserted that in such cases, without the fire exception (and with the burden of proof) carrier will be, in a sense, subject to something like strict liability.[7] However, the cargo

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(Foot-note continued.)

unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

"(*a*) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

"(*b*) Fire, unless caused by the actual fault or privity of the carrier;

"(*c*) Perils, dangers and accidents of the sea or other navigable waters;

"(*d*) Act of God;

"(*e*) Act of war;

"(*f*) Act of public enemies;

"(*g*) Arrest or restraint of princes, rulers or people, or seizure under legal process;

"(*h*) Quarantine restrictions;

"(*i*) Act or omission of the shipper or owner of the goods, his agent or representative;

"(*j*) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

"(*k*) Riots and civil commotions;

"(*l*) Saving or attempting to save life or property at sea;

"(*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;

"(*n*) Insufficiency of packing;

"(*o*) Insufficiency or inadequacy of marks;

"(*p*) Latent defects not discoverable by due diligence;

"(*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

[5] For example at paras. 240-43.

[6] Tetley, Marine Cargo Claims 112 (1965); *Earle* v. *Stoddart*, 287 U.S. 420, 425 (1932); Gilmore and Black, the Law of Admiralty 698 (1957).

[7] Report of the Working Group, para. 65.

owner is generally in an even poorer position to establish the cause of a shipboard fire and, accordingly, a contrary rule would seem to leave the cargo owner without recourse regardless of the fault of the carrier. In any event, if there is to be a general rule that carriers are liable for loss or damage to cargo caused by the fault of the carrier or its employees, it would follow that the fire provision should be eliminated.

(3) *Seaworthiness during the voyage*

9. Section 1 of article 3 spells out carrier's obligation to provide a seaworthy ship but limits the obligation by the language—"before and at the beginning of the voyage".

10. Thus a carrier does not violate its obligations under section 1 by allowing the ship to become unseaworthy after commencement of a voyage [8] even if carrier was negligent. Such negligence under present law would most likely be considered negligence in the management of the ship, with the result that carrier would have no liability for loss or damage to cargo.

11. Under the changes in articles 3 and 4 proposed thus far, carrier would, of course, be liable for damage to cargo caused by negligent management of the ship as well as by negligent care of cargo. Consequently, if those changes are adopted, the limitation of carrier's duty to provide a seaworthy ship to the period "before and at the beginning of the voyage" is probably not of great consequence. Any fault of the carrier rendering the ship unseaworthy during the voyage would most likely be held a fault in management or in care of cargo, for either one of which carrier would be liable. However, there is always the possibility of a gap—of some act of negligence making the ship unseaworthy which some court might hold was neither an act of management or navigation nor care of cargo. To allow a carrier to escape liability for such an act would be contrary to a general policy of carrier liability for fault. Consideration should be given to amending article 3 (1) to guard against any such gap. The beginning of article 3 (1) might be amended to read as follows:

> "The carrier shall be bound before, [and] at the beginning of *and throughout* the voyage to exercise due diligence to:"

(4) *Removing ambiguities that arise when carrier's fault concurs with an article 4 exception*

(a) *Introduction*

12. The result under the Hague Rules is unclear when a fault of the carrier combines with an article 4 (2) exception. This requires some explanation. First, consider exceptions (*e*) through (*o*) which involve the overwhelming force of third parties, fault of the shipper or the goods, or an attempt to save life or property at sea. Normally, if one of these situations, or exceptions, causes the loss the result is clear. Thus, if loss or damage to cargo results from a delay caused by quarantine restrictions, normally no carrier fault is involved; and exemption of the carrier under (*h*) is consistent with the principle of carrier liability only for fault. But suppose that carrier's negligence had in some fashion caused the quarantine. Or suppose that carrier's negligence in incorrectly storing the cargo contributed or added to the damage. The Hague Rules are not clearly addressed to this situation. Which prevails, the carrier's article 3 obligations or the article 4 (2) exceptions?

13. A common view in these situations is that the exception will not exonerate the carrier.[9] Where carrier's fault has caused the exception to occur, carrier will usually be held liable for the entire damage. And where carrier's fault concurs with the exception—for example, cheese is damaged by a combination of quarantine delay in a hot harbour and improper storage—carrier will commonly be held responsible for that portion of the damage attributable to its fault, or for all of the damage if that portion cannot be singled out. However, while the above is a common interpretation of exceptions (*e*) through (*o*), it is not universal. Some jurisdictions take a contrary view and in others the result is unclear.

14. Other exceptions present a very similar situation. Thus, the perils of the sea exception (*c*) and the act of God exception (*d*) have been interpreted by some courts to have an inherent no-fault requirement. Those courts have held that unless the carrier has exercised due diligence to protect against the particular peril involved, be it high sea or lightning, the exception will not apply and the carrier will be liable.[10] But in other courts the result is different or unclear.[11]

15. At the third session of the Working Group, most representatives were of the view that the responsibility of the carrier should be based on fault and that uncertainties should be clarified or eliminated.[12] The present article 4 (2) exceptions, when combined with carrier fault, create uncertainty and the possibility of carrier fault without liability. Alternative approaches to this problem are given below. The first alternative would add a provision dealing with those kinds of situations where carrier's fault may combine with an article 4 (2) exception and would provide an appropriate rule of liability in such cases. Apart from adding such a provision the first alternative would leave the article 4 (2) exceptions as they are now. The second alternative would eliminate all of the specific article 4 (2) exceptions.

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[8] A common rule is that the voyage commences with respect to each item of cargo when the ship breaks ground at the port at which that item of cargo was loaded.

[9] See report of the Secretary-General, paras. 167-171, 267.

[10] See report of the Secretary-General, para. 159.

[11] There remain two additional provisions to be noted: the latent defect exception (art. 4 (2) (*p*)) expressly requires that the defect be "not discoverable by due diligence". And article 4 (1) exempts carrier from liability for loss or damage resulting from unseaworthiness "unless caused by want of due diligence . . .". By reason of their explicit language these are the two clearest provisions on the matter of carrier's concurring fault.

[12] Report of the Working Group, para. 70, quoted at para. 1, above.

(b) *First alternative: adding a clarifying provision to article 4*

16. A new provision,[13] such as the following, might be added to article 4 immediately after article 4 (2) (*q*):

"Provided, however, that the occurrence of one or more of the foregoing exceptions shall not relieve carrier of responsibility for any of the loss or damage arising or resulting therefrom if carrier's fault or want of due diligence:

"(i) caused or brought about the occurrence of the exception or exceptions; or

"(ii) concurred with the occurrence of the exception or exceptions; however, carrier shall be liable only for that portion of the loss or damage attributable to its fault provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault."

(c) *The second alternative: elimination of exceptions*

17. A second alternative for eliminating the ambiguities and difficulties described above (at paras. 12-14) would eliminate all the specific exceptions, leaving only one general or catch-all exception similar to the present article 4 (2) (*q*).[14] That general exception clearly exonerates carrier from liability for all loss or damage arising or resulting from all causes whatsoever—except the fault of the carrier; this provision would appear to be sufficient to implement a policy of carrier liability for fault. The specific exceptions are superfluous.[15] Article 4 (2) (*q*) removes all danger that carrier will be held liable for any loss or damage if it is not at fault. It appears that elimination of the specific exceptions is preferable to the first alternative because it is a simpler and more certain way to implement a general system of carrier liability for fault. Leaving in unnecessary specific provisions is likely to cause confusion. (The discussion on burden of proof in part II (paras. 21-31) of this working paper will further illustrate the redundancy of the specific exceptions and will indicate their potentiality for confusion.)

18. To make the rule in the case of concurring negligence clear, under this alternative a provision such as the following could be considered as article 4 (2):

"2. Where carriers's fault concurs with another cause to produce loss or damage, carrier shall be liable only for that portion of the loss or damage attributable to its fault, provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault."

(d) *The "subject to" qualification to article 3 (2)*

19. Whichever of the above alternatives is chosen, a change should also be considered in article 3 (2). This section, which sets out the carrier's duties regarding care of cargo, begins with the clause: "subject to the provisions of article 4 . . .". It appears desirable to eliminate the quoted words.

20. This clause might appear to be innocuous, but can present serious difficulty if independent meaning is ascribed to it. One construction of the "subject to" clause would be to conclude that it adds nothing to the law on the ground that it merely means that article 4 should be given effect. However, this would be obvious without the clause. Thus, the argument that independent meaning must be given to these words could lead a court to conclude that if a carrier fit within one of the article 4 (2) exceptions it had no obligation to exercise proper care of the cargo. This would, of course, be contrary to a liability for fault principle. If either of the two foregoing alternatives is adopted it is unlikely that many courts would so interpret the "subject to . . ." language. But since the phrase serves no useful purpose and can lead to confusion, consideration should be given to its elimination.

II. Changes to be considered in implementation of a uniform burden of proof system

21. As is explained more fully in the report of the Secretary-General (paras. 167-177) the Brussels Convention of 1924 contains no unified burden of proof system. Some provisions have their own express burden of proof rules[16] but for the most part the Convention is silent on the matter. As a result, courts have developed several different burden of proof rules. The rule used may vary with the particular exception relied upon and with the jurisdiction in which the case is brought. Under many circumstances it is quite unclear what the rule on burden of proof is. Moreover, it does not appear that any consistent or rational policy can account for the varying burden of proof rules currently used in articles 3 and 4 cases.

22. At the third session of the Working Group there was substantial support for simplification and unification of the rules on burden of proof and for careful consideration of the burden of proof proposal in paragraph 269 of the report of the Secretary-General.[17] That proposal would add a provision to article 4 (2) as follows:

"The burden of proof shall be on the claimant to show:

"(*a*) that the claimant is the owner of the goods or is otherwise entitled to make the claim;

"(*b*) that the loss or damage took place during the period for which carrier is responsible;

[13] The text of the provisions resulting from this alternative and the changes proposed in sections 1-3, above, of this part of the working paper appears below at para. 34 (alternative proposal A).

[14] The text of the provisions resulting from this alternative appears below, para. 35 (alternative proposal B).

[15] Note that the article 4 (2) (1) exception "Saving or attempting to save life or property at sea" seems unnecessary on the ground that this conduct in itself would not seem to constitute fault and carrier is liable only for the consequences of fault (article 4 (2) (*q*)). Any doubt on this issue could be removed in connexion with review of the deviation provision which makes specific reference to saving life or property at sea.

[16] Foot-note 12, above.

[17] See report of the Working Group at para. 70 (*c*) quoted at para. 1, above. Three minor changes were made in the proposal as it appeared in the report of the Secretary-General: "shipper" was changed to "claimant"; "(*b*) the contract" was eliminated as unnecessary; the words "to avoid liability" were added for clarity.

"(*c*) the physical extent of the loss or damage;
"(*d*) the monetary value of the loss or damage.

The burden of proof shall be on the carrier as to all other matters: to avoid liability carrier must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage."

The proposal is based on considerations described in the report of the Secretary-General,[18] including the desirability of placing the burden of proof upon the party most likely to have knowledge of the facts—generally the carrier. Another important consideration is the need to clarify and simplify the present burden of proof rules which are now complicated, uncertain and, therefore, wasteful.

23. This section will analyse the textual changes to be made in article 4, if the burden of proof proposal in paragraph 269 of the report of the Secretary-General is adopted.

24. *Exceptions* (e) *through* (o). It is necessary first to consider the article 4 exceptions in paragraphs (*e*) through (*o*) in relationship to the above unified burden of proof proposal. These involve the overwhelming force of third parties, fault of the shipper or the goods or an attempt to save life or property at sea. No single statement can be made as to burden of proof in relation to all of these exceptions in all jurisdictions—indeed, the existence of confusing and varying rules on burden of proof under the present Hague Rules is an important reason for change and simplification. However, a common rule is that carrier has the burden of proving itself within the exception and, if carrier succeeds, the burden then passes back to cargo owner to prove that the carrier's fault caused the excepted act or concurred with the excepted act in producing the loss or damage.[19]

25. This burden of proof formula is clearly inconsistent with the proposed unified provision on burden of proof. If the proposed provision is adopted, therefore, two courses are open: these alternatives are analogous to the two alternatives of part I, section 4 of this working paper (paras. 16-18, *supra*).

26. Under the first alternative, language would be added to the unified burden of proof provision making it clear that it applies in all cases, whether or not one of the article 4 (2) exceptions is also applicable. The following underlined words could be added: "The burden of proof shall be on the carrier as to all other matters, *whether or not one or more of the provisions in article 4 (2) is applicable:*".[20]

27. Under the second alternative, the specific exceptions, article 4 (2) (*e*) through 4 (2) (*o*) could be eliminated. This may be the preferable alternative. With a new unified burden of proof provision the exceptions should no longer play a role in the burden of proof. And if a general liability for fault rule is adopted the exceptions will no longer have any substantive effect on liability: they will all be subsumed in the general catch-all provision based on the present article 4 (2) (*q*). Accordingly, the (*e*) through (*o*) exceptions would be left with no function.

28. Provisions without function invite misinterpretation and confusion. A court faced with a large array of specific exceptions will be reluctant to conclude that they have no meaning or function. It will be recalled that these exceptions present difficulties in effecting a general policy of carrier liability for fault (see paras. 12-14, *supra*). These exceptions also present difficulties with respect to burden of proof. It seems likely that some courts will attempt to attribute meaning to the surplus exception provisions—an effort that is likely to lead to results that are unintended by the draftsmen. Accordingly, if the proposed burden of proof provision is adopted and the liability for fault is implemented, serious consideration should be given to eliminating exceptions (*e*) through (*o*).

29. *Exceptions* (c), (d), *and* (p). The perils of the sea exception (*c*) and the act of God exception (*d*) may differ from the (*e*) through (*o*) exceptions as to burden of proof in one respect. They have sometimes been interpreted to require the carrier to prove its lack of negligence before it will be considered to fit within the exception.[21] The burden of proof, therefore, stays with the carrier once the cargo owner has carried its initial burden of showing the loss. To the extent courts follow this pattern there would be no inconsistency between these provisions and the proposed burden of proof scheme. Nor would there be any inconsistency with a general liability for fault policy. This may suggest that the exceptions are innocuous and should be left intact. However, there is no certainty that all (or even most) courts will follow this pattern.[22] Thus, these provisions really present the same problems and alternatives as the (*e*) through (*o*) exceptions. The choice is between the previously suggested addition to the burden of proof language[23] and elimination of (*c*) and (*d*). Elimination appears to be the better alternative: as non-functional surplus the (*c*) and (*d*) exceptions would have the same potential for mischief as the (*e*) through (*o*) exceptions.

30. The latent defect exception reads, "(*p*) Latent defects not discoverable by due diligence". The text appears to require that the carrier show due diligence, and thereby bear the burden of proof, for the exception to apply. However, relying on such a textual analysis seems less certain than the suggested explicit provisions on burden of proof. Thus, again the choice is between the previously suggested addition to the burden of proof language and the elimination of (*p*).

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[18] See paras. 256-265.

[19] Report of the Secretary-General, paras. 167-171.

[20] The text in its fuller setting appears at para. 34, below.

[21] Report of the Secretary-General, para. 173.

[22] See Corte di Cassazione 4 aprile 1957, in *Dir. Mar.* 1958, p. 67 (shipper has burden of proving carrier negligence under perils of the sea exception).

[23] Viz., "whether or not one or more of the provisions in article 4 (2) is applicable:".

31. *Unseaworthiness: article 4 (1).* Article 4 (1) provides that carrier will not be liable for loss or damage resulting from unseaworthiness unless there was a want of due diligence. It contains its own express burden of proof provision as follows:

> "Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article."

The burden of proof provision does not appear inconsistent with the proposed uniform burden of proof scheme. Nor does the substantive provision appear to be inconsistent with a general policy of carrier liability for fault. It is equally clear, however, that article 4 (1) would be redundant if the uniform burden of proof scheme and the general policy of liability for fault were adopted. Thus article 4 (1) poses in its purest form the question of whether a provision without apparent function should be eliminated. Its potential for harm seems slight; but its potential for usefulness appears to be negligible. Given this situation the elimination of article 4 (1) seems to be indicated.

32. *The catch-all exception: article 4 (2)* (q). Article 4 (2) (*q*) (the general, or catch-all, exception) also has its own burden of proof provision. Like article 4 (1), article 4 (2) (*q*) is consistent with the proposed uniform scheme but would be redundant if the uniform scheme is adopted. Accordingly, it seems preferable to eliminate the burden of proof provision from article 4 (2) (*q*).

III. Compilation of alternative proposed textual changes in articles 3 and 4

33. This part sets out those provisions of articles 3 and 4 of the Hague Rules that have been discussed in this working paper and shows all suggested changes. Alternative proposal A shows the suggested changes on the assumption that the specific exceptions (article 4 (2) (*c*) through (*p*)) remain in the Convention. Alternative proposal B shows the suggested changes on the assumption that those exceptions are deleted. In both alternatives, suggested deletions from the present text of the Brussels Convention are enclosed in brackets; suggested additions are in italics.

34. *Alternative proposal A.*

Article 3

(1) The carrier shall be bound before, [and] at the beginning of *and throughout* the voyage to exercise due diligence to: [24]

(*a*) Make the ship seaworthy;
(*b*) Properly man, equip and supply the ship;
(*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

(2) [Subject to the provisions of article 4,] [25] The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) *The carrier shall properly and carefully navigate nad manage the ship.*[26]

Article 4

[(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.] [27]

[2] (*l*) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

[(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;] [28]
[(b) Fire, unless caused by the actual fault or privity of the carrier;] [29]
[(c)] (*a*) Perils, dangers and accidents of the sea or other navigable waters;
[(d)] (*b*) Act of God;
[(e)] (*c*) Act of war;
[(f)] (*d*) Act of public enemies;
[(g)] (*e*) Arrest or restraint of princes, rulers or people, or seizure under legal process;
[(h)] (*f*) Quarantine restrictions;
[(i)] (*g*) Act or omission of the shipper or owner of the goods, his agent or representative;
[(j)] (*h*) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;
[(k)] (*i*) Riots and civil commotions;
[(l)] (*j*) Saving or attempting to save life or property at sea;
[(m)] (*k*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
[(n)] (*l*) Insufficiency of packing;
[(o)] (*m*) Insufficiency or inadequacy of marks;
[(p)] (*n*) Latent defects not discoverable by due diligence;
[(q)] (*o*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier [but the burden of proof shall be on the person

[24] These proposed changes are discussed at paras. 9-11, above.

[25] This proposed deletion is discussed at paras. 19-20, above.
[26] This proposed addition is discussed at para. 9, above.
[27] This proposed deletion is discussed at para. 31, above.
[28] This proposed deletion is discussed at paras. 6-7, above.
[29] This proposed deletion is discussed at para. 8, above.

claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage]; [30]

provides, however, that the occurrence of one or more of the foregoing exceptions shall not relieve carrier of responsibility for any of the loss or damage arising or resulting therefrom if carrier's fault or want of due diligence:

(i) *caused or brought about the occurrence of the exception or exceptions; or*

(ii) *concurred with the occurrence of the exception or exceptions; however, carrier shall be liable only for that portion of the loss or damage attributable to its fault provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault.*[31]

(2) *The burden of proof shall be on the shipper to show:*

(*a*) *That the claimant is the owner of the goods or is otherwise entitled to make the claim;*

(*b*) *That the loss or damage took place during the period for which the carrier is responsible;*

(*c*) *The physical extent of the loss or damage;*

(*d*) *The monetary value of the loss or damage.*

The burden of proof shall be on the carrier as to all other matters, whether or not one or more of the provisions in article 4 (2) is applicable: to avoid liability carrier must show that neither the actual fault or privity of the carrier not the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage.[32]

35. *Alternative proposal B.*

Article 3

(1) The carrier shall be bound before, [and] at the beginning of *and throughout* the voyage to exercise due diligence to: [33]

(*a*) Make the ship seaworthy;

(*b*) Properly man, equip and supply the ship;

(*c*) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and sale for their reception, carriage and preservation.

(2) [Subject to the provisions of article 4,] [34] The carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

(*3*) *The carrier shall properly and carefully navigate and manage the ship.*[35]

Article 4 [36]

[2] (*1*) Neither the carrier nor the ship shall be responsible for loss or damage [arising or resulting from:]

[(q) Any other] *from any* cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier [but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage].[37]

(*2*) *Where carrier's fault concurs with another cause to produce loss or damage, carrier shall be liable only for that portion of the loss or damage attributable to its fault, provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault.*

(3) *The burden of proof shall be on the claimant to show:*

(*a*) *That the claimant is the owner of the goods or is otherwise entitled to make the claim;*

(*b*) *That the loss or damage took place during the period for which the carrier is responsible;*

(*c*) *The physical extent of the loss or damage;*

(*d*) *The monetary value of the loss or damage.*

The burden of proof shall be on the carrier as to all other matters: to avoid liability carrier must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage.[38]

IV. Standards of liability based on conventions governing other modes of transport of goods

A. *Introduction*

36. The report of the Secretary-General describes the bases of liability and the burden of proof systems of the major conventions dealing with international carriage of cargo by rail, road and air.[39] These are the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention),[40] the International Convention Concerning the Carriage of Goods by Rail (CIM) [41] and the Convention on the Contract for the International Carriage of Goods by Road (CMR).[42] The pattern of the liability provisions of the three conventions is very similar. One section states what appears to be a rule of strict liability, seemingly holding carrier liable for all loss or damage to the goods

[30] This proposed deletion is discussed at para. 32, above.

[31] This proposed addition is discussed at paras. 12-16, above.

[32] These proposed additions are discussed at paras. 21-23, 26, above.

[33] These proposed changes are discussed at paras. 9-11, above.

[34] This proposed deletion is discussed at paras. 19-20, above.

[35] This proposed addition is discussed at para. 7, above.

[36] Article 4 (1) and 4 (2) (a) through (p) are deleted. These proposed deletions are discussed at paras. 17, 24, 27-31, above. The full text of articles 3 and 4 is found at above, para. 4 and foot-note 4.

[37] These proposed changes are discussed at para. 32, above.

[38] These proposed changes are discussed at paras. 21-23, above.

[39] Report of the Secretary-General, paras. 215-230.

[40] *Ibid.*, paras. 216-221.

[41] *Ibid.*, paras. 222-226.

[42] *Ibid.*, paras. 227-230.

during the period of carriage. A second section, however, in effect cuts down carrier liability to something like a fault or negligence standard. For example article 18 (1) of the Warsaw Convention provides:

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

And article 20 (1) cuts the broad rule down as follows:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

The language of article 20 (1) has been interpreted to require a standard of reasonable care only.[43]

B. *Substantive provisions based on other international conventions*

37. If the approach of the three conventions were followed in amending the Hague Rules article 3 (1) imposing a duty on carrier to provide a seaworthy ship and article 3 (2) requiring the carrier, *inter alia*, to carefully load, handle and discharge the goods, would both be deleted. In their place would be a new article 3 (1) such as the following:

"The carrier shall be liable for all loss or damage to the goods carried occurring while in the charge of the carrier."

38. The above provision was modelled on article 17 (1) of CMR but would not be significantly different if modelled on the counterpart provisions of either CIM or the Warsaw Convention.[44]

39. Article 4 (1) and (2) would also be deleted. They could be replaced by a provision from one of the three conventions as follows:

However, the carrier shall not be liable if:

(*a*) [Air: The Warsaw Convention] "he and his agents have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures";

(*b*) [Rail: The CIM Convention] the loss or damage resulted "through circumstances which the [carrier] . . . could not avoid and the consequences of which it was unable to prevent";

(*c*) [Road: The CMR Convention] the loss or damage resulted "through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent".[44a]

C. *Burden of proof*

40. The general rule under all three conventions is that carrier bears the burden of proof. There are certain exceptions to this general rule, described in the report of the Secretary-General,[45] which are different under each convention and presumably are based on the particular conditions of each mode of carriage. The unified burden of proof arrangement proposed in paragraph 269 of the report of the Secretary-General is like the scheme of the three conventions in placing the burden of proof on the carrier as a general rule. Paragraph 269 differs from the three conventions much as they differ among themselves—that is, in the particular exceptions to the general burden of proof rule. There does not seem to be any good reason why the particular exceptions of either air, rail or road should be followed. Probably such detail should depend on the conditions and practices of each particular mode of carriage. However, paragraph 269, in generally placing the burden on carrier, is exactly in line with the central thrust of the burden of proof provisions of all three conventions.

D. *Compilation of provisions on carrier's liability based on the other international conventions*

41. This section sets out suggested substantive provisions regarding carrier's liability based on the Warsaw Convention and the CMR and CIM Conventions. The second part of the provision includes alternative language based on (1) the Warsaw Convention and (2) the CMR and CIM Conventions. The unified burden of proof provision (in para. 4) is taken from the draft proposed in part II of this working paper. It will be noted that this draft burden of proof provision is in line with the draft proposed in paragraph 269 of the report of the Secretary-General.

42. *Alternative proposal C.*

"(3) The carrier shall be liable for all loss or damage to the goods carried occurring while in the charge of the carrier.[46]

"However, the carrier shall not be liable if . . .

"[Alternative C (1) based on the Warsaw Convention] 'he and his agents have taken all necessary measures to avoid the damages or it was impossible for him or them to take such measures'.

"[Alternative C (2) based on the CIM and CMR Conventions] 'the loss or damage resulted through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent'.[47]

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[43] *Ibid.*, paras. 217-218.

[44] It will be noted that this draft provision omits the references to delay which was found in the CMR and CIM Conventions since the effect of delay may be an item for separate consideration.

[44a] Both the CIM and CMR Conventions relieve the carrier for loss or damage arising from the "special risks inherent" in specified circumstances. See the report of the Secretary-General at paras. 222 (note 186) and 229 (note 190). Some of these specified circumstances are similar to the carriage of goods on deck, and the carriage of live animals which were considered at the third meeting of the Working Group. Any such special circumstances requiring particular treatment could be dealt with by provisions which would supplement the rules establishing the basis for liability.

[45] See report of the Secretary-General, paras. 225-226, 230.

[46] This proposed provision is discussed at paras. 36-38, above.

[47] These alternative provisions are proposed in para. 39, above.

"(4) The burden of proof shall be on the claimant to show:

"(*a*) that the claimant is the owner of the goods or is otherwise entitled to make the claim;

"(*b*) that the loss or damage took place during the period for which carrier is responsible;

"(*c*) the physical extent of the loss or damage;

"(*d*) the monetary value of the loss or damage.

"The burden of proof shall be on the carrier as to all other matters: to avoid liability carrier must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage." [48]

E. *Comparison of rules based on other transport conventions with provisions based on the Hague Rules*

43. The liability rules of the three conventions seem very similar in effect to the liability rules suggested earlier in this paper. All appear to rest, essentially, on a liability for fault system. But the approaches are different. The three conventions first state a flat rule of carrier liability for loss or damage to the goods carried during the relevant time period. Then a general exception is provided which appears in effect to reduce carrier liability to a fault standard.

44. The liability system described earlier in this paper, which we might call a modified Hague Rules system, has quite a different pattern. It states the obligations of carriers in a much more limited way than the flat initial rules of the three conventions. The modified Hague Rules system requires only that the carrier exercise "due diligence" to make the ship seaworthy, and that it "properly and carefully" care for the cargo and navigate and manage the ship. Thus article 4, in excusing carrier for damage arising without fault or neglect, can be regarded as reinforcement of the terms "due diligence" and "properly and carefully" rather than as an exception.

45. Certainly both systems are pointed in the same direction—toward a liability for fault rule—and appear to come out in approximately the same place. It is difficult to say which would require a higher standard of care on the part of the carrier, or whether there would be any difference in this respect.

46. It may be difficult to predict the interpretations that maritime courts would give the words of the three conventions. Since the draft based on the Hague Rules departs less in form from the traditional statutory language it may raise fewer doubts as to how courts will interpret the language in the setting of the carriage of goods by sea.

47. On the other hand adopting the system of one of the three conventions might facilitate the making of contracts for combined transport operations and the preparation of uniform rules applicable to such contracts. Under the existing régimes attempts at unification of the rules of liability encounter serious difficulties because of the differences in liability rules for the various modes of carriage. To the extent that the liability rules regarding carriage of goods by sea may be brought closer to the rules of other types of carriage, these problems would be alleviated.[49]

[48] This proposed provision is discussed at paras. 21-23 and 40, above.

[49] See report of the Working Group, para. 64.

3. *Working paper by the Secretariat, annex II to the report of the Working Group (A/CN.9/74): * arbitration clauses in bills of lading*

I. Introduction

1. The Working Group, at its third session, considered the question of arbitration clauses in bills of lading. There was general support within the Working Group for inclusion of a provision in the Hague Rules [1] that would deal with the place where arbitration proceedings may be held, and that would assure that the Hague Rules would always be applied in arbitration proceedings.[2]

2. The Working Group's consideration was directed at proposals set forth in the report of the Secretary-General on "responsibility of ocean carriers for cargo: bills of lading" [3] and further proposals made by members of the Working Group during the course of the session.[4]

* 12 October 1972.

[1] References to the "Hague Rules" or to "the Convention" are to the International Convention for the Unification of Certain Rules relating to Bills of Lading, 1924, League of Nations, *Treaty Series*, vol. CXX, p. 157, No. 2764, reproduced in the Register of Texts of Conventions and Other Instruments concerning International Trade Law, vol. II, chap. II, 1 (United Nations publication, Sales No. E.73.V.3).

[2] Report of the Working Group on International Legislation on Shipping on the work of its third session (hereinafter, report of the Working Group), A/CN.9/63, para. 52, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[3] Hereinafter, report of the Secretary-General, A/CN.9/63/Add.1, paras. 127 to 149, UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex.

[4] Report of the Working Group, paras. 54-56.

3. To facilitate this further consideration of the question of arbitration clauses in bills of lading this working paper will analyse and compare the various proposals presented.[4a]

4. The problems to which the draft proposals on arbitration were addressed were similar to those discussed in connexion with choice of judicial forum clauses (see in particular paras. 75 to 85 of the report of the Secretary-General). The report of the Secretary-General pointed out that choice of forum clauses in bills of lading are normally prepared by carriers in the interest of their convenience in presenting their defences to cargo owners' claims. It has been contended that the place for suit specified in the bill of lading is often so inconvenient to cargo owners as to impede full and fair presentation of their claims. The objectives which provided the bases for the draft proposals, made in connexion with choice of forum clauses, were: "(1) minimizing those inconveniences that are related to the place where the dispute will be adjudicated; (2) minimizing the opportunity to escape the protective provisions in the Convention".[5] It should be noted that the Working Group, at the third session, drafted a provision on choice of forum clauses to meet the problems raised in the report of the Secretary-General.[6]

II. Draft proposals

5. In the interest of an orderly development of the subject this working paper will take up first the draft proposals that would least limit the freedom of the party (normally the carrier) who draws up the bill of lading to choose the place where arbitration proceedings may be brought.

A. *Provision permitting arbitration clauses to be inserted in bills of lading—with minimal limitation regarding the choice of a place for arbitration*

6. The following draft was submitted at the third session of the Working Group:

[Draft proposal A]

"Notwithstanding the provisions of the preceding article [... dealing with jurisdictional matters...] arbitration clauses in a contract of carriage shall be allowed provided the designated arbitration shall take place within a contracting State and shall apply the [substantive] rules of this Convention."[7]

7. Draft proposal A would appear to have two principal elements: (*a*) the specific inclusion in the Hague Rules of the principle of the validity of arbitration clauses in bills of lading; (*b*) ensuring the application of the Hague Rules in any arbitration proceedings.

8. This draft proposal would permit any choice of a place of arbitration to be made so long as it was within a contracting State.[8] It would not appear that this provision is addressed to the question of the convenience of the parties. The extent to which this provision would restrict the place of arbitration would depend on the course of ratifications and accessions. In early years when few States have ratified the Convention the provision would often interfere with the freedom of the drafters of the bill of lading to select a particular place. At later stages, the provision would have little effect in controlling the place for arbitration.

9. It will be noted that a requirement that actions before courts can only be brought in a contracting State was included in the provision on choice of forum clauses that was approved by the Working Group. However, the inclusion of this requirement was questioned in the Working Group (report, para. 44), where it was observed that it might defeat the underlying purpose of the draft provision which is meant to give the claimant a choice of a number of jurisdictions in which to bring suit. Further, as is indicated above, it has been argued that as it can be expected that it will take some time for the new Convention to gain wide acceptance, the requirement that any arbitration proceeding must take place in a contracting State would mean that the places where arbitration could be held would be severely limited. Places that would be most convenient for the parties might thereby be excluded. In evaluating this provision it might be useful to give further attention to the connexion between the place of arbitration and the extent to which the arbitrator applies the rules of the Convention. It will be noted that other draft proposals placed before the Working Group employ a different technique to bring about application of the rules of the Convention by the arbitrator; these proposals provide that the contract must direct the arbitrator to apply the provisions of the Hague Rules.[9]

B. *Provision limiting the places where arbitration may be brought but imposing minimal restriction on the power of a body or person designated in the arbitration clause to select the place for arbitration*

10. Two draft proposals set limits to the number of alternative places where arbitration may be brought. However, they impose no restriction on the power of the person or body designated in the arbitration clause to select the place for arbitration.

[4a] It should be noted that at an appropriate stage consideration would have to be given to the relationship between the rules on arbitration and the claimant's right to arrest the ship as a provisional or protective measure to ensure payment of any amount that may be awarded to the claimant in the arbitration Consideration might be given to provisions comparable to those developed in the context of choice of judicial forum at paras. 39 (3), 47 and 48 of the report of the Working Group.

[5] Report of the Secretary-General, para. 97.

[6] Report of the Working Group, para. 39, subpara. 3.

[7] Para. 55, "Alternative I". A foot-note to this draft stated: "Cf. art. 32 of the Warsaw Convention (para. 134 of the Secretary-General's report) and draft proposal E (para. 147 of the report)."

[8] The same requirement is to be found in draft proposals B and E, below.

[9] This technique is used in subparagraph (*a*) of draft proposal B, and paragraph 2 of draft proposal E, below.

11. The first of these proposals was made by a member of the Working Group.[10] It reads as follows:

[Draft proposal B]

"Notwithstanding the provisions of the preceding article [. . . dealing with jurisdictional matters . . .] arbitration clauses in a contract of carriage shall be allowed provided it has been thereby stipulated that the arbitral body or arbitrators designated in the contract:

"(*a*) Shall apply the [substantive] rules of this Convention,

"(*b*) Shall hold the [arbitration] proceeding within a contracting State at one of the places referred to in [the said] article [. . .] or at the place chosen by such arbitral body or arbitrators." [11]

12. Draft proposal B would, in the first part of its subparagraph (*b*) permit the selection by the arbitral body or arbitrators designated in the contract[12] of any place for arbitration that is listed as permissible in the choice of forum provision.[13] This would presumably include the principal place of business of the defendant (the carrier). It would appear, however, that unlike the choice of forum provision draft that the Working Group approved, draft proposal B would not give the claimant the choice of any of the permissible places listed at the time that he institutes his proceeding.[14]

13. Draft proposal B, as is indicated in the second part of its subparagraph (*b*), gives free rein to the body or person selected in the arbitration clause to decide on the place where the arbitration proceedings will take place. An argument in favour of giving the designating person or body such freedom is that normally the designating body or person will take into account the convenience of both parties.[15] A problem of construction might arise when the contract specifies arbitration by a body that under its rules (or legislation) sits at a specified place.[16] If such a body does not have the power to select a place, taking into account the convenience of the parties, the issue might arise whether the place for arbitration has been "chosen" by such a body. In any event, it would seem that the selection of such a body in the contract would present issues of policy comparable to the designation in the contract of a place for arbitration.

14. The requirement that the arbitration proceeding must be held within a contracting State would introduce a similar problem to that discussed above in paragraph 9 in connexion with draft proposal A.

15. The second draft proposal along the lines set out in paragraph 12 above is a merger of draft proposals D and E in the report of the Secretary-General (paras. 141 and 147). The draft proposal reads as follows:

[Draft proposal C]

"1. The contract of carriage may contain a provision for arbitration only if that provision states [17] that this Convention shall be applied in the arbitration proceedings.

"2. An arbitration proceeding initiated pursuant to an arbitration clause in the contract of carriage must be held:

"[(*a*) Within the State of the domicile or permanent of residence of the plaintiff if the defendant has a place of business in that State; or] [17a]

"(*b*) Within the State of the place where the goods were delivered to the carrier; or

"(*c*) Within the State of the place designated for delivery to the consignee; or

"(*d*) At the place chosen by the body or person designated in the arbitration provisions of the contract of carriage.

"3. After a dispute has arisen the parties may enter into an agreement selecting the territory of any State as the place for arbitration."

16. As a practical matter since neither draft proposal B nor draft proposal C set any limitation on the designating body or person, it would appear that the limitations listed in the draft proposals might be circumvented by the use of a designating body or person. In this connexion one important distinction between draft proposal B and draft proposal C would appear to be that the latter does not include the carrier's principal place of business as one of the permissible places where an arbitration proceeding may be brought. However, as has been pointed out above, this restriction might be circumvented by making use of a designating body or person.

C. *Provision specifying alternative places where arbitration may be brought*

17. This draft provision consists of a merger of draft proposals C and E, set out in paragraphs 136 and 147 of the report of the Secretary-General. It will be noted that this provision would restrict the place for arbitration

[10] In the report of the Working Group (para. 55) this draft proposal was an alternative to the proposal that appears in this Working Paper as draft proposal A.

[11] Report of the Working Group, para. 55, "Alternative II".

[12] It would appear that the draft proposal assumes that the contract would always designate an arbitral body or arbitrators.

[13] See proposed draft provision on choice of forum, report of the Working Group, para. 39.

[14] It is assumed that this draft proposal would contain language excluding the following choice set out in the provision on choice of forum adopted by the Working Group: "(*e*) a place designated in the contract of carriage". In the context of draft proposal B, such a clause would further weaken the draft provision.

[15] Report of the Secretary-General, paras. 138 and 140.

[16] Report of the Secretary-General, foot-note 118.

[17] The following words might be added: "or it is otherwise provided in the contract of carriage . . .". This would permit use of the arbitration clause in the bill of lading in cases where the specific choice of the Convention is not made in the arbitration claude but is made in a clause paramount which the courts might consider to apply to arbitration or which might itself mention arbitration.

[17a] This clause is set out in brackets because of a number of problems that would arise if it were included; these problems are discussed in the report of the Secretary-General in connexion with choice of forum clauses (para. 116). It will be noted that the Working Group did not include this provision in its draft on choice of forum clauses (para. 39 (3)).

that may be selected in the contract of carriage or by a body, person or procedure specified in the contract. The draft provision reads as follows:

[Draft proposal D]

"1. The contract of carriage may contain a provision for arbitration only if that provision states [18] that this Convention shall be applied in the arbitration proceedings.

"2. An arbitration proceeding initiated pursuant to an arbitration clause in a contract of carriage must be held within one of the following States:

"[(*a*) The domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that State; or] [18a]

"(*b*) The place where the goods were delivered to the carrier; or

"(*c*) The place designated for delivery to the consignee.

"3. After a dispute has arisen the parties may enter into an agreement selecting the territory of any State as the place for arbitration."

18. The basic objective of draft proposal D, like draft proposals B and C, is to protect the cargo owner from having to bring arbitration proceedings in a place which is inconvenient for him. However, this draft proposal allows less latitude in the contract for a choice of a place for arbitration since the selection must be made from among places which have some connexion with the transaction and are likely to be convenient for the claimant. The report of the Secretary-General in paragraph 137 deals with the reasons why it is desirable that the principal place of business of the carrier not be included in the set of permissible places in paragraph 2 of draft proposal D. It directs attention to complaints made that the carrier normally specifies in standard bills of lading that all claims must be brought for adjudication to the carrier's place of business.[19]

19. The carrier's principal place of business or any other place that falls outside the permissible places in paragraph 2 of draft proposal D can, by virtue of paragraph 3, be selected by the parties after a dispute has arisen. Such an agreement would not be subject to the abuses of adhesion contracts since the claimant has the opportunity to negotiate concerning the place for arbitration.[20] By the same token, if the body or person designated in the contract wishes to have the arbitration proceedings conducted in a place other than those set out in paragraph 2 of draft proposal D, the parties to the dispute can be asked to agree to select the place desired by the designating body or person.[21] As a practical matter, even when the bill of lading provides for a place for arbitration other than places listed under paragraph 2 of draft proposal D, the claimant may decide that it is convenient for him to arbitrate in the place designated. This may particularly be the case when the claimant's insurance company has been subrogated to the claim. Under such circumstances it would seem that the parties would be able to agree on the mutually desired place, on the basis of paragraph 3 of draft proposal D.

D. *Provision specifying alternative places where, at the option of the claimant, arbitration may be brought*

20. One provision introduced in the course of the session of the Working Group reflects the view that the approach to arbitration clauses should be the same as the one adopted by the Working Group with regard to choice of forum clauses.[22] The draft proposal along these lines reads as follows:

[Draft proposal E]

"1. In legal proceedings arising out of the contract of carriage, provision may be made in the contract for arbitration proceedings in accordance with an arbitration clause. These proceedings may take place, at the option of the plaintiff, in a contracting State within whose territory is situated:

"(*a*) The principal place of business of the carrier or the carrier's branch or agency through which the contract of carriage was made; or

"(*b*) The place where the goods were taken in charge by the carrier; or

"(*c*) The place designated in the contract for delivery of the goods to the consignee; or

"(*d*) The place designated in the contract of carriage [or selected by the person or body designated in the arbitration clause].

"2. The arbitration clause shall state that the designated arbitrator must apply this Convention; otherwise, such clause shall be null and void.

"3. After a dispute has arisen, the parties may enter into an agreement selecting the territory of any contracting state as the place of arbitration [or any person or body in a contracting state]. The parties may agree that the arbitrator shall act as an *amiable compositeur*."

21. The approach taken in draft proposal E calls for a provision that permits the insertion of an arbitration clause in a bill of lading but gives the claimant the right to choose his arbitral forum.[23] Under draft proposal E (unlike the preceding draft proposals) the claimant is provided with choices as to the places for arbitration which he may exercise when the dispute arises.

22. Under a provision set out in brackets in paragraph 1 (*d*) of draft proposal E, when the person or body designated in the arbitration clause has selected a place, the claimant has the option to accept or reject that selection. Such an arrangement would mean that the

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[18] See foot-note 17, above, where the suggestion is made that the following words be added: "... or otherwise provided in the contract of carriage".

[18a] See foot-note 17a above.

[19] Report of the Secretary-General, para. 137.

[20] *Ibid.*, para. 139.

[21] *Ibid.*, para. 138.

[22] Report of the Working Group, paras. 39 and 41.

[23] Report of the Working Group, para. 54.

person or body designated in the bill of lading would have to submit their choice of a place to the claimant who could reject the place submitted. This power by the plaintiff might well complicate the process of selection of an appropriate person and place.

23. The requirement in draft proposal E that the arbitration proceedings must be held in a contracting State is found in both paragraph 1 (arbitration clause) and paragraph 3 (agreement after dispute has arisen). Discussion of this requirement and its possible drawbacks is to be found in paragraph 9 above.

E. *Some comparisons between draft proposal D and draft proposal E*

24. Draft proposal D, above, limits the choice of a specific place that a person or body designated in the bill of lading may make, but provides that such a selection is binding. Under draft proposal E the choice made by such a person or body is merely one of many among which the claimant may choose.

25. It may be argued that the flexibility that draft proposal E gives in making it possible for the claimant to choose the principal place of business of the carrier (paragraph 1 (*b*)) or the place designated in the contract (paragraph 1 (*d*)), is no greater than that of draft proposal D. Under draft proposal D if the claimant wishes to have the arbitration proceedings brought at the carrier's principal place of business he can presumably gain the carrier's agreement to this when the dispute arises. He could also presumably gain the carrier's agreement to any other place which the carrier would have chosen if he were free to do so.

F. *Provision which would confine recourse to arbitration to cases where the parties agreed to arbitration after the dispute arose*

26. A provision whose purpose is to confine recourse to arbitration to cases where the parties agreed to arbitration after the dispute arose was presented to the Working Group. It reads as follows:

[Draft proposal F]

"Notwithstanding the provision of the preceding paragraph, after the cocurrence of an event giving rise to a claim the parties may agree on a jurisdiction where legal action may be commenced or submit the case to arbitration for a final decision in accordance with the rules of this Convention." [24]

27. Draft proposal F was meant to be read in conjunction with the draft provision on choice of forum clauses. This draft proposal would bring about the invalidity of all arbitration clauses in bills of lading.[25]

[24] Report of the Working Group, para. 56.

[25] See report of the Secretary-General, para. 132, which discusses the widespread favour enjoyed by arbitration as an efficient and inexpensive process for the settlement of disputes. It should be noted that this draft proposal would also effect such clauses in charter parties when they are incorporated into bills of lading.

4. *Report of the Secretary-General, second report on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1)* *

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* 21 March 1973.