III. INTERNATIONAL LEGISLATION ON SHIPPING

1. Report of the Working Group on International Legislation on Shipping on the work of its sixth session (Geneva, 4–20 February 1974) (A/CN.9/88)*

CONTENTS

* 29 March 1974.

[1] This compilation sets forth draft provisions adopted by the Working Group at its third, fourth and fifth sessions.

GENERAL 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 (1969), and was enlarged by the Commission at its fourth session. The Working Group consists of the following 20 members of the Commission: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Zaire.[1]

2. In defining the task of the Working Group, the Commission resolved that:

[1] As enlarged by the Commission at its fourth session, the Working Group consisted of 21 members of the Commission. Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 19; UNCITRAL Yearbook, Vol. II: 1971, part one, II, A, para. 19. The term of one of these members of the Commission (Spain) expired on 31 December 1973.

"The rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the Protocol to amend that Convention (the Brussels Protocol 1968), should be examined with a view to revising and amplifying the rules as appropriate, and that a new international convention may, if appropriate, be prepared for adoption under the auspices of the United Nations."[2]

In addition, the Commission specified a number of topics that, among others, should be considered.[3] The Working Group at earlier sessions has taken action with respect to the following of these topics: (*a*) the period of carrier responsibility; (*b*) responsibility for deck cargoes and live animals; (*c*) choice of forum clauses in bills of lading;[4] (*d*) the basic rules governing the responsibility of carriers; (*e*) arbitration clauses in bills of lading;[5] (*f*) unit limitation of liability; (*g*) trans-shipment; (*h*) deviation; and (*i*) the period of limitation.[6]

3. At its fifth session[7] the Working Group decided to devote the sixth session to the following topics: (*a*) definitions under article I;[8] (*b*) elimination of invalid clauses;[8] (*c*) deck cargo and live animals; (*d*) liability of the carrier for delay; and (*e*) scope of application of the Convention.

4. The Working Group held its sixth session in Geneva from 4-20 February 1974.

5. All 20 members of the Working Group were represented at the session. The session was attended by the following members of the Commission as observers: Bulgaria and Federal Republic of Germany; and also by observers from the following international, intergovernmental and non-governmental organizations: United Nations Conference on Trade and Development (UNCTAD), International Maritime Committee (IMC), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Union of Marine Insurance (IUMI), Office Central des Transports Internationaux par Chemins de Fer (OCTI), the International Institute for the Unification of Private Law (UNIDROIT), the Inter-Governmental Maritime Consultative Organization (IMCO), the International Shipowners' Association (INSA) and the Baltic and International Maritime Conference (BIMCO).

6. The Working Group, by acclamation, elected the following officers:

Chairman	Mr. Mohsen Chafik (Egypt)
Vice-Chairmen	Mr. Nehemias Gueiros (Brazil)
	Mr. Stanislaw Suchorzewski (Poland)
Rapporteur	Mr. R. K. Dixit (India)

7. The following documents were placed before the Working Group:

1. Provisional agenda and annotations (A/CN.9/WG.III/L.1)
2. Second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1)
3. UNIDROIT study on carriage of live animals (A/CN.9/WG.III/WP.11)
4. Third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/WG.III/WP.12), Vols. I to III
5. Deck cargo: working paper by the Secretariat (A/CN.9/WG.III/WP.14)
6. Comments and suggestions on the topics to be considered at the sixth session of the Working Group (A/CN.9/WG.III/WP.12/Add.1)
7. Compilation of draft provisions approved by the Working Group: note by the Secretariat (A/CN.9/WG.III/WP.13)

8. 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 at the fifth session of the Working Group to be dealt with at the sixth session
5. Future work
6. Adoption of the report.

9. The Working Group used the report of the Secretary-General entitled "third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading" (hereinafter referred to as the third report of the Secretary-General) (A/CN.9/WG.III/WP.12) as its working document for the topics examined therein. In that report the Secretary-General examined the following topics: liability of ocean car-

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[2] *Ibid.* The Commission decided at its sixth session that the Working Group should "continue its work under the terms of reference set forth by the Commission in the resolution adopted at its [the Commission's] fourth session". Report of the United Nations Commission on International Trade Law on the work of its sixth session (2-13 April 1973), *Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 17* (A/9017), para. 61; UNCITRAL Yearbook, Vol. IV: 1973, part one, II, A.

[3] *Ibid.*

[4] Report of the Working Group on the work of its third session, Geneva, 31 January-11 February 1972 (A/CN.9/63; UNCITRAL Yearbook, Vol. III: 1972, part two, IV). The first report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/63/Add.1; UNCITRAL Yearbook, Vol. III: 1972, part two, IV, annex) was used by the Working Group as its working paper.

[5] Report of the Working Group on the work of its fourth (special) session, Geneva, 25 September-6 October 1972 (A/CN.9/74; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 1). The Working Group used as its working documents the first report of the Secretary-General (see preceding note) and two other working papers prepared by the Secretariat: "Approaches to basic policy decisions concerning allocations of risks between the cargo owner and carrier" (A/CN.9/74, annex I; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 2) and "Arbitration clauses" (A/CN.9/74, annex II; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 3).

[6] Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973 (A/CN.9/76; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5). The Working Group used as its working document the second report of the Secretary-General on responsibility of carriers for cargo: bills of lading (A/CN.9/76/Add.1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

[7] Report of the Working Group on the work of its fifth session (*ibid.*, part two, IV, 5), paras. 73-75.

[8] The items mentioned in (*a*) and (*b*) were the remaining topics of those listed in the resolution adopted by UNCITRAL at its fourth session (see note 2) above).

riers for delay (part one); geographical scope of application of the Convention (part two); documentary scope of application of the Convention (part three); invalid clauses in bills of lading (part four).[9] With respect to the consideration of definitions under article 1 the Working Group used as its working document part five of the report of the Secretary-General entitled "Second report on responsibility of ocean carriers for cargo: bills of lading" (hereinafter referred to as the second report of the Secretary-General) (A/CN.9/76/Add.1*). In addition to the aforementioned reports the Working Group used a study prepared by the International Institute for the Unification of Private Law (UNIDROIT) entitled "Study on carriage of live animals" (A/CN.9/WG.III/WP.11)** and a working paper by the Secretariat on the topic of deck cargo (A/CN.9/WG.III/WP.14).

I. Liability of ocean carriers for delay

A. *Introduction*

10. Part one of the third report of the Secretary-General dealt with the liability of ocean carriers for delay in the delivery of cargo.[10] The report noted that the Brussels Convention of 1924 contains no provision addressed to this question; that case-law on the subject was conflicting; and that in most jurisdictions the problems had not been resolved either by court decisions or by legislation.

11. The report noted (paragraph 5) that under the present Convention when cargo had been physically damaged during transit as a result of delay in delivery, the legal issue involved was not analytically different from the issue presented generally by physical damage to goods on the failure of the carrier to perform his obligation under article 3 (2)—"properly and carefully" to "load . . . carry . . . and discharge the goods carried". On the other hand, it was also noted that when the consequence of delay was not physical damage to the goods, but rather economic loss to the consignee (e.g. because of the consignee's inability to use or resell the goods or as a result of a drop in the value of the goods during the period of delay), the existing law was especially unclear.[11]

12. The report examined provisions dealing with delay in other transport conventions (paragraphs 8-12). The report then set forth five draft provisions for consideration by the Working Group: (1) Draft provision A (paragraph 13) would establish the basic principle that the Convention's rules on responsibility of the carrier were applicable not only to physical loss of or damage to cargo but also to delay in delivery. (2) Draft provision B (paragraph 17) set forth a definition of delay. (3) The report presented two alternative texts with respect to the limitation of a carrier's liability for delay. One alternative (draft provision C, at paragraph 26) would provide the same limitation on liability as that approved by the Working Group with respect to loss or damage to goods.[12] A second alternative (draft provision D, at paragraph 28) would provide a special limitation on a carrier's liability to the shipper for loss other than physical loss of or damage to the goods (e.g. for economic loss); this special limitation was to be based on the freight charges for the goods in question.[13] (4) The problem presented by an extended delay in arrival of the goods, when it was unclear whether the goods were lost, was dealt with in a proposal (draft provision E, paragraph 37) based on provisions of the Road (CMR) and Rail (CIM) Conventions.

B. *Discussion by the Working Group*

(1) *The basic rule on responsibility of the carrier for delay*

13. There was general agreement within the Working Group that a specific provision establishing the carrier's responsibility for loss or damage from delay was desirable and most representatives spoke in favour of the approach taken in draft provision A of the third report of the Secretary-General.[14] One observer opposed inclusion of such a provision in the Convention on the grounds that shipowners would thus be subjected to heavy potential liability for consequential damages from delay. Another observer stated that carrier liability for delay would be considered as a new risk for insurance purposes, but that insurance would be available to cover such risk.

14. Several representatives suggested that draft provision A be amended along the lines of article 19 of the CMR Convention.[15] Other representatives proposed that any modification of draft provision A in the third report of the Secretary-General should take into account the draft TCM Convention,[16] and the ICC Uniform Rules for a Combined Transport Document.[17] Some

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* UNCTRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

** Reproduced in this volume, part two, III, 3, *infra*.

[9] Parts one and two of the above document (A/CN.9/WG.III/WP.12, Vols. I-III) appeared in volume one; part three in volume two, and part four in volume three. The third report of the Secretary-General which was also circulated as an addendum to the present report (A/CN.9/88/Add.1) is reproduced in this Yearbook, part two; III, 2, *infra*.

[10] A/CN.9/88/Add.1, reproduced in this volume, part two, III, 2, *infra*.

[11] The report (note 12 at paragraph 5) noted that one of the problems was whether certain types of economic loss were sufficiently direct or foreseeable to provide a basis for the recovery of damages. It was further noted that such problems of economic loss to the buyer may arise when the goods are lost or are rendered unusable as a result of physical damage, and hence are not peculiar to unavailability of the goods because of delay in delivery. The report also drew attention to the connexion between this general problem and the rules setting limits on the liability of the carrier. See Compilation of draft provisions approved by the Working Group (A/CN.9/WG.III/WP.13) (herein referred to as "Compilation"), part J, on carrier responsibility. The Compilation is reproduced as an annex to this report.

[12] Compilation, part J. In this provision the monetary amounts were left blank.

[13] The report noted (foot-note 35) that the 1970 revision of the CIM Convention provided a limitation of "*twice* the amount of the carriage charges". For separate consideration by the Working Group the bracketed language in the draft provision included this approach.

[14] A/CN.9/88/Add.1, part one; reproduced in this volume, part two, III, 2, *infra*.

[15] Convention on the Contract for International Carriage of Goods by Road (1956), United Nations, *Treaty Series*, vol. 399, 189.

[16] IMCO/ECE Draft Convention on the International Combined Transport of Goods (November 1971), CTC IV/18/Rev.1, TRANS/374/Rev.1, article 11.

[17] International Chamber of Commerce, Brochure 273, November 1973, Rules 14-15.

representatives and observers, however, cautioned against the use of conventions on land transportation as models for a convention concerned with the carriage of goods by sea.

15. Several representatives stressed that the Convention should apply only after the carrier has taken charge of the goods, as the transportation does not commence until the carrier has in fact taken charge of the goods. One representative suggested that the Convention should provide specifically that the carrier was liable for extra expenses incurred by the shipper as a consequence of the carrier's delay in taking charge of the goods.

16. Some representatives favoured, in principle, the suggestion of one representative that the carrier be held liable for "economic losses resulting from delay". However, a number of representatives and observers who expressed support for use of the term "economic loss" considered that the types of economic losses from delay for which a carrier would be held responsible should be enumerated and that the measure of such damages be limited to some standard of foreseeability. Other representatives suggested that the measure of damages as a result of delay due to the fault of the carrier should be left to national legislation; for this reason they opposed any listing of the types of recoverable economic losses or the inclusion of a limitation of recoverable damages based on a test of foreseeability for damages other than physical damage to the goods. Some representatives were opposed to any use of the term "economic loss", as all loss was in a sense economic and the term had no accepted meaning in most legal systems.

(2) *Definition of delay*

17. There was general agreement within the Working Group that there should be a definition of delay. Some representatives supported draft provision B[18] in the third report of the Secretary-General, focusing on the agreed upon or normal date for delivery. Other representatives favoured a definition centred on the concept of "actual duration of the carriage" as found in article 19 of the CMR Convention.

18. One representative proposed the deletion of the phrase "date for delivery expressly agreed upon by the parties" from draft provision B, thus eliminating the option of the parties to agree on a specific date for delivery. Two representatives expressed reservations concerning the possibility that, should the above phrase be retained, the specific date for delivery agreed upon by the parties would not be reflected in the bill of lading or that the date could be based on an oral agreement between the parties.

19. Some representatives proposed that the definition of delay should include a specific provision to cover cases of partial loads but several other representatives expressed their opposition to this proposal.

(3) *Application of limitation of liability rules in case of delay*

20. About half of the representatives in the Working Group expressed their support in principle for the establishment of a single limitation on carrier liability, regardless of whether the damages were in the form of physical loss of or damage to the goods or some other type of loss or damage (e.g. due to delay suffered by the owner of the goods), and regardless of whether the carrier's fault giving rise to the damages had taken the form of delay or of some other violation by the carrier of his obligations under the Convention. While suggesting some drafting modifications, these representatives favoured therefore the approach contained in draft provision C.[19]

21. A majority—although narrow—of the representatives and some observers expressed their preference for a dual system of liability, establishing a per package or per weight limitation of carrier liability for physical loss of or damage to the goods and a separate limitation of carrier's liability based on freight charges for delay, along the lines suggested in draft proposal D.[20] A majority of the representatives who favoured a special limitation for delay based on freight indicated that they proposed to have the per package or per weight limitation apply in cases of physical loss of or damage to the goods due to delay, and that the freight limitation would apply only to cases of damages from delay in delivery other than physical loss or damage to the goods.

22. One representative, supported by some others, proposed the following wording for the special limitation applicable to cases of delay: "In the case of delay, if the claimant to the goods proves that damage (*préjudice*) has resulted therefrom, the carrier shall pay compensation for such damage not exceeding [double] the freight charges." The representative stated that his proposal used as its model article 23 of the CMR Convention.

23. Some representatives expressed the view that the Working Group should adopt alternative texts, one based on the single limitation approach and the other on the dual system of limitation providing for a special limitation for cases of delay. In this connexion it was argued that governments were not yet in a position to choose between these two approaches, since their final preference may well depend on the level of actual liability established by an agreement as to the sum of the per package or per weight limitation. One representative suggested that the special limitation of liability for delay should also have alternative texts: one alternative incorporating the freight limitation and the other one based on a per package or per weight limitation.

(4) *Delay in delivery: loss of goods*

24. All representatives who spoke on the subject endorsed the principle contained in paragraph 1 of draft proposal E[21] of the third report of the Secretary-General, to the effect that after a specified period of delay in delivery the person entitled to the goods may treat them as lost and make a claim against the carrier on that basis. However, differing views were expressed as to whether the carrier should have the right to prove that the goods were not in fact lost.

[18] A/CN.9/88/Add.1, part one, para. 17, reproduced in this volume, part two, III, 2, *infra*.

[19] A/CN.9/88/Add.1, part one, para. 26; reproduced in this volume, part two, III, 2, *infra*.

[20] *Ibid.*, para. 28.

[21] A/CN.9/88/Add.1, part one, para. 37; reproduced in this volume, part two, III, 2, *infra*.

25. A majority of the representatives stated that the rules in paragraphs 2-4 of draft proposal E, regulating in detail the rights of the claimant and the carrier should the goods be recovered subsequently, were unnecessary as the matter could be left to commercial practice. However some representatives held the view that the above provisions were useful and should be retained because there could be cases when the consignee wanted to have the goods in spite of delay, due to their particular usefulness to him. It was also necessary to protect the consignee's interest in cases when the value of recovered goods was far in excess of the maximum carrier liability. Otherwise the carrier in this latter case would have a quick windfall profit.

C. Report of the Drafting Party

26. The Working Group, after a discussion of alternative approaches to deal with the subject, decided to constitute a Drafting Party to prepare texts on the subject as well as on the other topics that were to be considered during the sixth session.[22] The report of the Drafting Party on the inclusion of provisions on carrier liability for delay in delivery, with some amendments to the text of the proposed draft provisions made by the Working Group,[23] is as follows:

PART I OF THE REPORT OF THE DRAFTING PARTY: INCLUSION OF PROVISIONS ON CARRIER LIABILITY FOR DELAY IN DELIVERY

(*a*) The Drafting Party formulated draft texts to reflect the views expressed in the discussion of the Working Group on the inclusion of provisions imposing carrier liability for delay in delivery. It was agreed by the Drafting Party that these draft texts would necessarily replace certain provisions previously agreed upon by the Working Group as indicated below. The Drafting Party recommended the following provisions:

BASIC RULES GOVERNING THE RESPONSIBILITY OF THE CARRIER

To replace paragraph 1, part D of the compilation of draft provisions approved by the Working Group reading as follows:

"1 (*a*) The carrier shall be liable for loss, damage or expense resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article ( ),[24] 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.

"1 (*b*) Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon in writing or, in the absence of such agreement, within the time which, having regard to the circumstances of the case, would be reasonable to require of a diligent carrier."

LIMITATION OF LIABILITY

To replace article A, paragraph 1, in part J of the compilation reading:

Alternative A: Single method for limitation of liability:

1. The liability of the carrier according to the provisions of article [ ][25] shall be limited to an amount equivalent to ( ) francs per package or other shipping unit or ( ) francs per kilo of gross weight of the goods lost, damaged or delayed, whichever is the higher.

Alternative B: dual method for the limitation of liability:

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

1 (*b*) In case of delay in delivery, if the claimant proves loss, damage or expense other than as referred to in subparagraph (*a*) above, the liability of the carrier shall not exceed

variation x: [*double*] the freight.

variation y:[26] an amount equivalent to (X-Y) francs per package or other shipping unit or (X-Y) francs per kilo of gross weight of the goods delayed, whichever is the higher.

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

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

[23] The amendments made by the Working Group are the following: (*a*) the definition of delay in delivery will be subparagraph 1 (*b*) rather than a separate paragraph 4 of the basic rules on the responsibility of the carrier (part D of the compilation); (*b*) subparagraph 1 (*a*) of alternative B shall commence with the words "the liability of the carrier for loss, damage or expense resulting from . . ." ("loss, damage or expense" to be translated into French as "*préjudice*" and into Spanish as "*los perjuicios*"), instead of the words "the liability of the carrier according to the provisions of article [ ] for . . ."; (*c*) in subparagraph 1 (*c*) of alternative B the word "paragraph" will replace the word "article" preceding the expression "for total loss of the goods"; (*d*) in the revised formulation of article B, paragraph 1 of part J of the compilation, the phrase "covered by the contract of carriage" should replace the phrase "covered by a contract of carriage"; (*e*) and in the draft provision on delay in delivery—loss of goods, the bracketed language "unless the carrier proves the contrary" following the expression "may treat the goods as lost", shall be deleted.

During the consideration by the Working Group of this report of the Drafting Party, notes (*f*) and (*g*) were added, at the request of the Chairman of the Drafting Party, to the notes on the proposed draft provisions.

[24] The reference is to the provision on the period of carrier responsibility found in subparagraph (ii), art B of the compilation.

[25] The reference is to the revised basic rules governing the responsibility of the carrier, above, which includes liability for delay.

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

To replace article B, paragraph 1 of part J of the compilation reading:

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

DELAY IN DELIVERY: LOSS OF GOODS

The person entitled to make a claim for the loss of goods may treat the goods as lost when they have not been delivered as required by article ( )[27] within [sixty] days following the expiry of the time for delivery according to paragraph ( ) of article ( ).[28]

Notes on the proposed draft provisions

The attention of the Working Group is drawn to the following matters:

(*b*) Among the representatives favouring the dual method of limiting liability a majority supported alternative B, variation *x*, while some support was expressed for variation *y* as a possible alternative.

(*c*) With respect to the provision on limitation of liability, the views of the members of the Drafting Party were divided regarding paragraph 1 (*c*) establishing the non-cumulative effect of the separate limitations incorporated in the dual method.

(*d*) Some representatives favoured the inclusion of a special rule on foreseeability applicable to cases of delay in delivery. The language proposed is as follows:

> "The carrier shall, however, not be liable to pay compensations for loss, damage or expense, other than loss of or damage to the goods, resulting from delay in delivery when such loss, damage or expense could not have been reasonably foreseen by the carrier at the time of entering into the contract of carriage as a probable consequence of the delay."

(*e*) One representative expressed reservations about identifying delay only as "delay in delivery".

(*f*) The phrase "loss, damage or expense" should be translated into French as "*préjudice*" and into Spanish as "*los perjuicios*".[29]

(*g*) Adoption of the above draft texts may require the Working Group, at some future date, to review the texts of some provisions it had approved previously in order to ensure uniformity of terminology in the revised Convention.

[27] The reference is to the provision on the period of carrier responsibility, in subparagraph (ii), part B of the compilation.

[28] The reference is to the definition of delay adopted by the Drafting Party as subparagraph 1 (*b*) of the basic rules governing the responsibility of the carrier.

[29] Some representatives stated that by adopting, in the context of article D, para. I (*a*) of the compilation, the terms "loss, damage or expense resulting from loss or damage to the goods", the Working Group explicitly enlarged the scope of application of the Convention to damages other than the loss of the commercial value of the goods. The extent of liability for such other damages will be determined in accordance with the principles concerning causality which are in effect in each Contracting State.

D. *Consideration of Part I of the Report of the Drafting Party*

27. The Working Group considered the above part of the report of the Drafting Party.[30] The report of the Drafting Party, including the proposed draft provisions, was approved by the Working Group.

28. The following comments and reservations were made with respect to the draft provision on delay in delivery—loss of goods:

(*a*) Some representatives favoured retention of the bracketed language "unless the carrier proves the contrary" following the expression "may treat the goods as lost", in order to permit a carrier to establish that goods were not in fact lost but only delayed, and thereby overcome the presumption of their loss.

(*b*) Some representatives expressed support for the adoption of specific provisions dealing with the subsequent recovery of goods that had been treated as lost by the person entitled to make a claim for the loss of the goods pursuant to the basic operative provision on delay in delivery—loss of goods. These representatives proposed that the basic provision proposed by the Drafting Party be supplemented by three further paragraphs, modelled after the CIM Convention,[31] CMR Convention,[32] or draft proposal E in part one of the third report of the Secretary-General.[33] One representative reserved his position concerning the addition of such supplementary provisions.

II. DOCUMENTARY SCOPE OF APPLICATION OF THE CONVENTION

A. *Introduction*

29. The Working Group discussed separately two aspects of the scope of application of the Convention: (1) "documentary" scope of the Convention—the effect of the use (or non-use) of certain documents evidencing the contract of carriage; and (2) "geographic" scope—the effect of the place of origin and of destination of the carriage of goods by sea.

30. The question of "documentary" scope was considered in part three of the third report of the Secretary-General.[34] The responsibilities and liabilities established under the 1924 Brussels Convention are applicable when there is a "contract of carriage" as defined in article 1 (*b*). Article 1 (*b*) provides:

> "(*b*) Contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea; it also applies to any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such instrument regulates the relations between a carrier and a holder of the same."

[30] See foot-note 23 above.

[31] A/CN.9/88/Add.1, part one, para. 36, reproduced in this volume, part two, III, 2, *infra*.

[32] *Ibid.*, para. 35.

[33] *Ibid.* para. 37.

[34] The question of "geographic" scope is considered in part III of the present report, and in A/CN.9/88/Add.1 part two, reproduced in this volume, part two, III, 2, *infra*.

31. The report drew attention to problems that had arisen, particularly under modern shipping practices, with respect to the words contained in article 1 (*b*): "covered by a *bill of lading* or similar *document of title*".

32. It was noted that at the time of the drafting of the Convention in the early 1920s, the terms "bill of lading" and "document of title" clearly identified the standard contracts of carriage of that period. When goods were loaded the carrier would issue a document entitled "bill of lading". This "bill of lading" clearly was a "document of title" in that, *inter alia*, the carrier was only obliged to surrender the goods in exchange for the document—a feature that gave the possessor of the document control over the goods.[35]

33. The report noted that in many regions documents labelled "bills of lading" clearly met the above criteria, but in other regions two distinct types of "bills of lading" were used. One type called for the delivery of the goods to "the *order* of" the consignee; this "order" or "negotiable" bill of lading was clearly a "document of title" and fell within the above definition in article 1 (*b*). A second type, a "non-negotiable" (or "straight") "bill of lading", permitted delivery to a named consignee without surrender of the document. It was reported that in some jurisdictions this document, when labelled a "bill of lading" and under local law having some (but not all) of the indicia of a "document of title", would bring the carriage within the scope of the Convention; however, in many other jurisdictions the applicability of the Convention to carriage of goods under such documents was subject to question.[36]

34. It was also reported that mercantile and shipping practices which had developed since the preparation of the Convention had led to the use of documents permitting greater flexibility and efficiency. Shipping arrangements might be made under documents bearing various names, such as "consignment note" or "shipping receipt", and, sometimes, these arrangements might be recorded and reproduced by computer and by other electronic devices. There was serious doubt as to whether such carriage fell within the definition set forth in article 1 (*b*) of the Convention.[37]

35. The report raised the question whether the areas of protection given to the shipper under the Convention should shrink with the increased use of such new types of documentation,[38] or whether it should be enlarged. Attention was drawn to the provisions dealing with this question in other transport conventions.[39] In the light of these considerations, the report set forth a draft proposal whereby "contract of carriage" would be defined to apply to "all contracts for the carriage of goods by sea". It was noted that, under such an approach, the label of the document evidencing the contract of carriage, or the non-existence of such a document, would not affect the applicability of the Convention.[40]

36. The report pointed out that if such a broad basic rule concerning the applicability of the Convention were adopted, certain exceptions should also be considered. Draft provisions were set forth preserving the present exception for charter parties. Attention was also directed to the possibility of further exceptions for specific types of carriage where the applicability of the Convention would be inappropriate.[41]

B. *Discussion by the Working Group*

(1) *General rule on scope of application*

37. It was generally agreed by the Working Group that the scope of application of the Convention should be broadened so that its mandatory rules would be made more widely applicable. Most representatives were of the view that the Convention should state as the general rule that it was applicable to all contracts of carriage of goods by sea subject to the rules on geographic scope.[42]

38. Some representatives favoured extending the coverage of the Convention beyond the contract of carriage so that the Convention would cover all types of maritime transport, all forms of obligation (contract, tort, bailment), all documents, and situations where shipments are processed by computers. On the other hand, some other representatives were of the opinion that the Convention should apply only to contracts of carriage evidenced by a document and that the basic document should be the "bill of lading" since parties to contracts of maritime carriage were familiar with this document.

39. Some representatives, who favoured the application of the Convention to all contracts of carriage, indicated that every shipper should continue to have the right to demand a bill of lading and that the Convention should contain uniform rules governing the contents of bills of lading. In addition, it was suggested that it would be desirable to have rules specifying the type of information to be contained in other documents evidencing carriage such as consignment notes and delivery orders.

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[35] Such control over the goods facilitates arrangements for the exchange of goods for the price—often through banking intermediaries whereby documents are presented in response to the terms of a letter of credit. In addition national law usually gave the purchaser of such a "bill of lading" strong legal protection against claims by earlier possessors of the document and (in many jurisdictions) of the goods. This protection was commonly associated with the concept that the document was "negotiable" and "represented" the goods.

[36] A/CN.9/88/Add.1, part three, paras. 8-9; reproduced in this volume, part two, III, 2, *infra*.

[37] The report also considered the effect of the failure of the carrier to issue a document in circumstances where such issuance would be expected or usual. (*Ibid.*, paras. 14-18.)

[38] It was noted that the protection given the shipper in the event of loss of or damage to the goods, or delay in delivery, was a distinct issue from the rules defining the rights as between successive holders of bills of lading and other documents evidencing the carriage.

[39] A/CN.9/88/Add.1, paras. 25-27; reproduced in this volume, part two, III, 2, *infra*. referring to provisions in the Rail (CIM), Road (CMR), and Air (Warsaw) Conventions.

[40] The report noted that other provisions of the Convention, with respect to the obligation of the carrier to issue documents containing specified provisions, and the rights of third persons under documents, presented issues that were distinct from the basic rule as to the applicability of the Convention. (*Ibid.*, para. 38.)

[41] *Ibid.*, paras. 23-24, 31, 36-37.

[42] See para. 65, below, for the draft articles adopted by the Working Group as to the geographic scope of the Convention.

(2) *Exceptions to application of the Convention*

40. It was suggested that the article on the scope of application of the Convention should contain a provision to the effect that, in cases where a bill of lading or similar document of title was not issued, the parties to a contract of carriage might agree, by means of a note endorsed on the document evidencing the contract of carriage and signed by the shipper, that the contract would not be subject to the rules of the Convention. These representatives observed that, under the circumstances set forth above, the contract between the parties would not be a contract of adhesion since the shipper would have specifically agreed to the non-application of the Convention.

41. A majority of the representatives were opposed to including such a provision permitting the shipper to sign away the protection of the Convention, even in cases where the document evidencing the contract of carriage was not a bill of lading. It was indicated that standard form documents might well be developed by carriers, excluding application of the Convention, which shippers would be expected to sign as a matter of routine. These would then be new types of adhesion contracts.

42. Some representatives, while agreeing with the majority, nevertheless were of the view that under special circumstances the parties to a contract of carriage should be permitted to agree specifically to the non-applicability of the Convention.

43. The Working Group generally favoured the exclusion of charter-parties from the scope of application of the Convention. In this connexion it was pointed out by one representative that, according to the legislation of his country, charter-parties were not considered to be contracts of carriage, and hence there was no need to exclude specifically charter-parties. This view was not shared by other representatives.

44. It was agreed that the Convention would not be applicable to a charter-party between the charterer and the shipowner, but that it would be applicable to the contractual relationship between the carrier and a cargo owner who was not the charterer.

45. Many representatives opposed the incorporation of a definition of "charter-party" into the Convention. It was observed that it would be difficult to find a definition of "charter-party" that would avoid substantial difficulties of interpretation. In this connexion, it was pointed out by one representative that there had been very little litigation over the distinction between charter-parties and contracts of carriage. Some representatives who favoured the inclusion of a definition of "charter-party" supported such inclusion on the ground that it would be desirable to distinguish clearly between charter-parties and contracts for the carriage of goods governed by the Convention.

46. The exclusion of quantum contracts from the application of the rules of the Convention was also discussed. Such exclusion was supported by some representatives.

47. The Working Group decided to delete article 6 of the Brussels Convention of 1924. It was generally considered that article 6 was vague and that practice had shown that parties to contracts of carriage had not made use of the provisions of this article.

C. *Report of the Drafting Party*

48. Following the discussion by the Working Group, this subject was referred to the Drafting Party. The Drafting Party agreed on a draft provision on the documentary scope of application of the Convention to replace article 1 (*b*) and article 5, paragraph 2, (first sentence) of the Brussels Convention of 1924 and made a number of other recommendations and observations which were included in its report to the Working Group. This report, including the draft provision to which minor amendments were made by the Working Group,[43] reads as follows:

PART II OF THE REPORT OF THE DRAFTING PARTY: DOCUMENTARY SCOPE OF APPLICATION OF THE CONVENTION

The Drafting Party was requested by the Working Group to draft provisions on the scope of application of the Convention, taking into account the views on the various aspects of the subject expressed by representatives.

(*a*) The Drafting Party recommends the following draft provisions:

1. The provisions of this Convention shall be applicable to all contracts for the carriage of goods by sea.

[2. Where a bill of lading or similar document of title is not issued, the parties may expressly agree that the Convention shall not apply, provided that a document evidencing the contract is issued and a statement of the stipulation is endorsed on such document and signed by the shipper.]

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

[4. For the purpose of this article, contracts for the carriage of a certain quantity of goods over a certain period of time shall be deemed to be charter parties.]

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[43] The amendments to the draft provision made by the Working Group are the following: (*a*) in paragraph 2, "agree" was replaced by "stipulate" and "agreement" was replaced by "stipulation"; (*b*) in paragraph 3 "contained herein" was replaced by the words "of the Convention"; (*c*) in paragraph 4 the expression "carriage of a quantity of goods" was replaced by "carriage of a certain quantity of goods".

The Working Group deleted the recommendation of the Drafting Party (which had been part (*b*) (ii) of the report of the Drafting Party) that "the term 'charter party' should be translated into French as *'contrat d'affrètement constaté par une charte-partie'* "; however, the Working Group added the following item to the notes on the proposed draft provisions: "Paragraph 3 of the draft provisions—It was noted by the representative of France that 'charter party' was translated into French as *'contrat d'affrètement'* ". It was also noted by the representatives of Argentina and Chile that "charter party" was translated into Spanish as *"contrato de fletamento"*. The Working Group decided to follow these suggestions.

At the request of the Chairman of the Drafting Party the following recommendation was added as part (*b*) (iii) of the report of the Drafting Party: "The Drafting Party recommended that article 6 of the Brussels Convention of 1924 be deleted."

(*b*) The Drafting Party also recommends that:

(i) The Convention should not contain any definition of the terms "charter party" and "*contrat d'affrètement*".

(ii) A provisional definition of bill of lading be adopted for the purpose of the deliberations of the Working Group. The definition reads as follows:

"Bill of lading means a bill of lading or any similar document of title".

(iii) The Drafting Party recommended that article 6 of the Brussels Convention of 1924 should be deleted.

Notes on the proposed draft provisions

(*c*) The attention of the Working Group is drawn to the following: *Paragraph 1 of the draft provisions*

1. One representative was of the opinion that the scope of application should be related to "the carriage of goods" rather than to "contracts of carriage". This representative suggested that subparagraph 1 should read as follows:

"The provisions of this Convention shall apply to the carriage of goods between ports in two different States."

2. It was suggested by one member of the Drafting Party that the following phrase should be added to paragraph 1: "*whether evidenced by a bill of lading or any other document covering such carriage*" in order to cope with modern or future practices involving new and various forms of contract of carriage documentation and at the same time to indicate clearly that some document is still required to evidence such contracts. This view was supported by another representative.

Paragraph 2 of the draft provision

1. Opinion as to whether this paragraph should be included was divided in the Drafting Party and it was agreed that the paragraph should appear in square brackets in the report of the Drafting Party.

2. Two representatives, although in favour of the principle laid down in this paragraph, held the view that such an exception from applicability of the Convention should be made available only in special circumstances.

Paragraph 3 of the draft provision

It was noted by the representative of France that "charter-party" was translated into French as *contrat d'affrètement*". It was also noted by the representatives of Argentina and Chile that "charter-party" was translated into Spanish as "*contrato de fletamento*".[44]

Paragraph 4 of the draft provision

At the request of four representatives who were opposed to this provision it was agreed to place this subparagraph in square brackets.

[44] The Working Group decided to follow these suggestions.

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

49. With minor amendments,[45] the Working Group approved the above part of the report of the Drafting Party, including the draft provisions.

III. Geographic scope of application of the Convention

A. *Introduction*

50. Article 10 of the Brussels Convention of 1924 provides:

"This Convention shall apply to all bills of lading issued in any of the contracting States."

51. Part two of the third report of the Secretary-General noted (at paragraphs 4-5) that this provision had given rise to criticism, *inter alia*, on the following grounds: (1) Under a literal reading, the Convention could be applicable when the carriage had no international element; i.e., coast-wise carriage within the same State involving a ship and nationals of that State; (2) The place of issuance of the bill of lading, as the sole criterion for applicability did not bear an adequate relationship to the performance of the contract of carriage.

52. The difficulties presented by article 10 of the 1924 Brussels Convention led to the revision of that article by article 5 of the Brussels Protocol of 1968. Article 5 of the 1968 Protocol reads as follows:

"The provisions of this Convention shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

"(*a*) The bill of lading is issued in a contracting State, or

"(*b*) The carriage is from a port in a contracting State, or

"(*c*) The Contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

"Each Contracting State shall apply the provisions of this Convention to the Bills of Lading mentioned above.

"This article shall not prevent a Contracting State from applying the rules of this Convention to bills of lading not included in the preceding paragraphs."

53. The report noted that the above provision had been based on draft provisions developed at two conferences of the International Maritime Committee (CMI)—the XXIVth Conference held at Rijeka and the XXVIth Conference held at Stockholm. The Rijeka/Stockholm draft differed from that embodied in the above provisions of the Brussels Protocol in one important respect: namely, under the Rijeka/Stockholm draft, the Convention would also be applicable when "the port of discharge ... is situated in a contracting State".[46]

[45] See foot-note 43 above.

[46] The report noted (A/CN.9/88/Add.1, para. 24, reproduced in this volume, part two, III, 2, below) that the final paragraph of revised article 5 in the 1968 Protocol reflected a compromise in response to the proposals to include the port of discharge as a basis for applicability.

54. The above proposal contained in the Rijeka/Stockholm draft was discussed at the Diplomatic Conference that drafted the Brussels Protocol of 1968. The report summarized the main points developed in the course of the discussion,[47] and drew attention to certain practical considerations bearing on the interest of the consignee in the applicability of the Convention. These included the fact that the existence of damage to the goods, and the scope of any such damage can usually be determined only when the goods are unloaded at the port of discharge; as a consequence, claims and litigation over the contract of carriage are usually more closely related to the port of discharge than to the port of loading.[48]

55. In the light of these considerations the report set forth alternative draft proposals for consideration by the Working Group. Draft proposal A was patterned on Brussels Protocol of 1968.[49] Draft proposal B was also based on the Brussels Protocol, but included a provision whereby the Convention would also be applicable when the port of discharge was located in a Contracting State.

B. *Discussion by the Working Group*

56. It was generally agreed that article 10 of the 1924 Brussels Convention was not satisfactory in that it was ambiguous and did not provide a sufficiently broad scope of geographic application.

57. Further, it was generally agreed that article 5 of the 1968 Brussels Protocol (on which draft proposal A was based) was an improvement on article 10 of the 1924 Convention. However, most representatives considered neither article 5 of the Protocol, nor draft proposal A to be fully satisfactory. These representatives favoured draft proposal B which, in addition to what was set forth in draft proposal A, provided for the application of the Convention when the port of discharge was situated in a Contracting State.

58. Representatives favouring draft proposal B emphasized the need for protection of the consignee, who was often the claimant in case of loss of or damage to the goods; consequently, the State in which the port of discharge was situated had a distinct interest in the matter, and the Convention should apply if the State in question was a party to the Convention even if the port of loading was situated in a non-contracting State. It was also noted that the Working Group had already adopted provisions on choice of forum and arbitration clauses, which gave the option to the plaintiff to bring an action in the contracting State where the port of discharge was situated; to assure implementation of these provisions, the Convention must be in force at the port of discharge. It was also observed in support of draft proposal B that one of the main objectives of the Convention was to achieve harmonization and unification of maritime law, and that this objective was best served by as wide a scope of application as possible.

59. One representative stated that several Parties to the 1924 Convention, in their national legislation to implement the Convention, had narrowed the scope of the Convention; the legislation of one such State provided for application of the provisions set forth in the Convention only when a bill of lading was issued in that State and not when issued in *any* contracting State as provided for in article 10 of the Convention. Attention was drawn to paragraph 3 of draft proposal A, which provided: "3. Each contracting State shall apply the provisions of the Convention to the contract of carriage". This representative, supported by others, favoured the inclusion of paragraph 3 in draft proposal B. In support of this view attention was also drawn to the fact that under the constitutions of some States the ratification of a convention does not give the provisions of the convention the force of private law, and that such effect results only from the enactment of national legislation.

60. Some representatives, while favouring the approach of draft proposal B, suggested that the place of issuance of the bill of lading or of other documents evidencing the contract of carriage should not be an independent criterion for the application of the Convention as that would lead to an unnecessarily wide scope of application. However, some other representatives were in favour of such a provision while suggesting that reference should be made not to the bill of lading but to the document evidencing the contract of carriage since, pursuant to draft provisions already adopted by the Working Group, application of the Convention was no longer dependent on the existence of a bill of lading or similar document of title.

61. Some representatives indicated that the term "port of discharge" was ambiguous in that it was not clear whether it referred to an *agreed* port of discharge, or to an *actual* port of discharge other than one agreed upon, or possibly to both. In this context, one representative thought it would be desirable to provide that an optional port of discharge should be regarded as a factor for determining the applicability of the Convention. The same representative suggested that, consistent with the intention of draft proposal B to broaden the scope of application, consideration could be given to making the Convention applicable regardless of the location of the port of loading or the port of discharge.

62. Two representatives who favoured draft proposal A emphasized that draft proposal B was unacceptable to them and stated that they would have to reserve their position should the Working Group adopt a provision including a port of discharge situated in a Contracting State as a criterion for the application of the Convention. These representatives drew attention to the reasons mentioned in paragraph 31 of the Secretary-General's report in support of their position. They also stressed certain additional considerations. Thus, it was observed that under article 5 of draft proposal A, States could apply the rules of the Convention to cases not expressly covered by that article. It was noted that the approach of draft proposal A had been the outcome of a difficult compromise achieved in 1967-1968. It was also observed that draft proposal B would increase the difficulties of resolving conflicts of laws, especially with respect to countries which were parties to the 1924 Convention but which would not be parties to the new Convention during a transitional period.

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[47] *Ibid.*, paras. 31-32.

[48] *Ibid.*, paras. 33-34.

[49] *Ibid.*, para. 21. Article 5 of the Brussels Protocol was quoted at paragraph 52 above. Draft proposal A suggested certain drafting changes to take account of language and approach reflected in earlier decisions of the Working Group.

63. In addition, one of the representatives favouring draft proposal A stated that if the Working Group adopted a formula along the lines of draft proposal B, it would be essential to add a provision, similar to one contained in the 1955 Hague Protocol to the Warsaw Convention, to the effect that the Convention was applicable to carriage of goods between ports in two different States provided that both the port of loading and the port of discharge were situated in Contracting States.

64. One representative, although recognizing merits in draft proposal B, observed that the practical result of that proposal would not be very much different from that of draft proposal A. The Working Group should consider whether it was desirable to have a provision on scope of application that might prevent a number of States from acceding to the Convention. In that event the attempt to establish a wide scope of application would fail to achieve its objectives; conversely, a narrower provision on geographic scope of application would not be significant if the Convention obtained general adherence.

C. *Report of the Drafting Party*

65. Following discussion by the Working Group this subject was referred to the Drafting Party. The report of the Drafting Party, with some amendments made by the Working Group is as follows:[50]

PART III OF THE REPORT OF THE DRAFTING PARTY: GEOGRAPHIC SCOPE OF APPLICATION

(*a*) The Drafting Party considered the revision of the provision regarding the geographic scope of application of the Convention, based on the views expressed by the members of the Working Group. The Drafting Party recommends the following provision:

1. The provisions of this Convention shall, subject to article [ ],[51] be applicable to every contract for carriage of goods by sea between ports in two different States, if:

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

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

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

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

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

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

[3. Each Contracting State shall apply the provisions of this Convention to the contracts of carriage mentioned above.]

4. This article shall not prevent a contracting State from applying the rules of this Convention to domestic carriage.

Notes on the proposed draft provisions

(*b*) Some representatives suggested that the terms "port of departure" and "port of destination" should be used instead of the terms "port of loading" and "port of discharge" respectively, in paragraph 1, subparagraph (*a*), (*b*) and (*c*). The Drafting Party noted that the terms "port of loading" and "port of discharge" had been used in other draft texts adopted by the Working Group, and recommended that these terms should be retained, subject to a subsequent decision on the terminology to be used in the Convention.

(*c*) In opposing paragraph 1, subparagraphs (*b*) and (*c*), two representatives favoured a provision based on article 5 of the Brussels Protocol. They felt that as a matter of policy it was incorrect for parties to a Convention to purport to control the terms on which goods were shipped to their countries, regardless of the applicable law in the port of loading. It was also feared that the adoption of the draft proposal would lead to a conflict with the existing Hague Rules during any transitional period.

(*d*) One representative, commenting on paragraph 1, subparagraph (*b*), observed that it made it unnecessary to include an express provision (paragraph 1, subparagraph (*c*)) dealing with optional ports of discharge.

(*e*) With respect to paragraph 1, subparagraphs (*a*) to (*c*), one representative was of the opinion that as additional criteria for the application of the Convention the actual port of loading and the actual port of discharge should be added, since one of these ports may well not have been mentioned in the contract of carriage.

(*f*) Some representatives referring to the concept of "contracts for carriage of goods" used in paragraph 1 of the draft article on the documentary scope of the Convention, expressed the opinion that paragraph 1, subparagraph (*d*) was not necessary in view of the adoption of subparagraphs (*a*) to (*c*) and (*e*), but they were nevertheless prepared to

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[50] The amendments made by the Working Group are the following: (1) the foot-note below (numbered 51) is added to paragraph 1; (2) subparagraphs 1 (*d*) and (*e*) commence with the words "the bill of lading or other document evidencing ...", instead of with the words "the document evidencing ..."; (3) paragraph 3 is put between square brackets; (4) paragraph 4 is added; (5) the words "..., as one of these ports may well not have been mentioned in the contract of carriage", were added under (*d*) to the notes on the proposed draft provisions; (6) note (*h*) commences with the words "Some representatives ...", instead of the words "One representative ..."; (7) note (*i*) is added to the notes on the proposed draft provisions.

It was also noted that the draft provisions set forth in this part of the report of the Drafting Party were intended to replace article 10 of the 1924 Brussels Convention and article 5 of the 1968 Protocol.

[51] The reference is to the draft provision on the documentary scope of application of the Convention, found in part II of the report of the Drafting Party, at paragraph 48 above.

accept it in order to meet the wishes of other representatives. One representative held the view that the text of paragraph 1, subparagraph (*d*) should read: "the contract of carriage is concluded in a contracting State." According to that representative it was necessary to adopt such a formulation to take account of paragraph 1 of the draft article previously adopted with respect to the documentary scope of application of the Convention, and of the fact that paragraph 2 of that draft article had been placed in square brackets: a certain number of representatives had thus accepted that the Convention should apply to all contracts of carriage irrespective of whether a document had been issued. Therefore, that representative suggested that a draft of this article should be adopted, which would be in harmony with the text of paragraph 1 of the draft article on the documentary scope of application of the Convention.

(*g*) With respect to paragraph 1, subparagraph (*e*), two representatives held the view that the words "or the legislation of any State giving effect to them" should be deleted.

(*h*) Some representatives suggested that the provisions of paragraph 3 might need further consideration at a later stage, from the point of view of its stating the truism that international treaties must be complied with, and from the point of view of its incidental effect on the law of international treaties; in the latter respect it should not be taken as a precedent implying that in the absence of such a specific provision in the text of a Convention the parties thereto may avoid applying the Convention in cases where it shall be applicable.

(*i*) One representative suggested that the provisions on geographic scope should read as follows:

"1. The provisions of this Convention shall apply to the carriage of goods between ports in two different States.

2. Contracting States may decline to apply the rules of this Convention where the transit is domestic or does not involve traversing oceans or seas.

3. Contracting States may decline to apply the rules of this Convention if both the port of loading and the port of discharge are in non-contracting States."

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

66. The Working Group considered the above part of the report of the Drafting Party and approved paragraphs 1, 2 and 4 of the proposed draft provisions.

67. With respect to subparagraphs 1 (*d*) and 1 (*e*) one representative suggested that specific reference should be made to bills of lading, as well as to documents evidencing the contract of carriage, since the bill of lading could well be a document different from the contract of carriage and could be issued in a State other than the one where the contract of carriage was concluded. In reply another representative stated that such reference to bills of lading was unnecessary as the words "document evidencing the contract of carriage" would include bills of lading. On the other hand, this representative was prepared to accept express reference to the bill of lading, if that was the wish of the Working Group, as such reference would not alter the substance of subparagraphs 1 (*d*) and 1 (*e*). Consequently, the Working Group decided to include express reference to bills of lading in the above-mentioned subparagraphs.

68. With respect to paragraph 3, some representatives, for reasons set forth in paragraph 59 above, expressed a strong preference for retaining this paragraph without square brackets. However, the majority of the representatives, some of whom considered this paragraph to be superfluous, preferred placing paragraph 3 in square brackets for further consideration at a later stage.

69. A representative of a State with a federal constitutional system suggested an additional paragraph on the lines of paragraph 4 (comparable to article 5, paragraph 3 of the 1968 Protocol), aimed at solving problems of application of the provisions of the Convention in States with such a constitutional system. Most representatives who spoke on the subject considered such a paragraph unnecessary from the point of view of their own governmental systems, but were willing to accept it in order to meet the above-mentioned problem. Accordingly, the Working Group adopted paragraph 4 of the proposed draft provisions.

IV. Elimination of invalid clauses in bills of lading

A. *Introduction*

70. The problems involved in the use of invalid clauses were analysed in part six of the second report of the Secretary-General (A/CN.9/76/Add.1).* In part four of the third report of the Secretary-General this analysis was carried further by the development of alternative (though not mutually exclusive) draft texts directed to the use of clauses which derogate from the provisions of the Convention.

71. Both reports noted that the inclusion of invalid clauses in bills of lading caused uncertainty in the minds of cargo owners as to their rights and liabilities. It was considered that their removal "would facilitate trade, because their continued inclusion [in bills of lading] has the following onerous effects: (*a*) the clauses mislead cargo interests, thus causing them to drop the pursuit of valid claims, (*b*) they present an excuse for prolonging discussion and negotiation of claims which otherwise might have been settled promptly, and (*c*) they encourage unnecessary litigation".[52]

72. The reports noted four possible approaches in dealing with invalid clauses; these approaches are considered below.

73. The first approach was aimed at making the mandatory requirements of the Convention as clear and explicit as possible. In this regard attention was drawn to article 3 (8) of the Brussels Convention of 1924 which attempted to regulate the use of invalid clauses. The text of this article is as follows:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from

* UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

[52] "Bills of lading", report by the secretariat of UNCTAD TD/B/C.4/ISL/6/Rev.1, para. 295 (United Nations publication, Sales No. E.72.II.D.2).

liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance clause in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability."

The reports noted that the present wording of article 3 (8) is inadequate in that it (*a*) refers only to the Convention's provisions on "liability", (*b*) leaves unclarified its effect on clauses which are valid only under certain circumstances and not in others, and (*c*) leaves uncertain the effect of invalidity of one clause on the rest of the contract of carriage.

74. To remedy the aforementioned inadequacies of article 3 (8), the third report of the Secretary-General proposed a draft provision (draft proposal A, at paragraph (5) which (1) required that the contract of carriage or bill of lading conform to all the provisions of the Convention, (2) provided for the nullity of a clause only to the extent that it derogated from the Convention and (3) expressly limited the nullity of an invalid clause to the clause itself. Paragraph 2 of the draft provision incorporated the substance of article 5, paragraph 1 of the Brussels Convention of 1924 permitting a carrier by contract to increase his responsibilities set forth in the Convention.

75. The above-mentioned reports of the Secretary-General also considered the suggestion that the text of the Convention itself should specify certain types of clauses which are invalid. In this regard attention was directed to the last sentence of article 3 (8) of the Brussels Convention of 1924 which specifically prohibits "benefit of insurance" clauses. However, it was noted that this approach presented difficulties in that (1) certain clauses are invalid only in some circumstances and not in others and (2) the identification of certain clauses as invalid might lead draftsmen to prepare new wording to achieve the same ends.

76. The third approach proposed the introduction of sanctions to penalize the use of invalid clauses. The third report of the Secretary-General set forth two alternative draft provisions.* The first alternative (draft proposal B (1), paragraph 14) would remove the carrier's limitation of liability under the Convention when the carrier relies on a clearly invalid clause in a judicial or arbitral proceeding. The second alternative (draft proposal B (2), paragraph 17) established the carrier's liability for all expenses, loss or damage (such as litigation costs) caused by the presence of the invalid clause.

77. The fourth approach suggested that the Convention require the inclusion, in the contract of carriage, of a notice clause regarding invalid clauses. The third report of the Secretary-General set forth a draft provision (draft proposal C, paragraph 21) which required all contracts of carriage or bills of lading to contain a statement that (*a*) the carriage is subject to the provisions of the Convention and (*b*) any clause derogating from the Convention is null and void. By way of sanction, paragraph 2 of the draft provision removed the carrier's entitlement to the Convention's rules on limitation of liability whenever the contract of carriage or bill of lading did not contain the required statement. The report noted that a similar approach had been taken in the Warsaw (Air) Convention and the Convention of Carriage by Road (CMR).

B. *Discussion by the Working Group*

78. The Working Group discussed the problems involved in the inclusion of invalid clauses in bills of lading and considered solutions based on the foregoing draft proposals. It was emphasized by a number of representatives that these proposals complemented each other and were not mutually exclusive.

79. A majority of the representatives were in agreement on the need for a general provision along the lines of draft proposal A (see paragraph 74 above), which specified the legal status of clauses that were inconsistent with the Convention. On the other hand, one representative considered such a provision to be unnecessary, since the provisions of the Convention were obligatory anyway.

80. Suggestions were made for improving the clarity of the provisions in paragraph 1 of draft proposal A. In addition, one representative suggested the deletion of any reference to separation or severance of the invalid clause from the rest of the contract on the ground that such a rule would be a source of litigation.

81. A number of representatives expressed the view that the general provision in draft proposal A should indicate clearly that it applied to all clauses in the contract of carriage, whether or not contained in the bill of lading or other document evidencing the contract of carriage. One representative expressed concern that, even with this broad terminology, the possibility still existed that under common law systems there could be collateral agreements inconsistent with the provisions of the Convention and yet not covered by the provision.

82. The view was expressed that draft proposal A was too broad in that it applied to all provisions of the Convention instead of permitting some degree of freedom of contract, within the scope of the Convention, in those areas not considered mandatory. Another representative stated that there should be flexibility in the scope of application of the Convention, thereby permitting the parties to alter the burden of responsibilities in certain circumstances.

83. Most representatives supported paragraph 2 of draft provision A, validating clauses which increased the carriers' responsibilities or obligations. Two representatives expressed doubt whether it was necessary to require that clauses increasing the carriers' liabilities be evidenced in a document.

84. Some representatives, who supported the general provision in draft proposal A, also advocated the inclusion of an illustrative list of invalid clauses as a supplement to the basic provision.

85. In regard to the inclusion of a sanction to deter carriers from utilizing invalid clauses (draft proposals B (1), B (2) and C), a majority of the representatives were in favour of including a sanction, but no clear consensus was reached as to the form of this sanction.

86. Some support was expressed for a sanction which would remove the limitation of liability under

* See the next section of this volume.

the Convention (draft proposal B (1)). However, most representatives were of the opinion that such a sanction was excessive. It was noted that this sanction was limited to invoking clauses which were "clearly" inconsistent with the Convention; however, most representatives expressed concern over the difficulties inherent in determining which clauses would be "clearly" invalid.

87. A majority of the representatives supporting the concept of a sanction for invalid clauses were in favour of the approach embodied in draft proposal B (2), which made the carrier liable for all expenses, loss or damage caused by an invalid clause. However, one representative opposed this alternative to the extent that it would permit the assignment of legal fees to the losing party in a legal action, an approach which was inconsistent with the law of his country. Another representative, opposed to the concept of sanctions, expressed a similar reservation to this particular alternative on the grounds that the costs of litigation should be determined by national rules.

88. Several representatives were opposed to the approach of both draft proposal B (1) and draft proposal B (2) on the ground that these provisions were unnecessary and might produce arbitrary results.

89. A majority of the representatives in the Working Group favoured the inclusion of a notice provision in the contract of carriage along the lines suggested in draft proposal C (see paragraph 77 above). On the other hand, there was little support for the sanction which provided for withdrawal of the limits on the carriers' liability when the required notice was omitted in the contract of carriage.

90. A majority of the representatives agreed that some sanction was necessary. Several representatives indicated that a sanction along the lines of draft proposal B (2) (see paragraphs 76 and 87, above) might be amalgamated with draft proposal C. One representative noted that if this latter approach were not adopted, the problem of a sanction for omission of the required notice should be left to the national legislatures. Speaking in favour of a sanction similar to draft proposal B (2) rather than the one originally contained in draft proposal C, several representatives noted that a sanction removing the carrier's limitation of liability whenever there was an omission of the required notice had caused complications in the Warsaw (Air) Convention and had been deleted in that Convention's most recent revision of the rules on the carriage of passengers. Some of these representatives observed that draft proposal B (2) was similar to the sanction adopted by the Convention of Carriage by Road (CMR).

91. Some representatives opposed any provision mandating that a specified notice be given in the bill of lading or other documents. In this connexion it was noted that such a requirement would be inconsistent with the trend to reduce costs by using fewer documents in international transport.

92. One representative expressed the view that this provision should be made dependent upon issuance of a document which could contain the required statement. However, two representatives were of the opinion that such a qualification was unnecessary since, if no document were issued, there would be no opportunity for the inclusion of an invalid clause. These representatives responded to a query as to the language to be employed in giving the required notice by observing that the notice would be in the same language as the rest of the document.

93. It was the general consensus of the Working Group that the Drafting Party should develop provisions on invalid clauses along the lines of the principles approved by the Working Group.

C. *Report of the Drafting Party*

94. Following the discussion by the Working Group, this subject was referred to the Drafting Party. The report of the Drafting Party, with amendments to the text of the proposed draft provisions made by the Working Group,[53] is as follows:

PART IV OF THE REPORT OF THE DRAFTING PARTY: INVALID CLAUSES

(*a*) On the basis of the opinions expressed by members of the Working Group, the Drafting Party considered the revision of the present Convention to deal more effectively with the problem of invalid clauses in contracts of carriage. On the basis of these opinions the Drafting Party recommends the following text:

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

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

3. When a bill of lading or any other document evidencing the contract of carriage is issued, it shall contain a statement that the carriage is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the shipper or the consignee.

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[53] The amendments made by the Working Group are the following: (*a*) the word "that" was inserted after the word "extent" in the first sentence of paragraph 1; (*b*) the phrase "directly or indirectly" was inserted after the word "derogates" in the first sentence of paragraph 1; (*c*) the phrase "or any similar clause" was inserted after the word "carrier", and the phrase "null and void" replaced the phrase "deemed to derogate from the provisions of this Convention".

During the consideration by the Working Group of this report the following additions and amendments were made at the request of the Chairman of the Drafting Party: (*a*) Notes (4) and (5) were added to the Notes on the proposed draft provisions; and (*b*) paragraph 3 of the proposed draft provisions was amended by deleting the colon after the word "that" and the quotation marks around the remainder of the sentence.

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

Notes on the proposed draft provisions

(*b*) The attention of the Working Group is drawn to the following:

1. One representative was of the opinion that a separate paragraph should be inserted after paragraph 1 to provide a non-exclusive list of characteristics common to various types of invalid clauses.

2. Some representatives who opposed paragraph 3 of the draft text above expressed the view that it should be placed in brackets to indicate that there should be further discussion on this point. One representative stated that this notice provision did not go far enough as it did not call for the incorporation of the substantive rules of the Convention into the bill of lading or other document evidencing the contract of carriage. Another representative was of the opinion that the phrase "or any other national legislation based on this Convention" should be inserted after the word "Convention".

3. In reference to paragraph 4 one representative stated that the term "including lawyer's fees" should be inserted after the word "costs" in the second sentence of the paragraph.

4. The proposed draft provisions are intended to replace articles 2, 3 (8) and 5 (1) of the 1924 Brussels Convention.

5. In view of the proposed draft provisions, the Working Group may wish to delete paragraph 5 of article A in part J of the Compilation.

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

95. The Working Group considered and approved the above part of the report of the Drafting Party including the proposed draft provisions.[54] The following comments and reservations were made with respect to the report:

(*a*) One representative opposed the inclusion of the phrase "directly or indirectly" after the word "derogates" in the first sentence of paragraph 1.

(*b*) Some representatives were opposed to the inclusion of the provision providing for a sanction since they considered that it was not necessary and, as drafted, it did not in fact provide a sanction.

[54] See foot-note 53 above.

V. Carriage of cargo on deck

A. *Introduction*

96. A working paper prepared by the Secretariat summarized consideration and action by the Working Group at the third session regarding this issue.[55] It was noted that the definition of "goods" (article 1 (*c*) of the 1924 Convention) had been revised so as not to exclude the carriage of cargo on deck from the coverage of the Convention.[56] Attention was also directed to two proposals presented at the third session on which action was still pending.[57]

97. *Pending proposal A* would exempt carriers from liability for risks inherent in the carriage of goods on deck when such carriage was authorized by the contract of carriage.

98. *Pending proposal B* incorporated the principles regarding unauthorized carriage on deck that were recommended by the Drafting Party during the third session of the Working Group.[58] The main operative provision of pending proposal B were the following: (1) Carriage on deck is only permitted by agreement with the shipper, by usage or where required by statutory rules or regulations; (2) If the agreement with the shipper is not reflected in the bill of lading, the carrier bears the burden of proving the existence of such agreement and, furthermore, the carrier cannot invoke the agreement against a third party who acquired the bill of lading in good faith; (3) If goods are carried on deck without agreement of the shipper, or without justification by usage or statutory rules and regulations, the carrier is liable for loss or damage to the goods due to the carriage on deck (with the provisions on limitation of carrier liability being applicable unless the carrier was guilty of wilful misconduct).

B. *Discussion by the Working Group*

99. All representatives who commented on pending proposal A stated that a provision exempting carriers from liability for risks inherent in carriage of goods on deck was unnecessary in the light of the revised basic rule on the responsibility of carriers. Accordingly the Working Group decided not to adopt this proposal.

100. A majority of the representatives expressed support for pending proposal B. Most representatives stated that this proposal should be augmented by a rule to the effect that carriage of goods on deck in violation of an express agreement to carry them below deck would be treated as wilful misconduct to which the provisions on limitation of liability would not apply.[59] These representatives stated, however, that in other cases of unauthorized carriage on deck, the rules on limitation of liability would remain applicable.

101. Several representatives stated that any unauthorized carriage of goods on deck was in fact wilful misconduct and that, therefore, in all cases of unauthorized carriage on deck the carrier should not be able to

[55] A/CN.9/WG.III/WP.14; report on third session (A/CN.9/63) paras. 23-29; UNCITRAL Yearbook, Vol. III: 1972, part two, VI.

[56] Part A of the compilation.

[57] A/CN.9/WG.III/WP.14, at paras. 5 and 13.

[58] *Ibid.*, para. 11.

[59] Report on fifth session, paragraph 26 (2); compilation, part J, article C (damage resulting from wilful misconduct).

rely on the provisions establishing limitations on the carrier's liability. Some of these representatives stressed that it was important to provide for unlimited liability for all unauthorized carriage on deck, since full insurance coverage generally was applicable only to goods carried under deck; unauthorized carriage on deck consequently would deprive the shipper or consignee of the benefit of insurance on the goods. This will be all the more unjustifiable in cases where the shipper or consignee took the insurance under the clear understanding that the goods were being carried under deck but found to his dismay that they were carried on deck and that he had no insurance protection.

102. One representative favoured a rule holding the carrier absolutely liable, regardless of fault, for all loss or damage to goods carried on deck without authorization.

C. *Report of the Drafting Party*

103. Following the discussion by the Working Group, the subject of carriage of goods on deck was referred to the Drafting Party. The report of the Drafting Party, including a draft provision concerning the carriage of goods on deck to which a minor amendment was made by the Working Group,[60] reads as follows:

PART V OF THE REPORT OF THE DRAFTING PARTY: DECK CARGO

The Drafting Party considered the addition to the Brussels Convention of a provision regarding the carriage of goods on deck. On the basis of views that had been expressed during the Working Group's discussion of the subject, a draft provision was prepared.

The Drafting Party recommends

(*a*) the following provision on the carriage of goods on deck:

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

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

3. Where the goods have been carried on deck contrary to the provision of paragraph 1, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck in accordance with the provisions of articles [ ].[61] The same shall apply when the carrier, in accordance with paragraph 2 of this article is not entitled to invoke an agreement for carriage on deck against a third party who has acquired a bill of lading in good faith.

4. Carriage of goods on deck contrary to express agreement for the carriage under deck shall be deemed to be wilful misconduct and subject to the provision of article [ ].[62]

(*b*) that the above draft provision replace the draft provision set forth in part C of the compilation.

Note on proposed draft provision

In regard to paragraph 3 some representatives were of the opinion that it should be deleted.

D. *Consideration of Part V of the report of the Drafting Party by the Working Group*

104. The Working Group considered the above part of the report of the Drafting Party[63] and approved the report of the Drafting Party, including the proposed draft provision.

105. The following comments and reservations were made by representatives in the Working Group during the consideration of the Drafting Party's report on carriage of goods on deck:

(*a*) A majority of the representatives objected to the phrase "with the common usage of the particular trade" on a variety of grounds. Some objected on the ground that the phrase was ambiguous. Other representatives stated that it was difficult to determine common usage as it may vary from region to region and even from port to port. One representative reserved his position regarding the above phrase and another representative expressed his opposition to any reference to "custom" or "usage". It was agreed that the question needed further study and consideration; therefore, this phrase in paragraph 1 of the draft provision was placed within square brackets.

(*b*) Several representatives suggested that paragraph 2 of the draft provision on carriage of deck cargo be amended to require that the bill of lading or other document evidencing the contract of carriage clearly indicate that carriage shall be or may be on deck, whether the carrier was entitled to carry the goods on deck by virtue of an agreement with the shipper, the common usage of the particular trade or statutory rules and regulations. These representatives proposed the following wording to replace the paragraphs 2, 3 and 4 that were recommended by the Drafting Party:

"2. *In any of the cases referred to in paragraph 1 above,* the carrier shall insert in the bill of lading or other document evidencing the contract of carriage a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving *his right of on-deck carriage as referred to in paragraph 1*; however, the carrier shall not be entitled to invoke such *right* against a third party who has acquired a bill of lading in good faith.

[60] In paragraph 1, the words "with the common usage of the particular trade" were placed within square brackets.

[61] The reference is to the provisions on limitations of liability, to be found in articles A and C of part J of the compilation.

[62] The reference is to provision on limitation of liability in cases of wilful misconduct, to be found in article C of part J of the compilation.

[63] See foot-note 60 above.

"3. Where the goods have been carried on deck contrary to the provisions of paragraph 1, the carrier shall be liable for loss of or damage to the goods, as well as for delay in delivery, which results solely from the carriage on deck in accordance with the provisions of articles [ ].[64] The same shall apply when the carrier in accordance with paragraph 2 of this article is not entitled to invoke *the right of on-deck carriage* against a third party who has acquired a bill of lading in good faith.

"4. Carriage of goods on deck *contrary to the provisions of paragraphs 1 and 2 above* shall be deemed to be wilful misconduct and subject to the provision of article [ ]."[65]

(*c*) The Working Group took note of the comments and draft proposal contained in subparagraph (*b*) above, and decided to consider that proposal at the next session of the Working Group.

(*d*) One representative proposed deletion of paragraphs 2 and 3 that were recommended by the Drafting Party and another representative favoured placing these paragraphs within square brackets.

(*e*) One of the representatives referred to in paragraph (*b*) above reserved his position regarding paragraphs 3 and 4 as recommended by the Drafting Party as these provisions do not give sufficient protection to the shipper or consignee. This representative stated that if a shipper fails to disclose to the insurer that the goods are carried on deck, the insurance may be void as to goods so carried. In addition, if the shipper does not know that the goods will be carried on deck, he may fail to provide packing that is adequate for such carriage. For these reasons, carriage on deck should be permitted only in accordance with an express agreement. In addition, if the carrier improperly carries the goods on deck, he should be fully liable for all loss or damage to the goods resulting from other forms of negligence, and not merely for loss or damage resulting from the carriage on deck.

VI. Carriage of live animals

A. *Introduction*

106. The Brussels Convention of 1924 excludes "live animals" from the definition of "goods" in article 1 (*c*), with the result that the carriage of live animals falls outside the scope of the Convention. The Working Group at its third session (1972) considered whether the carriage of live animals should be brought within the scope of the Convention. However, at that session agreement was lacking on the approach to be followed in dealing with the question, and it was decided to request the International Institute for the Unification of Private Law (UNIDROIT) to prepare a study on this question.[66] A study prepared by UNIDROIT in response to this request was considered at the present session of the Working Group.[67]

107. The UNIDROIT study on live animals set forth three alternative proposals. Proposal I would include the carriage of live animals within the coverage of the Convention. However, in view of the risks involved in such carriage it was proposed that a clause be added to article 3 (8) of the Convention stating the following:

"However, with respect to the carriage of live animals, all agreements, covenants or clauses relating to liability and compensation arising out of the risks inherent in such carriage shall be permitted in the contract of carriage."

108. Proposal II would also involve the inclusion of live animals in the coverage of the Convention but would relieve the carrier of responsibility for the special risks inherent in the carriage of animals. The carrier would have the burden of proving that the loss or damage was caused by such inherent risk. Proposal II states the following:

"With respect to live animals, the carrier shall be relieved of his responsibility where the loss or damage results from the special risks inherent in the carriage of animals. When the carrier proves that, in the circumstances of the case, the loss or damage could be attributed to such risks, it shall be presumed that the loss or damage was so caused, unless there is conflicting proof that such risks were not the whole or partial cause of it. Furthermore, the carrier shall prove that all steps incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him."

109. Proposal III also presupposes the inclusion of live animals within the scope of the Convention. Unlike the other proposals, it places the carriage of live animals within the general rules of liability of the Convention. However, under proposal III a paragraph would be added to article 4 (6) of the Hague Rules regarding notice by the shipper to the carrier of the nature of the danger in the carriage of particular animals and the actions that may be taken by the carrier if such animals become a danger. The paragraph reads as follows:

"Before live animals are taken in charge by the carrier, the shipper shall inform the carrier of the exact nature of the danger which they may present and indicate, if need be, the precautions to be taken. If such animals become a danger to the ship and the cargo, they may, at any time before discharge, be landed at any place or rendered harmless or killed, without liability on the part of the carrier except to general average, if any, provided that he proves that he unsuccessfully took all measures that could reasonably be required in the circumstances of the case."

B. *Discussion by the Working Group*

110. There was general support in the Working Group for including live animals within the scope of application of the Convention. It was pointed out that the general Convention rules on liability should apply to live animals since the carriage of live animals was just another type of carriage of goods. It was also stated by one representative that the carriage of live

[64] The reference is to the provisions on limitation of liability to be found in articles A and C of part J of the compilation.

[65] The reference is to the provision on limitation of liability in cases of wilful misconduct, to be found in article C of part J of the compilation.

[66] A/CN.9/63, paras. 30 and 34, UNCITRAL Yearbook, Vol. III: 1972, part two, IV.

[67] A/CN.9/WG.III/WP.11; reproduced in this volume, part two, III, 3, below.

animals, like the carriage of certain fruits and vegetables, required the maintenance of proper ventilation and also called for shippers to give precise instructions to the carrier regarding care of the cargo. Other representatives observed that making the carrier liable under the Convention for the carriage of live animals would encourage decent treatment of live animals.

111. Two representatives did not favour the application of the liability rules of the Convention to the carriage of live animals. In support of this position it was stated by one representative that the UNIDROIT study, in the opinion of this representative, did not contain evidence of unreasonable losses suffered by shippers because of the exclusion of live animals from the Convention; on the other hand, increased liability in this area would lead to higher freight charges. It was pointed out by an observer that under current insurance practice, damage to live animals was not fully insurable in the same manner as damage to other cargo.

112. A majority of the members of the Working Group approved the approach of proposal II (set out at paragraph 108 above). Proposal II would bring the carriage of live animals within the Convention, but would relieve the carrier of liability for special risks inherent in such carriage if the carrier can prove that the loss or damage was caused by a special inherent risk. Some supporters of this proposal observed that live animals were a special category of cargo and therefore a special provision dealing with the subject was required. Two representatives, who stated that they could support the principal aim of proposal II, stated that their support hinged on a change in the proposed burden of proof rule. These representatives suggested that the rule should state that the carrier would only be liable if the claimant proved that the loss or damage to the live animals was due to the fault of the carrier.

113. Some representatives preferred proposal III (see paragraph 109 above) which would bring the carriage of live animals within the Convention with no qualifications regarding special risks but with an addition to the Convention of a provision on dangers relating to the carriage of live animals. It was pointed out by a representative who favoured the basic aim of proposal III that, although special problems could arise in the carriage of live animals, there was no justification for any special treatment of such cargo. Carriers should be aware of the general propensities of animals, and shippers should only be required to inform the carrier of special propensities of a cargo of live animals; the proposed provision dealing with notice of danger was ambiguous in requiring the shipper to state the exact nature of the danger.

114. Two representatives favoured proposal I (see paragraph 107 above) under which, in their view, the Convention would apply to the carriage of live animals subject only to reasonable derogation clauses. In support of this position it was stated that animals are sensitive and react in divergent ways to climatic and other physical changes. On the other hand, other representatives stated that they found proposal I unsatisfactory since it would allow the parties to derogate from the Convention's general rules on liability.

C. *Report of the Drafting Party*

115. Following discussion by the Working Group, this subject was referred to the Drafting Party on the understanding that, if it proved to be impossible to reach consensus on one draft text, alternative texts should be prepared on the basis of the two proposals (II and III) that had received the widest support in the Working Group. The Drafting Party agreed to a revised definition of "goods" to replace article 1 (*c*) of the Brussels Convention of 1924. The Drafting Party also agreed to add a special risk rule for the carriage of live animals and made several observations which were included in its report to the Working Group. This report, including the drafting provisions, reads as follows:[68]

PART VI OF THE REPORT OF THE DRAFTING PARTY: CARRIAGE OF LIVE ANIMALS

(*a*) Based on the views expressed by representatives in the Working Group, the Drafting Party considered the inclusion in the Convention of the carriage of live animals by sea, and recommends the following draft texts:

1. DEFINITION OF GOODS (to replace part A in the compilation):

"Goods" includes goods, wares, merchandise and articles of every kind whatsoever including live animals.

2. SPECIAL RISK RULE FOR LIVE ANIMALS (to become paragraph 4 of part D in the compilation, with the current paragraph 3 of part D becoming a new paragraph 5):*

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

* It will be noted that the Working Group made no decision at this session regarding a new paragraph 3 of part D of the compilation. This gap could be filled by inserting the draft provision on "delay in delivery: loss of goods" (see paragraph 26 above) as paragraph 3.

[68] The report of the Drafting Party appears as amended by the Working Group. The Working Group made the following modifications in the draft texts: (*a*) in paragraph 1 the words after "goods" were changed from "means goods of any kind including live animals" to the text appearing above; (*b*) in paragraph 2 the first sentence shall end with "results from any special risks inherent in that kind of carriage" instead of "results from any special risks inherent in the carriage of animals"; (*c*) in the second sentence of paragraph 2 the phrase "loss, damage or delay in delivery" replaced, in all three places where it had appeared, the words "loss or damage" in the English text.

Notes on the proposed draft provisions

(*b*) The attention of the Working Group is drawn to the following:

1. Some representatives expressed their opposition to a special risk clause for carriage of live animals. These representatives stated that live animals should be treated as any other cargo and that the basic rule on the liability of carriers should apply to the carriage of live animals.

2. Two representatives suggested that the second sentence of the special risk clause on the carriage of live animals should commence:

"When the carrier proves that he has taken all steps incumbent upon him in the circumstances and that he has complied with any special instructions . . .".

3. Several representatives proposed that article 4 (6) of the present Convention be expanded to cover the carriage of animals who are dangerous by nature or become dangerous during the voyage. One representative agreed to submit to the Drafting Party, at a future date, a draft text modifying article 4 (6) in this manner.

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

116. The Working Group considered the above part of the report of the Drafting Party.[69] The report of the Drafting Party, including the draft text, was approved by the Working Group.

117. The following comments and reservations were made with respect to these draft provisions:

(*a*) One representative favoured retention of the definition of goods that had originally appeared in the report of the Drafting Party, which read as follows:

" 'Goods' means goods of any kind including live animals."

(*b*) Several representatives, who were opposed to paragraph 2 of the proposed draft text, stated that it should be placed in square brackets. Some of these representatives suggested that the words "special risks inherent" should be subject to further study. These representatives expressed concern that the words "special risks inherent" would give rise to difficulties of interpretation.

(*c*) One representative reserved his position with respect to paragraph 2.

(*d*) Several representatives indicated that it would be desirable for the United Nations Commission on International Trade Law to request the Inter-Governmental Maritime Consultative Organization (IMCO) to prepare a manual concerning the carriage of live animals by sea. Several other representatives opposed this suggestion, some on the ground that this question should be considered by IMCO on the initiative of its own members. The observer of IMCO stated that he would report the comments set forth above to his organization.

(*e*) One representative proposed that the second sentence of article 4 (6) of the Brussels Convention of 1924 be amended in the following manner:

The words "or live animals" should be inserted between "shipped with such knowledge and consent" and "shall become a danger".

This suggestion was made in order to extend the scope of that article to the carriage of live animals. Another representative supported the above proposal in principle, but suggested that it should be considered at a future session of the Working Group. This representative also suggested that at such future time the Working Group might wish to further amend article 4 (6) to require that any measures taken by the carrier to protect the ship or its cargo be commensurate with the danger which the cargo involved represents.

VII. Definition of "carrier", "contracting carrier" and "actual carrier"

A. *Introduction*

118. The rules of the Brussels Convention of 1924, and the revised rules approved by the Working Group, are concerned with the liability of the "carrier".[70] This term is defined in article 1 (*a*) of the Brussels Convention as follows:

" 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."

119. The second report of the Secretary-General, submitted for consideration by the Working Group at its fifth session (1973), referred to some of the problems that arise under the Brussels Convention when the shipper contracts with one carrier (the "contracting carrier") and this carrier arranges to have the goods carried by another carrier (the "actual carrier").[71] In connexion with the above situation it was also necessary to take into account the action taken by the Working Group at its fifth session (1973) with respect to trans-shipment. At that session, the Working Group approved the following provision:[72]

Article D

"1. Where the carrier has exercised an option provided for in the contract of carriage to entrust the performance of the carriage or a part thereof to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention.

"2. The actual carrier also shall be responsible for the carriage performed by him according to the provisions of this Convention.

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[69] See foot-note 68 above.

[70] See the basic rules governing the responsibility of the carrier approved by the Working Group (replacing articles 3 (1) and (2), 4 (1) and (2) of the 1924 Brussels Convention) compilation, part D.

[71] Second report of the Secretary-General (A/CN.9/76/Add.1, at part five (B); UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4). This part of the report was directed primarily at problems resulting from the failure to identify clearly the "actual" carrier in the bill of lading. As to the wider problem of substituted performance by a second carrier, see the above report at part two: trans-shipment.

[72] Report on fifth session (A/CN.9/76 para. 38; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5). With respect to a proposed article E, *see idem* at paras. 41-44. These provisions appear in the compilation at part I.

"3. The aggregate of the amounts recoverable from the carrier and the actual carrier shall not exceed the limits provided for in this Convention.

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

The report of the Drafting Party, which submitted the above provision to the Working Group, included the following notes on that provision:

"3. With respect to paragraph 1 of article D, the Drafting Party recommends that the words "carrier" and "actual carrier" be specifically defined in article 1 of the Convention. "Carrier" would be defined as the person who has contracted with the shipper; "actual carrier" would be defined as any other carrier involved in the performance of the carriage.

"4. Paragraph 2 of article D is meant to assure the cargo-owner the right to bring a claim against an actual carrier, as well as against the contracting carrier, provided that the loss or damage occurred while the goods were in the charge of the actual carrier."

120. The discussion of the above provisions at the fifth session was focused on the situation where the "contracting" carrier arranges to have the goods transferred to a second ("actual") carrier at an intermediate point between the port of loading and the port of discharge.[73] However, it was noted that the problem was not analytically different from the case where the "contracting" carrier substitutes *carriage* by another ("actual") carrier at the port of loading. However, the second report of the Secretary-General noted that when such substitution occurs at the port of loading the problem is further complicated by the fact that the only bill of lading issued to the shipper might bear an inscription stating that the bill of lading was signed "for the master"; it was noted that such a bill of lading might include a "demise" or "identity of carrier" clause stating that the contracting evidenced by the bill of lading was between the shipper and the owner (or demise charterer) of the vessel named in the bill of lading, and that the shipping line or company who executed the bill of lading was subject to no liability under the contract of carriage.[74]

121. The approach to such provisions in the bill of lading had been affected by the emphasis placed on the bill in the Brussels Convention of 1924. However, present consideration of the subject needs to take into account action taken by the Working Group at its current session (see part II of the present report above) with respect to the "documentary" scope of application of the Convention. Thus, in place of the provision in article 1 (*b*) of the Brussels Convention that " 'contract of carriage' applies only to contracts of carriage covered by a *bill of lading or any similar document of title* . . ." the Working Group approved a provision (paragraphs 48-49 above) that "the provisions of this Convention shall be applicable to *all contracts for the carriage of goods by sea.*"[75]

B. *Discussion by the Working Group*

122. The Working Group considered the obligations under the Convention which should result when a shipper contracts with one carrier (the "contracting carrier"), and this carrier arranges to have the goods carried by another (or "actual") carrier. It was generally agreed that the question reached beyond drafting problems and presented issues of substance: which carrier, or carriers, should be responsible under the Convention?

123. Several representatives stated that responsibility should be placed on the "contracting carrier", and that he should not be able to escape this responsibility by arranging for another carrier to transport the goods. Some of these representatives stated that the responsibility of the "contracting" carrier was sufficient, and that it was not necessary to impose liability on a "substitute" or "actual" carrier.

124. On the other hand, some representatives stated that it should be possible to transfer responsibility to the "actual" carrier—which might be defined as the operator of the ship that effects the voyage in performance of the contract of carriage. It was suggested that, at least where the "contracting carrier" was not named in the bill of lading, the responsibility of the "actual carrier" would be sufficient. In support of this view it was noted that the "contracting carrier" might not have substantial assets, whereas the "actual" carrier, as owner and operator of the ship, would provide a more substantial basis for responsibility to the shipper or consignee.

125. Other representatives agreed with the above observations that the "contracting carrier" might not be financially sound; however, they noted that confining responsibility to the "actual" carrier could present similar practical problems, since the owner of the vessel that actually performed the carriage might be difficult to find or might have no available assets. In such situations the "contracting carrier" might be the only person who would be in a position to respond to a claim.

126. These representatives noted that the basic provision approved by the Working Group at its fifth session to deal with trans-shipment (article D, quoted at paragraph 119, above) placed responsibility on the initial carrier ("contracting carrier"), and also placed responsibility on the "actual" carrier for the carriage performed by him.[76] It was suggested that the provision on trans-shipment, with minor amendments,[77] would

[73] Report on fifth session (A/CN.9/76, paras. 30 (b) and 33; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5).

[74] Second report of the Secretary-General (A/CN.9/76/Add.1, part five (B), para. 5; UNCITRAL Yearbook, Vol. IV: part two, IV, 4).

[75] Exceptions to this provision appear at para. 48 above.

[76] It was noted in the second report of the Secretary-General (A/CN.9/76/Add.1, part five (B); UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 3), that this provision barred the shipper (or consignee) from recovering more from both carriers than the limits prescribed by the Convention (para. 3), and did not prejudice the rights of recourse between the two carriers (para. 4).

[77] It was noted that the reference in article D (1) to the carrier's exercise of "an option provided for in contract of carriage" would make it difficult to apply this provision to cases where the contracting carrier entrusted the entire carriage to another ("actual") carrier.

provide an appropriate solution for cases where the "contracting carrier", at the outset of the carriage, arranged to have the goods carried by another carrier (an "actual" carrier).

127. Most representatives approved this approach as a basis for work by the Drafting Party.

128. Attention was given to revision of the definition of "carrier" in article 1 (*a*) of the Brussels Convention, and to providing a joint definition for "carrier" and "contracting carrier". It was noted that replies to a questionnaire circulated in 1972 by the Secretary-General included the suggestion that the definition of "carrier" should refer not only to the owner or charterer, but to "any other person" who enters into a contract of carriage; the replies included the further suggestion that the definition should include the requirement that the person defined as "carrier" must "act on his own behalf" in concluding the contract.[78] Several representatives supported both suggestions.

129. Several representatives suggested that a specific provision was needed to deal with the case (described at paragraph 120, above) where the carrier with whom the shipper has arranged for the issuance, to the shipper, of a bill of lading furnishes a bill of lading which is signed "for the master" of another carrier (the "actual" carrier), and which may also contain a provision that the contract of carriage is only between the shipper and the "actual" carrier.[79] The problem was whether such provisions might prevent the carrier with whom the shipper had dealt from being the "contracting carrier" and might serve to substitute the second carrier as the "contracting carrier".

130. Most representatives agreed that the carrier with whom the shipper had made a contract of carriage should remain the "contracting carrier" and should be responsible under the Convention for the carriage to the port of destination in spite of the bill of lading provisions described above. Various drafting proposals were submitted to achieve this objective. One approach required identification of the contracting carrier in the bill of lading. Under a second approach, when the goods are received in the charge of either the contracting carrier or the actual carrier, the contracting carrier shall, on demand of the shipper, issue a bill of lading giving specified particulars. Under this approach, the master of the ship carrying the goods would be empowered to issue the bill of lading on behalf of the contracting carrier. Most representatives who spoke on the issue favoured this second approach.

131. Some representatives expressed the view that an approach based on the trans-shipment provisions approved at the fifth session (paragraph 119 above) did not give adequate protection to the consignee, since under article D (2) the "actual" carrier is only responsible for the carriage "performed by him". It was noted that the "actual" carrier that delivers the goods to the consignee sometimes will not have performed the entire contract of carriage. When the goods are delivered in damaged condition to the consignee, it is difficult for the shipper or consignee to ascertain whether the damage occurred during the carriage performed by him, or during an earlier stage of the carriage. It was noted further that even if it could be ascertained that the goods were damaged during the earlier stage, the carriage in question might be unknown to and remote from the consignee. It was suggested that an "actual" carrier, like the "contracting carrier", should also be responsible for the entire carriage even though he might have performed only part of the carriage. In case the actual carrier performed only a latter part of the carriage and the damage occurred during the earlier part, the actual carrier could then settle the claim with the earlier carrier. These representatives held the view that such an approach would also be more practical.

132. Other representatives noted that this question had been discussed at the fifth session, and the rules on the responsibility of the "actual" carrier had been adopted after giving consideration to conflicting views on this question.[80] Most representatives concluded that this issue should not be reopened at the present session of the Working Group.

C. Report of the Drafting Party

133. Following the discussion by the Working Group, this subject was referred to the Drafting Party. The report of the Drafting Party, with some amendments made by the Working Group, is as follows:[81]

PART VII OF THE REPORT OF THE DRAFTING PARTY: DEFINITION OF CARRIER AND RELATED PROVISIONS

(*a*) Based on the opinions expressed in the Working Group the Drafting Party formulated draft provisions on the definition of contracting and actual carrier, related rules on liability, and consequential amendments concerning the issuance of bills of lading. The Drafting Party recommends the following provisions:

[Definition of "carrier"]

1. "Carrier" or "contracting carrier" means any person who in his own name enters into a contract for carriage of goods by sea with shipper.

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

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[78] Second report of the Secretary-General (A/CN.9/76/Add.1, part five (B), para. 4; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

[79] The carrier so mentioned (often without specific identification) as the only carrier under the contract is often the owner of a ship chartered by the carrier with whom the shipper made his contract.

[80] Report on fifth session (A/CN.9/76, paras. 31-32, 37; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5). Second report of the Secretary-General (A/CN.9/76/Add.1, part two, paras. 32-33, 41, 43; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

[81] The amendments made by the Working Group are the following: (1) the words "of goods" were inserted after the word "carriage" in paragraph 1 of the Definition of Carrier; (2) the phrase "for the carriage performed by him" in para. 2 of article D was moved from between the words "responsible" and "according" to its present position; (3) in reference to the notes on the proposed draft provisions, note 7 was added; (4) note 5 was amended by the inclusion of reference to article E; and (5) note 1 was amended by the additional language following the first sentence.

[*Provision on the respective liability of the contracting carrier and the actual carrier: articles D and E of Part I of the Compilation as amended.*]

Article D

1. Where the contracting carrier has entrusted the performance of the carriage or part thereof to an actual carrier, the contracting carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention.

2. The actual carrier also shall be responsible, according to the provisions of this Convention, for the carriage performed by him.

3. The aggregate of the amounts recoverable from the contracting carrier and the actual carrier shall not exceed the limits provided for in this Convention.

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

Article E

[1. Where the contract of carriage provides that a designated part of the carriage covered by the contract shall be performed by a person other than the contracting carrier (through bill of lading), the responsibility of the contracting carrier and of the actual carrier shall be determined in accordance with the provisions of article D.

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

[*Provision on issuance of bill of lading*]

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

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

(*b*) The Drafting Party also recommends:

(i) That the proposed draft provisions on the definition of carrier replace article 1 (*a*) of the 1924 Brussels Convention and that this definition be placed in part A of the compilation, which part should be entitled "Definitions" and should also include the provisional definition of "bill of lading" noted earlier in part II of the report of the Drafting Party.

(ii) That the proposed draft provisions amending articles D and E of part I of the compilation should replace these articles and that part I of the compilation be named "Carriage by an actual carrier, including trans-shipment and through carriage".

(iii) And that the proposed draft provisions on the issuance and required contents of a bill of lading, revising article 3 (3) of the 1924 Brussels Convention, should be included in the compilation at a place to be agreed upon at a later stage.

Notes on the proposed draft provisions

(*c*) The attention of the Working Group is drawn on the following:

1. It was noted by the Drafting Party that it might be desirable to formulate a definition of the "contract of carriage" at a later stage, in the light of subsequent decisions. In this respect, some representatives requested that a study be prepared by the Secretariat on the definition of the contract of carriage and on the relationship between the carrier and the person having the right to the goods. To this end the following provisional definition was proposed:

> "The contract of carriage is one whereby the carrier agrees with the shipper to carry specific goods from one port to another against payment of freight. By virtue of this contract the person having the right to delivery of the goods shall be able to exercise the rights of the shipper and will be subject to his duties."

2. One representative proposed a different formulation for the definition of carrier:

> "Carrier means any person who in his name concludes a contract of carriage of goods by sea with a shipper. The carrier is also called a contracting carrier when he entrusts the performance of all or part of the carriage of goods to another carrier called the actual carrier."

3. In reference to the definition of carrier, the question was raised by one representative, for consideration at a later stage, whether a definition of the term "person" was required to cover individuals, corporations and partnerships.

4. One representative reserved his position on paragraph 2 of article D since in his opinion any action brought by the consignee against an actual carrier should be governed by the domestic law of the forum.

5. In reference to articles D and E, some representatives raised the question whether, in situations involving trans-shipment and through carriage, the last actual carrier should be responsible for the whole carriage even though only part of the carriage was actually performed by that carrier. It was noted by the Drafting Party, in conformity with the decision of the Working Group, that this issue would be considered at a later stage when the provisions on trans-shipment and through carriage are reviewed.

6. In reference to the inclusion of provisions concerning required statements in the bill of lading designating the contracting and actual carriers and the effect of insufficient or inaccurate statements,[82] it was noted that this topic should be considered at a future session.

[82] See part five of the second report of the Secretary-General (A/CN.99/76/Add.1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

7. One representative objected to the proposed changes in paragraph 1 of article E since in his opinion the adopted definition of "actual carrier" was obviously unsuited for the situation covered by article E, which deals, in fact, with two autonomous carriers.

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

134. The Working Group considered the above part of the report of the Drafting Party and approved the proposed draft provisions.[83]

135. With respect to paragraph 2 of article D of the provisions on the respective liability of the contracting carrier and the actual carrier, one representative expressed the view that the draft provision was inadequate in determining whether the shipowner involved in a time-charter is a "carrier" with respect to a contract of carriage concluded between the charterer and a shipper. This issue should be determined in accordance with national law outside of this Convention. If the proposed draft provisions in fact intended to make the shipowner under a time-charter liable as the actual carrier with respect to a contract of carriage between the charterer and a third person, this representative would be strongly opposed to such a solution and would reserve his position in this respect. This representative proposed the following draft text:

1. Carrier means the owner, the charterer or any other person who enters into a contract of carriage with a shipper.

2. Where a bill of lading is issued by the charterer of a ship under a charter party such charterer only shall be the carrier for the purpose of this Convention and any stipulation in the bill of lading which is designed to deny that he is the carrier shall be null and void and of no effect.

136. In reply to the above comments, two representatives expressed the view that the draft provisions were not intended to affect the relation between the shipowner and a charterer under a charter-party. Specific reference was made by these representatives to paragraph 4 of article D, which leaves undisturbed the contractual relationship between a contracting carrier and an actual carrier.

VIII. Definition of "ship"

A. *Introduction*

137. "Part five, section D of the second report of the Secretary-General[84] dealt with the definition of "ship" in the Brussels Convention of 1924. Article 1 (*d*) of the Brussels Convention states that:

" 'Ship' means any vessel used for the carriage of goods by sea."

138. The second report of the Secretary-General stated that the issue that had been raised with respect to this definition related both to the type of vessel to which the Brussels Convention applies and to the question of whether the Convention applies during loading and discharging operations. This last question was discussed during the third session of the Working Group and the revision of article 1 (*d*), adopted at that session, was designed to clarify the period of the Convention's application.[85]

139. The second report of the Secretary-General suggested that the revision of article 1 (*d*), extending the coverage of the Convention to the "period during which the goods are in the charge of the carrier", resolves uncertainties that had arisen under the 1924 Convention with respect to whether the Convention applies to barge or lightering operations conducted by the carrier under his contract of carriage.

B. *Discussion by the Working Group*

140. Some representatives stated that, in their view, the definition of "ship" should be deleted since, under the revision of provisions in the Convention on the period of responsibility of the carrier (article 1 (*e*) of the 1924 Brussels Convention), the carrier would be responsible for the period during which the goods are in his charge. Problems as to the time when the goods are loaded on the ship or when the goods are discharged from the ship, which arose under the 1924 Convention, do not arise under the above revision of article 1 (*e*) that had been approved by the Working Group.

141. Many representatives were of the opinion that a decision as to whether a definition of "ship" be retained or deleted should be postponed to a later session. At the suggestion of some representatives, the Working Group decided to place square brackets around the definition of "ship" in article 1 (*d*) of the 1924 Brussels Convention in order to indicate that the Working Group wished to leave the matter open until a later stage in its drafting. In this connexion it was observed that it would be desirable to postpone a decision on this definition until it was resolved whether the word "ship" would be used in the provisions of the Convention in such a way as to warrant including a definition of "ship".

IX. Future work

Time and place of the seventh and eighth sessions

142. The Working Group considered the time for holding its seventh and eighth sessions.

143. It was suggested that in order to expedite the completion of its work, the seventh session should be held in the course of the current year, i.e. in the late summer or autumn of 1974. It was noted that under the pattern of rotation that had been followed by the Working Group, the seventh session would be held at United Nations Headquarters in New York.

144. The Secretariat reported to the Working Group that the heavy schedule of recurrent meetings

[83] See foot-note 81 above.

[84] A/CN.9/76/Add.1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

[85] Report on third session (UNCITRAL Yearbook, Vol. III: 1972, part two, IV), para. 14 (1); compilation, part B.

and major special conferences, already scheduled during the second half of 1974, made it impossible to hold a session in New York in August 1974, and that such a meeting during September-December 1974 could not be held in New York because of the regular session of the General Assembly.

145. The question was raised as to the possibility of holding the seventh session in Geneva during the fall or winter of 1974. The Secretariat reported that the earliest date at which the session could be held in Geneva at a minimum cost would be 25 November-6 December 1974. It was noted, however, that this period would not be feasible because two other meetings in the field of maritime legislation had already been scheduled for part of that period. The Secretariat then reported that space for the meeting would be available in Geneva for 30 September-11 October; it would, however, be necessary to recruit staff to service this meeting with financial implications that could be reported to the Commission at its seventh session (New York, 13-17 May 1974).

146. Most representatives were of the view that it was important to complete the current work as soon as possible. It was indicated that two sessions, each two weeks in length, would be required, and that long periods between sessions interfered with the continuity of the work and delayed the submission of the revised rules to the Commission. These representatives consequently suggested that the seventh session should be held in Geneva from 30 September to 11 October 1974 and that the eighth session should he held in New York during January or February 1975. On the other hand, some representatives opposed the first suggestion, citing both the problem of added cost to the United Nations and to their Governments, and the difficulty of receiving Secretariat studies in advance of such a session. One of these representatives stated that he did not oppose the holding of two sessions in 1975, at times that did not involve serious extra expense, and indicated that such a schedule would not unduly delay completion of the work. One representative stated that his acceptance of the dates set forth above was conditioned upon approval by the Commission of the decision of the Working Group. It was generally understood that a final decision on the matter could only be taken by the Commission at its seventh session, following a statement of financial implications.

147. The Working Group decided to recommend to the Commission that its next two sessions be held: the seventh session at Geneva from 30 September to 11 October 1974 and the eighth session at New York in January or February 1975.

Subjects for consideration at the seventh session

148. Attention was directed to the decision by the Working Group at its fifth session that topics to be considered at the seventh session should include the following:[86] (1) contents of the contract for carriage of goods by sea; (2) validity and effect of letters of guarantee; (3) legal effect of the bill of lading in protecting the good faith purchaser of the bill of lading. It was reported that in response to a request of the Working Group at its fifth session, a questionnaire had been circulated by the Secretary-General on the above questions, and that the replies were set forth in document A/CN.9/WG.III/L.2. Attention was also directed to the fact that, under decisions of the Working Group, certain questions had been deferred for further consideration.

149. The Working Group decided that at its seventh session it would consider the topics referred to in paragraph 148 above, together with any other topics necessary to complete the initial consideration of its revision of the 1924 Brussels Convention and the 1968 Protocol, pursuant to the Commission's mandate.

150. To facilitate the work of the seventh session, the Working Group invited its members and interested international organizations to submit any further suggestions and proposals they may wish to have examined, dealing with matters described in paragraph 148 above and with any new topics that, in their view, should be considered prior to completion of the Working Group's initial revision of the Hague Rules. It was requested that such suggestions and proposals be transmitted to the Secretariat by 1 June 1974, for analysis and distribution to members of the Working Group in advance of the seventh session.

151. The Working Group also requested the Secretary-General to prepare a report dealing with the matters described in paragraph 148, for circulation in advance of the seventh session. The Working Group, in addition, requested the Secretary-General to consider, in the above report, a possible definition of "contract of carriage" and the position, with respect to the carrier, of the person entitled to take delivery of the goods.[87]

152. The Working Group decided that the report should focus, as regards "contents of the contract of carriage", on the contents of the bill of lading or other document evidencing the contract of carriage, bearing in mind that different provisions may be necessary to deal with the various types of documents. In particular, it would seem necessary to require that the bill of lading contain information different from that required in relation to transport documents of a more simple type

153. The Secretariat was also requested to prepare, in advance of the next session, a new compilation of texts, including the texts adopted at the present session.

[86] Working Group, report on fifth session (A/CN.9/76, UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5), para. 77.

[87] See note 1, notes on the proposed draft provision to part VII of the report of the Drafting Party on definition of carrier and related provisions, at para. 133 above.

Annex

COMPILATION OF DRAFT PROVISIONS ON CARRIER RESPONSIBILITY APPROVED BY THE WORKING GROUP

(Approved by the Working Group at its third, fourth and fifth sessions)*

Note by the Secretariat

CONTENTS

* The present compilation does not embody the decisions taken by the Working Group at its sixth session.

INTRODUCTION

1. At its fourth session the United Nations Commission on International Trade Law (UNCITRAL) decided "that within the priority topic of international legislation on shipping, the subject for consideration for the time being shall be bills of lading" and agreed on the topics that should be considered for revision and amplification.[a]

2. At its fifth session the Commission stated that it considered "that the Working Group should give priority in its work to the basic question of the carrier's responsibility" and to that end recommended "that the Working Group keep in mind the possibility of preparing a new convention as appropriate, instead of merely revising and amplifying the rules in the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924 Brussels Convention) and the Brussels Protocol, 1968".[b]

3. The Working Group at its third, fourth and fifth sessions examined the topics within its work programme for those sessions.[c] The Secretary-General, at the request of the Working Group prepared two reports which served as working documents for the three sessions.[d] Also at the request of the Working Group two questionnaires were submitted to Governments and to international organizations active in the field and the replies were utilized in the preparation of the reports of the Secretary-General.

4. The present compilation sets forth the draft provisions of the Convention on the responsibility of ocean carriers for cargo which were prepared at the third, fourth and fifth sessions of the Working Group by the Working Group's Drafting Party and adopted by the Working Group.

5. For reasons of convenience the order of the draft provisions in this compilation generally follows the pattern of the Brussels Convention of 1924. The corresponding provisions in the Brussels Convention are cited in parentheses immediately after the descriptive title of the provision. The final order of the draft provisions will depend on the Working Group's decision as to the form of the new rules. In certain cases where the Brussels Convention of 1924 does not contain an equivalent rule, the draft provision is placed in what appears to be the most appropriate order.

6. In order to give the reader the clearest possible view of the work thus far completed by the Working Group, this compilation includes only the texts that have either been adopted or have been prepared subject to brackets signifying less than general approval. References to the paragraphs in the reports of the Working Group which contains particular draft provisions are given in foot-notes. The foot-notes contain references to the discussion by the full Working Group of each provision proposed by the Drafting Party. The foot-notes also set forth the specific reasons stated by the Working Group for placing various provisions in brackets.

[a] Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 19; UNCITRAL Yearbook, Vol. II: 1971, part one, II, A.

[b] Report of the United Nations Commission on International Trade Law on the work of its 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.

[c] The first two sessions of the Working Group were concerned with organizational and procedural questions. Report of the Working Group on the work of its second session, Geneva, 22-26 March 1971 (A/CN.9/55; UNCITRAL Yearbook, Vol. II: 1971, part two, III).

[d] Report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/63/Add.1; UNCITRAL Yearbook, Vol. III: 1972, part two, IV, annex). Second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4).

DRAFT PROVISIONS APPROVED BY THE WORKING GROUP

A. *Definition of "goods" (article 1 (c) of 1924 Brussels Convention)*

[*Revision of article 1 (c) "Goods"*][e]

"Goods" includes goods, wares, merchandise and articles of every kind whatsoever [except live animals].[f]

B. *Period of carrier's responsibility (article 1 (e) of 1924 Brussels Convention)*

[*Revision of article 1 (e) "Carriage of goods"*][g]

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

(ii) For the purpose of paragraph (i), the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:

a. By handing over the goods to the consignee; or

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

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

(iii) In the provisions of paragraphs (i) and (ii), reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee.

C. *Responsibility for deck cargo*

[*Possible addition to article*][h]

[In respect of cargo which by the contract of carriage is stated as being carried on deck and is so carried, all risks of loss or damage arising or resulting from perils inherent in or incident to such carriage shall be borne by the shipper and the consignee but in other respects the custody and carriage of such cargo shall be governed by the terms of this Convention].[i]

D. *Basic rules governing the responsibility of the carrier*

(replacing article 3 (1) and (2), articles 4 (1) and 4 (2) of 1924 Brussels Convention)

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 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.[j]

E. *Period of limitation* (article 3 (6) of 1924 Brussels Convention; article 1 (2) (3) of 1968 Brussels Protocol)

Article F[k]

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

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

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

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

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

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

F. *Saving life and property at sea* (replacing article 4 (4) of 1924 Brussels Convention).

The carrier shall not be liable for loss or damage resulting from measures to save life and from reasonable measures to save property at sea.[l]

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[e] Report of the Working Group on International Legislation on Shipping on the work of its third session, Geneva, 31 January to 11 February 1972 (herein referred to as Working Group, report on third session) (A/CN.9/63), para. 25 (1); UNCITRAL Yearbook, Vol. III: 1972, part two, IV. The draft was adopted by the Working Group (para. 26).

[f] Paragraph 34 of the report of the Working Group on its third session states: "In view of the lack of agreement on the approach to be followed in dealing with live animals, the Working Group decided to defer a decision on the subject."

[g] Working Group, report on third session, para. 14 (1); UNCITRAL Yearbook, Vol. III: 1972, part two, IV. The Working Group accepted the revision of article 1 (*e*) and also decided: "(*c*) to delete article VII of the Hague Rules on the ground that this article was inconsistent with the above revision (article 1 (*e*)) and that, in view of the revision of article 1 (*e*), no further provision was necessary (para. 15). This deletion was subject to reservations by some representatives (para. 17).

[h] Working Group, report on third session, para. 25 (2), UNCITRAL Yearbook, Vol. III: 1972, part two, IV.

[i] The report *ibid.*, para. 25 (2) foot-note 17, states: "As noted in paragraph 28 below, the Working Group did not reach agreement on this provision, and considered that it should be taken up at a future session of the Working Group."

[j] Report of the Working Group on International Legislation on Shipping on the work of its fourth (special) session, Geneva, 25 September to 6 October 1972 (herein referred to as Working Group, report on fourth session); (A/CN.9/74; UNCITRAL Yearbook, vol. IV: 1973, part two, IV, 1), para. 28 (3). Most members of the Working Group supported the above text (para. 36).

[k] Report of the Working Group on International Legislation on Shipping on the work of its fifth session, New York, 5 to 16 February 1973 (herein referred to as Working Group, report on fifth session) (A/CN.9/76; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5), para. 65 (1). The draft provision was approved by the majority of the Working Group (para. 66).

[l] Working Group, report on fifth session (*ibid.*), para. 54 (2). The Working Group adopted the draft provision (para. 55).

G. *Choice of forum clauses* (no corresponding provision in the 1924 Brussels Convention)

[*Proposed draft provision*][m]

Paragraph A

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

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

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

(*c*) The port of loading; or

(*d*) The port of discharge; or

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

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

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

Paragraph B

No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph A above. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

Paragraph C

1. Where an action has been brought before a court competent under paragraph A or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought.

2. For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement shall not be considered as the starting of a new action.

3. For the purpose of this article the removal of an action to a different court within the same country shall not be considered the starting of a new action.

Paragraph D

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

[m] Working Group, report on third session (UNCITRAL Yearbook, Vol. III: 1972, part two, IV), para. 39 (3). The Working Group approved the report of the Drafting Party that contained the draft provision on choice of forum clauses (para. 40).

H. *Arbitration clauses* (no corresponding provision in the 1924 Brussels Convention)

[*Proposed draft provision*][n]

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.

I. *Trans-shipment* (no corresponding provision in the 1924 Brussels Convention)

Article D[o]

1. Where the carrier has exercised an option provided for in the contract of carriage to entrust the performance of the carriage or a part thereof to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention.

2. The actual carrier also shall be responsible for the carriage performed by him according to the provisions of this Convention.

3. The aggregate of the amounts recoverable from the carrier and the actual carrier shall not exceed the limits provided for in this Convention.

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

Article E

[1. Where the contract of carriage provides that a designated part of the carriage covered by the contract shall be performed by a person other than the carrier (through bill of lading), the responsibility of the carrier and of the actual carrier shall be determined in accordance with the provisions of article D.

2. However, the carrier may exonerate himself from liability for loss of, damage (or delay) to the goods caused by events occurring while the goods are in the charge of the actual carrier provided that the burden of proving that

[n] Working Group, report on fourth session (UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 1), para. 47 (2). The majority of the Working Group approved the proposed draft provision (para. 48).

[o] Working Group, report on fifth session (UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5), para. 38 (2). The Working Group approved draft article D (para. 39).

any such loss, damage (or delay) was so caused, shall rest upon the carrier.][p]

J. *Limitation of liability* (article 4 (5) of 1924 Brussels Convention; article 2 of 1968 Brussels Protocol)

Article A[q]

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

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

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

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

3. A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.

4. The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in paragraph 3 of this article on the date of the judgement or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purposes of this Convention.

[5. By agreement between the carrier and the shipper a limit of liability exceeding that provided for in paragraph 1 may be fixed.][r]

Article B

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

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

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

Article C

The carrier shall not be entitled to the benefit of the limitation of liability provided for in paragraph 1 of article A if it is proved that the damage was caused by wilful misconduct of the carrier, or of any of his servants or agent acting within the scope of their employment. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage caused by wilful misconduct on his part.

[p] Paragraph 43 of the report of the Working Group on its fifth session (*ibid.*) states: "It was decided that the report of the Drafting Party should be set forth as presented to the Working Group subject to placing brackets around the text of article E, but that it be indicated that there were more members of the Working Group opposed to paragraph 2 of article E than there were members who favoured its inclusion."

[q] Working Group, report on fifth session (UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5), para. 26 (2). The Working Group approved these proposed draft provisions (para. 27).

[r] At paragraph 26 (9) of the report of the Working Group on its fifth session (*ibid.*) the report of the Drafting Party noted the following:

"9. Paragraph 5 of article A specifies that the carrier and shipper may by agreement raise the limit of the carrier's liability. This paragraph picks up the substance of the first part of article 2 (*a*) and article 2 (*g*) of the Brussels Protocol. This provision is set in brackets on the ground that such language may not be necessary in view of the general rule on the right of the carrier to agree to an increase of his liability which is embodied in article 5 of the Brussels Convention of 1924. However, this bracketed language is set forth at this point pending action on general provisions concerning the carrier's right to increase his liability."

2. Report of the Secretary-General; third report on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/88/Add.1)*

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* 12 April 1974