

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

^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).

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.

^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)*

CONTENTS

	Paragraphs		Paragraphs
GENERAL INTRODUCTION	1-7	H. Presumption of loss of delayed cargo: subsequent recovery	33-38
PART ONE. LIABILITY OF OCEAN CARRIERS FOR DELAY	1-38	PART TWO. GEOGRAPHIC SCOPE OF APPLICATION OF THE CONVENTION	1-37
A. Introduction	1-2	A. Introduction	1-2
B. Bases for recovery for delay under present law and practice	3-5	B. Provision defining the scope of the Brussels Convention of 1924	3-5
C. Effect on delay of draft provision on basic responsibility of the carrier	6-7	C. Rijeka/Stockholm draft on scope of application	6-8
D. Comparison with other transport conventions	8-12	D. Provision of 1968 Brussels Protocol defining the scope of application of the Convention	9-11
E. Draft proposal to impose carrier liability for delay	13-15	E. Provisions on scope of application in conventions on carriage of goods by rail, air and road	13-17
F. Definition of delay	16-21		
G. Application of limitation of liability rules to delay	22-32		

	Paragraphs		Paragraphs
1. Carriage of goods by rail: CIM Convention	13	3. Exceptions in the 1924 Brussels Convention to the application of the Convention	19-24
2. Carriage of goods by air: Warsaw Convention	15	(a) Charter-parties	19-22
3. Carriage of goods by road: CMR Convention	15	(b) Exception with respect to certain non-commercial shipments: article 6 of the 1924 Brussels Convention	23-24
4. Comparison of provisions of the three transport Conventions	16-17	C. Relevant provisions of other transport conventions	25-27
F. Alternative draft proposals	18-40	1. Carriage by rail: CIM Convention (1970)	25
1. Introduction	18-19	2. Carriage by air: Warsaw Convention (1929)	26
2. Draft proposal based on article 5 of the 1968 Brussels Protocol	20-24	3. Carriage by road: CMR Convention (1956)	27
3. Draft proposal based on article 5 of the 1968 Brussels Protocol and the Rijeka/Stockholm draft	25-37	D. Alternative approaches to scope of application of Convention	28-38
PART THREE. DOCUMENTARY SCOPE OF APPLICATION OF THE CONVENTION	1-27	1. Scope of application based on reference to additional types of documents	28-30
A. Introduction	1	2. Scope of application extending to all contracts of carriage of goods by sea ..	31-38
B. Current law and practice	2-24	PART FOUR. ELIMINATION OF INVALID CLAUSES IN BILLS OF LADING	
1. Provision of the 1924 Brussels Convention concerning documentary scope	2-3	A. Introduction	1-2
2. Ambiguities of the current test for documentary scope of "a bill of lading or any similar document of title"	4-18	B. Clarifying and specifying mandatory requirements of the Convention	3-8
(a) Meaning of "bill of lading"	6-10	C. Listing specific types of invalid clauses in the Convention	9-11
(b) Meaning of "any other document of title"	11-13	D. Setting forth sanctions for invalid clauses ..	12-18
(c) Effect of failure to issue a document ..	14-18	E. Requiring the contract of carriage to contain a notice clause regarding invalid clauses ...	19-27

GENERAL INTRODUCTION

1. The present study is the third in a series of reports prepared by the Secretary-General¹ to assist in the work on international shipping legislation by the United Nations Commission on International Trade Law (UNCITRAL). At its fourth session, UNCITRAL decided to establish an enlarged Working Group on International Legislation on Shipping² and further resolved that:

"The rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain

Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the Protocol to amend that Convention (the Brussels Protocol 1968), should be examined with a view to revising and amplifying the rules as appropriate, and that a new international convention may if appropriate be prepared for adoption under the auspices of the United Nations."³

Topics dealt with at past sessions

2. The matters considered in the present report need to be viewed in connexion with the Commission's over-all work programme in this field. The resolution adopted by the Commission at its fourth session enumerated a number of topics that, "among others, should be considered for revision and amplification of the present rules".⁴ The Working Group at its third session reached decisions as to the following topics:

¹ The first report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/63/Add.1; reproduced in UNCITRAL Yearbook, Vol. III: 1972, part two, IV, annex) was prepared to assist the Working Group on International Legislation on Shipping (hereinafter "Working Group") at its third and fourth special sessions, and it dealt with the following topics: the period of carrier responsibility; responsibility for deck cargoes and live animals; clauses of bills of lading confining jurisdiction over claims to a selected forum; and approaches to basic policy decisions concerning allocation of risks between the cargo owner and the carrier. The second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1; reproduced in UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.) was prepared to assist the Working Group at its fifth session and covered these subjects: unit limitation of liability; trans-shipment; deviation; the period of limitation; definitions under article 1 of the Convention; and elimination of invalid clauses in bills of lading.

² 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.

³ 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.

⁴ See foot-note 2. The areas listed in the resolution adopted at the fourth session of the Commission are as follows: (a) responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents; (b) the scheme of responsibilities and liabilities, and rights and immunities, incorporated in articles III and VI of the Convention as amended by the Protocol and their interaction and including the elimi-

(Continued on next page.)

(a) the period of carrier responsibility; (b) responsibility for deck cargoes and live animals; (c) choice of forum clauses in bills of lading; and (d) basic approaches for the allocation of risks between the cargo owner and the carrier.⁵ At its fourth (special) session, the Working Group considered and adopted draft provisions on (a) the basic rules governing the responsibility of carriers and (b) arbitration clauses in bills of lading.⁶ Then, at its fifth session, the Working Group dealt with the following subjects: (a) unit limitation of liability; (b) trans-shipment; (c) deviation; and (d) the period of limitation.⁷

Materials to be presented at the current sixth session

3. At its fifth session the Working Group noted that it had not yet taken action on the topics of definitions under article I of the Convention and the elimination of invalid clauses; the Working Group placed these items on the agenda for its sixth session.⁸ Part five of the second report of the Secretary-General on the responsibility of ocean carriers for cargo: bills of lading⁹ dealt with definitions under article I of the Convention. Part six of that report dealt with the elimination of invalid clauses in bills of lading; this topic is re-examined in further detail with alternative draft legislative texts, in part four of the present report.

4. At its fifth session the Working Group recalled that its work on the subjects of deck cargo and live animals had not been completed¹⁰ and decided that these items would also be taken up at its sixth session.¹¹

(Foot-note 4 continued.)

nation or modification of certain exceptions to carrier's liability; (c) burden of proof; (d) jurisdiction; (e) responsibility for deck cargoes, live animals and trans-shipment; (f) extension of the period of limitation; (g) definitions under article I of the Convention; (h) elimination of invalid clauses in bills of lading; (i) deviation, seaworthiness and unit limitation of liability.

⁵ Report of the Working Group on the work of its third session, Geneva, 31 January-11 February 1972 (A/CN.9/63; reproduced in 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 (see foot-note 1) was used by the Working Group as its working paper.

⁶ 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 on responsibility of ocean carriers for cargo: bills of lading (see foot-note 1) and two other working papers prepared by the Secretariat: "Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier" (A/CN.9/74, annex I *ibid.*, part two, IV, 2) and "Arbitration clauses" (A/CN.9/74, annex II; *ibid.*, part two, IV, 3).

⁷ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973 (A/CN.9/76; *ibid.*, part two, IV, 5). The Working Group used as its working document the second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (see foot-note 1).

⁸ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973, para. 73, UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

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

¹⁰ See report of the Working Group on the work of its third session (A/CN.9/63), paras. 23-29 and 30-34; UNCITRAL Yearbook, Vol. III: 1972, part two, IV.

¹¹ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973, A/CN.9/76, para. 74; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

5. Consequently for the present sixth session of the Working Group, the Secretariat has prepared a separate working paper concerning the topic of deck cargo.¹² Another document that will be made available to the Working Group at its current session is an UNIDROIT study on the international transport of live animals and the Hague Rules.¹³

6. The Working Group at its fifth session recommended that the agenda for its sixth session should also include the following topics: (a) liability of the carrier for delay and (b) the scope of application of the Convention.¹⁴ Part one of the present report responds to the request of the Working Group that the Secretary-General prepare a report on the topic of delay, setting forth proposals and indicating possible solutions.¹⁵ The Working Group also requested a working paper on the scope of application of the Convention.¹⁶ In response to this request, part two of the present report deals with "geographical scope", and part three discusses "documentary scope". As has been noted, part four deals with invalid clauses in bills of lading (see paragraph 3, above).

7. The Secretary-General invited comments and suggestions by members of the Working Group regarding the topics dealt with in the present report, and a similar inquiry was addressed to international organizations active in the field. The comments received by the Secretariat, as well as a copy of the note verbale, will be made available to the Working Group as an addendum to this report (A/CN.9/WG.III/WP.12/Add.1). The comments that are now available are summarized at relevant points in the present report.¹⁷

¹² A/CN.9/WG.III/WP.14.

¹³ A/CN.9/WG.III/WP.11; reproduced in this volume in the next section.

¹⁴ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973, A/CN.9/76, para. 75; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ It is expected that additional replies will be received subsequent to the preparation of this report. Copies of all replies in their original languages will be available to the members of the Working Group as A/CN.9/WG.III/WP.12/Add.1.

PART ONE: LIABILITY OF OCEAN CARRIERS FOR DELAY

A. Introduction

1. The Working Group at its fifth session decided that the sixth session should consider, among other topics, the liability of ocean carriers for delay with respect to the carriage of cargo.¹ Neither the International Convention for the Unification of Certain Rules Relating to Bills of Lading² nor the Protocol to amend

¹ Report of the Working Group on International Legislation on Shipping on the work of its fifth session, New York, 5-16 February 1973 (A/CN.9/76), para. 75; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

² Hereinafter referred to as the "Brussels Convention". League of Nations, *Treaty Series*, Vol. CXX, p. 157; *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, Vol. II, (United Nations publication, Sales No. E.73.V.3) (hereinafter cited as *Register of Texts*).

that Convention³ sets forth rules addressed directly to carrier liability for delay, and national legal rules vary with respect to some aspects of this question.

2. Both the second report of the Secretary-General on the responsibility of ocean carriers for cargo: bills of lading,⁴ and the discussions of the Working Group at its fifth session⁵ noted the close relationship between delay and other topics which are covered by existing or proposed legislation on bills of lading. For example, analysis of "deviation" revealed that the central practical issue was damage resulting from delay in the performance of the contract of carriage;⁶ decisions with respect to "deviation" were made on the assumption that the Working Group would deal subsequently with liability of the carrier for delay.

B. Bases for recovery for delay under present law and practice

3. The contract of carriage rarely includes an explicit promise by the carrier as to the exact time when he will deliver the goods at their destination. Sailing schedules announced or customarily maintained by the carrier may provide a basis for an implied undertaking as to the time of arrival; however, the bill of lading will often seek to negate any such undertaking. For example, one standard bill of lading includes the following clause:

"The carrier does not guarantee the dates of the departure or arrival of the ship or engage himself to complete the voyage in a given space of time, and he shall not be liable for any damage which may result for the shipper whether in connexion with the cargo or for any other reason, from the fact that the ship does not depart or arrive at the dates on which it might reasonably have been expected so to do from an extraordinary prolongation of the voyage."⁷

The difficulty of basing a claim for delay on a premise in the contract of carriage gives added importance to guarantees provided by the Convention.⁸

³ Hereinafter referred to as the "Brussels Protocol". Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels on 25 August 1924; Brussels, 23 February 1968, *Register of Texts*, ch. II, 1.

⁴ Hereinafter referred to as "second report of the Secretary-General" (A/CN.9/76/Add.1); part three: deviation, paras. 4, 6 and 35, UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

⁵ Report of the Working Group on International Legislation on Shipping on the work of its fifth session, New York, 5-16 February 1973 (A/CN.9/76), paras. 46 and 51; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

⁶ *Ibid.*, para 46; second report of the Secretary-General, para. 35.

⁷ The Single Bill of Lading of the Latin American Ship-owners Association (ALAMAR), Clause II; reprinted in annex III of Bills of lading: report by the secretariat of UNCTAD (E.72.II.D.2), p. 62. Compare the "CONLINE Bill of Lading", clause 13, reprinted *ibid.*, p. 66: No carrier responsibility for loss from delay "unless caused by the carrier's personal gross negligence".

⁸ It has been noted that risks brought about by delay are generally not insurable. Comment by Sweden, UN/IMCO Conference on International Container Traffic, E/Conf.59/39/Rev.1 (Report of the Third Main Committee, 1 December 1972), para. 38. Similarly, the British Institute of Cargo Clauses 1973 exclude from their coverage the "loss of adventure", which is one of the common risks resulting from delay. See Hardy-Ivamy, *Marine Insurance*, 1969, p. 531, *et seq.*

4. As has been mentioned, the Brussels Convention contains no provision addressed to the problem of delay in delivery. However, responsibility for loss resulting from delay in delivery may be based on article 3 (2), which provides that "the carrier shall properly and carefully load . . . , carry . . . , and discharge the goods carried".⁹

5. Where delay causes physical damage to the goods (as through spoilage) the legal grounds for recovery are not analytically different from other claims for physical damage under article 3 (2) of the Brussels Convention. When delay results in economic loss to the consignee (as through inability to fulfil a contract for resale or through a drop in the market value of the goods at the place of destination during the delay period), the above provision of the Convention also provides a basis for recovery,¹⁰ although the case law is sparse and difficulties may be encountered as to burden of proof,¹¹ and also as to the carrier's responsibility for certain types of economic loss.¹²

⁹ The replies to the 23 May 1973 note verbale of the Secretary-General by Norway, Sweden, the Comité Maritime International (CMI) and the secretariat of the Asian-African Legal Consultative Committee all mention that arguably the language of the 1924 Brussels Convention encompasses carrier liability for damages from delay. Similarly, the carrier incurs liability for loss when he violates e.g., his responsibility under article 3 (1) of the Brussels Convention to make the ship seaworthy, and delay results. As to the invalidity of attempts to remove or lessen the carrier's liability by contract, see article 3 (8) of the Brussels Convention.

¹⁰ A frequent rationale for this interpretation is that article 2 of the Brussels Convention defines the scope of carrier liability as "in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods . . ." (emphasis added), and that economic loss from delay arises "in relation to" the carriage and discharge. See *Anglo-Saxon Petroleum v. Adamastos Shipping Co.*, 1957 (1) L.I.L. Rep. 87. See also Stephane Dor, *Bill of Lading Clauses and the Brussels International Convention of 1924*, 2d ed., London, 1960, p. 165. See also Bills of lading: report by the secretariat of UNCTAD, 1971, United Nations publication, Sales No. E.72.II.D.2, para. 291.

¹¹ The legal rules of some jurisdictions create a rebuttable presumption of carrier liability when goods are lost or arrive in a damaged condition; the same concept was adopted in the draft rules developed by the Working Group on basic responsibility of the carrier, as set forth at para. 6 *infra*. In these jurisdictions the presumption of carrier liability does not operate where delay, although causing economic loss to the cargo owner, does not result in physical loss or damage to the goods; instead, the cargo owner has the burden of proving not only his losses but also that his losses were caused by the delay. See, France: René Rodière, *Traité général de droit maritime*, Paris, 1970, Vol. II paras. 608 and 612; Belgium: Pierre Wildiers, *Le connaissement maritime*, 2nd ed.; Antwerp, 1961, pp. 39-40.

¹² There is frequently uncertainty as to what types of economic loss may be too remote from the delay and thus not recoverable from the carrier by the consignee. For example, should the carrier be liable for: (a) a foreseeable drop in the market price during the delay? (b) an unforeseen and unforeseeable drop in the market price during the delay? (c) unavailability of the goods for a special use by the consignee, whether known to or unknown to the carrier? (d) liability for contract breach and loss of goodwill by the cargo owner from inability to fulfil resale agreements? Such questions raise general problems with respect to the measure of damages in contract law, and it seems preferable to resolve these issues in the more general context of the extent and limitation of carrier liability under the Convention rather than in the narrow context of delay only.

Several responses would limit carrier liability for economic loss from delay to some formulation of "foreseeability." Thus

(Continued on next page.)

C. *Effect on delay of draft provision on basic responsibility of the carrier*

6. The Working Group at its fourth (special) session developed the following draft provision on the basic responsibility of the carrier and the burden of proof:

"(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 measures that could reasonably be required to avoid the occurrence and its consequence . . ."¹⁸

This draft provision was designed to replace articles 3(1), 3(2), 4(1), and 4(2) of the Brussels Convention, i.e. the articles that set forth rules as to the rights and duties of carriers.

7. The draft provision quoted above clearly applies to physical loss or damage to the goods resulting from delay: the carrier is liable unless he can meet the burden of proving that "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences." However, since the draft provision only holds the carrier liable "for all loss of or damage to goods carried", under a literal reading it would not extend to economic loss suffered by the cargo owner resulting from delay. As has been noted, the draft provision would replace existing rules (such as the article 3 (2) requirement that the carrier

(Foot-note 12 continued)

Pakistan and the secretariat of the Asian-African Legal Consultative Committee propose that the carrier shall not be liable for any loss or damage which could not reasonably be foreseen at the time the delay occurred as likely to result from the delay; the International Chamber of Commerce suggests that a carrier be held only for "reasonably foreseeable" economic damage from delay; the Comité Maritime International (CMI) favours limiting carrier liability to "direct and reasonable expenses which, at the time of the conclusion of the contract, could reasonably have been foreseen by the carrier as a probable consequence of the delay"; while the Baltic and International Maritime Conference (BIMCO) advocates that "the cargo interests must prove their loss and that the shipowner ought to have known of the special market, etc., at the time of issue of the bill of lading".

If the Working Group adopts alternative proposal D, (*infra*), which establishes a special limitation of carrier liability for delay based on [twice the] freight, the practical importance of limiting carrier liability for delay to "foreseeable" or "proximate" economic damages, will be greatly lessened. See the discussion of alternative proposals C and D at paras. 26-31, *infra*.

¹⁸ 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 (A/CN.9/74), para. 28. See also Compilation by the Secretary-General of draft provisions previously approved by the Working Group (hereinafter referred to as "Compilation") (A/CN.9/WG.III/WP.13), part D, reproduced in this volume as annex to the preceding section. This draft provision continues:

"(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."

"properly and carefully . . . carry, keep, care for, and discharge the goods carried") on which carrier liability for economic loss might be based; the revision would thus remove the existing statutory basis for liability in cases of economic loss apart from physical damage to the goods. Therefore, unless the present draft is supplemented, carrier liability for delay will be reduced from its current level under the Brussels Convention and also under several national maritime codes¹⁴ and some national case law.¹⁵

D. *Comparison with other transport conventions*

8. The Conventions governing the three other modes of international transport expressly provide basic rules for carrier liability in cases of delay. The operative provisions of those Conventions with respect to delay are set forth below:

9. Warsaw Convention¹⁶ (air), article 19:

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods."

¹⁴ See, e.g., article 130 in the Swedish, Norwegian, Danish and Finnish Maritime Codes each of which imposes carrier liability for delay in substantially the following language: "The carrier shall be liable to pay compensation for any damage resulting from delay on his part, or from the ship being lost or becoming irreparable, unless it must be held that neither the carrier nor anyone for whom he is responsible has been guilty of error or neglect." These articles may be found side by side in Rodière, *Lois maritimes nordiques*, pp. 110-111. Scandinavian legislation to enact the Brussels Protocol also specifically covers delay—for Sweden, see *Statens offentliga utredningar*, 1972: 10, *Godsbefordran*; for Norway, see reply to UNCITRAL questionnaire of 23 May 1973.

Merchant Shipping Code of the USSR, article 149: "The carrier shall be obliged to deliver goods within the established periods and, if none have been established within the periods customarily applied." In Czechoslovakia, pursuant to Order 160/1956, the carrier is liable for damage caused by delay. Jan Lopuski, "Le contrat de transport maritime des marchandises dans le droit des pays socialistes européens, 294" *Le droit maritime français* (juin 1973), pp. 371, 375.

Article 422 of the Italian Code of Navigation holds carriers responsible for loss, damage or delay, unless it is shown that the cause of the loss, damage or delay was not in whole or in part the fault of the carrier. Vol. II, Rodière, *Traité général de droit maritime*, Paris, 1968, p. 258.

¹⁵ United Kingdom: *Renton v. Palmyra Trading Corp.* (1956), (2) L.I.L.R.379 (1957), A.C. 149; *Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co.* (1957), (2) Q.B.233 (1958), (1) L.I.L.R.73 (1959), A.C. 133; *The Makedonia* (1962), (1) L.I.L.R.316. See 1 Carver's *Carriage by Sea*, 12th ed., 1971, pp. 195-196. USA: *Comm. Trans. Internat. v. Lykes Bros.* (1957) A.M.C. 1188; *The Iossifoglu* (1929) A.M.C. 1157. In some countries, while rules of law provide for liability for delay, contractual provisions may eliminate such liability: France (see vol. II, Rodière, *Traité général de droit maritime*, Paris, 1958, p. 294); Bulgaria, Poland and the USSR (see, Jan Lopuski, "Le contrat de transport maritime des marchandises dans le droit des pays socialistes européens, 294" *Le droit maritime français*, juin 1973, pp. 371, 375).

See also the replies of the Secretariat of the Asian-African Legal Consultative Committee and of the Baltic and International Maritime Conference, expressing the view that current British law permits recovery by the cargo owner for at least some types of economic damage from delay.

¹⁶ Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw, 12 October 1929. League of Nations, *Treaty Series*, vol. CXXXVII, p. 11. Liability for destruction, loss or damage to goods is dealt with in article 18 (1).

10. CIM Convention¹⁷ (rail), article 27 (1):

"The railway shall be *liable for delay in delivery*, for total or partial loss of the goods, and for damage thereto occasioned between the time of acceptance for carriage and the time of delivery."

11. CMR Convention¹⁸ (road), article 17 (1):

"The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, *as well as for any delay in delivery.*"

12. It will be noted that each of these conventions contains (1) a general rule holding carriers liable for loss or damage to the goods, and also (2) a specific provision imposing liability on carriers solely for delay. In view of the breadth of the general rule concerning "loss or damage to goods", the additional provision on delay would appear to be designed to cover economic loss suffered by the consignee as a consequence of the late arrival of the goods.¹⁹

E. Draft proposal to impose carrier liability for delay

13. To adopt rules expressly governing carrier liability for delay would be in conformity with other major transport conventions. The basic rule on carrier responsibility, adopted by the Working Group at its fourth (special) session could be amended to cover delay, as follows (no words omitted, words to be added are in italics):

Draft provision A

"1. The carrier shall be liable for all loss of or damage *in relation to the goods* carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article [], *and for loss or damage resulting from delay in the delivery of goods subject to a contract of carriage, 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 *or delay* and its consequences."

14. The separate treatment in this draft provision of "loss or damage in relation to goods" and of "loss or damage resulting from delay" follows the pattern of

¹⁷ International Convention Concerning the Carriage of Goods by Rail, signed at Berne, 25 October 1962, United Nations, *Treaty Series*, vol. 241, p. 336. The 1970 revision of CIM incorporates in its article 34 a new procedure for compensation for delay, providing minimal recovery if the claimant did not suffer specific damage as a result of the delay and compensation up to twice the rail freight where there was specific loss or damage due to the delay. See foot-note 35 for the text of this novel provision in the 1970 CIM Convention.

¹⁸ Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva, 19 May 1956, United Nations, *Treaty Series*, vol. 399, p. 189.

¹⁹ The Draft Convention on the International Combined Transport of Goods (TCM Convention) text adopted at the fourth session of the Joint IMCO/ECE Meeting 15-19 November 1971 (CTC IV/18 Rev.1, TRANS/374/Rev.1) provides in article 11 (2): "In case of delay, if the claimant proves that damage has resulted, other than loss of or damage to the goods, the CTO shall pay in respect of such damage compensation not exceeding . . .". See also a discussion of the various proposals as to the coverage of delay in the TCM Convention, in: Economic implications, in particular for developing countries, of the proposed convention on international combined transport of Goods; study by the Secretary-General, ST/ECA/160, 8 May 1972, paras. 86, 135, 146, 154.

the other transport conventions discussed above.²⁰ Furthermore, the phraseology "loss of or damage *in relation to the goods*" preserves the approach of article 2 of the Brussels Convention to prevent the inadvertent narrowing of this basis for recovery and makes it clear that carrier liability in a case where there was no delay extends to both physical damage to the goods and to economic loss.²¹ In the same way, the phrase "loss or damage resulting from delay" covers both physical damage and economic loss suffered as a consequence of delay.

15. The above draft provision extends carrier responsibility to losses from delay without drawing any distinctions on the basis that the delay was occasioned by carrier fault prior to or subsequent to his having taken charge of the goods. Since the concept of "delay" has meaning for purposes of establishing liability for ensuing loss or damage only in terms of divergence from a reasonably expected delivery date, one need not differentiate among delay in taking charge or loading, delay during the voyage, and delay during unloading or surrendering the goods.²²

F. Definition of delay

16. Any attempt to define delay must recognize that precise scheduling is generally not possible in ocean shipping.²³ However, attention may be given to the

²⁰ The replies of Australia, France, Norway, Pakistan, Sweden, Secretariat of the Asian-African Legal Consultative Committee, Office Central des Transports Internationaux par Chemins de Fer (Berne), International Chamber of Commerce, Comité Maritime International and UNIDROIT all favour the inclusion of a separate provision to govern carrier liability for damages from delay. The Baltic and International Maritime Conference and the International Union of Marine Insurance expressed opposition to the inclusion of a provision on delay.

²¹ See discussion in foot-note 10 of the scope of the term "in relation to the goods" in the Brussels Convention. It may be noted that unavailability of the goods to meet the consignee's business needs, with consequent foreseeable economic loss to the consignee, may occur in cases where the goods are lost or seriously damaged in transit, as well as in cases of delay in delivery.

²² It will be noted that the provision on delay does not repeat the limiting phrase, "while the goods were in his charge", which is applicable to loss or damage in relation to goods. The broader language making the carrier responsible "for loss or damage resulting from delay in the delivery of goods . . ." would thus appear to be adequate to include cases in which the carrier, in breach of the contract of carriage, does not take charge of the goods, thereby causing delay in the ultimate delivery of the goods by an alternative carrier who had to be engaged because of the breach by the first carrier.

A draft proposal advanced in the replies of Pakistan and the Secretariat of the Asian-African Legal Consultative Committee would explicitly extend carrier responsibility for damage from delay occurring prior to the time the carrier takes charge. "The carrier shall be liable for all loss or damage caused by delay, whether the delay consists of the late arrival of the vessel for the purpose of performing the contract of carriage, or late performance of the contract of carriage."

²³ Precise timing is made impossible by divergences caused by such factors as weather conditions, different operating speeds of ocean vessels, variances in turn-around times among ports and lines, special handling requirements for some loads, correlation between ship load and speed. One treatise has defined delay as follows: "In any trade, there is a provable bracket between the swiftest and the slowest voyage of vessels of the class employed. Delay is not actionable unless the customary slowest voyage performance is exceeded negligently." A. W. Knauth, *The American Law of Ocean Bills of Lading*, 4th ed., Baltimore, 1953, p. 263.

flexible definition of delay provided by article 19 in the CMR (Road) Convention:²⁴

"Delay in delivery shall be said to occur when the goods have not been delivered within the *agreed time-limit* or when, failing an agreed time-limit, the *actual duration of the carriage having regard to the circumstances of the case*, and in particular, in the case of partial loads, the time required for making up a complete load in the normal way, *exceeds the time it would be reasonable to allow a diligent carrier*."²⁵

17. This CMR provision defines delay, in the absence of a specific agreement by the parties, in terms of an excessive "actual duration of the carriage". In formulating a definition of delay in the context of carriage of goods by sea, it may be preferable to place the emphasis on the failure to deliver goods on time, rather than on the actual duration of the carriage, in order to be certain of covering cases in which goods are delayed not by an excessively long voyage, but because the carrier delays or fails to take charge of them. The following draft definition of delay is therefore keyed solely to the delivery date:

Draft provision B

"Delay in delivery occurs when the carrier does not deliver the goods, in accordance with article [],²⁶ by the date for delivery expressly agreed upon by the parties or, in the absence of such agreement, by the latest date that may normally be required for delivery by a diligent carrier having regard for the circumstances of the case."

18. In draft provision B, the reference to the "date for delivery expressly agreed upon by the parties" is intended to give effect to an express agreement of the parties to a specific date for delivery, but not to a general disclaimer freeing the carrier from liability for consequences of delay.

19. As an alternative, the Working Group may wish to consider omitting from the above draft the phrase "by the date for delivery expressly agreed upon

²⁴ The replies of France, Norway, Sweden, UNIDROIT, and the Comité Maritime International all suggest article 19 of the CMR Convention as a model for formulating a draft definition of delay in the new convention on carriage of goods by sea.

²⁵ Italics added for emphasis. There is no definition of delay in the Warsaw (Air) Convention or in the 1962 CIM (Rail) Convention.

Article 11 (1) of the IMCO/ECE Draft TCM Convention (see foot-note 19) defined delay in the following manner: "Delay in delivery of the goods shall be deemed to occur when the CTO (Combined Transport Operator) has not made the goods available for delivery to the consignee within the agreed time-limit, when the actual duration of the whole combined transport operation, having regard to the circumstances of the case, exceeds the time it would be reasonable to allow for its diligent completion." The responses of UNIDROIT and the Office Central des Transports Internationaux par Chemin de Fer (Berne) suggest the TCM definition of delay as a good example to be followed.

²⁶ The reference is to the definition of delivery established by the Working Group in para. (ii) of the proposed revision of art. 1 (e). See Working Group, report on third session para. 14 (1); UNCITRAL Yearbook, Vol. III: 1972, part two, IV. Compilation, part B (reproduced in this volume as annex to the preceding section).

by the parties, or, in the absence of such agreement", thus making all contracts of carriage subject to the standard set by "a diligent carrier having regard for the circumstances of the case"; this single standard may be useful to guard against the possibility that a carrier might avoid liability for delay by inserting in the bill of lading a date for delivery far in the future.²⁷

20. The draft definition of delay combines the general standard of conduct by a "diligent carrier" with a consideration of "the circumstances of the case". In effect, the test may be paraphrased as asking how a diligent carrier placed in the shoes of the contractual carrier would have conducted this particular voyage, under the given circumstances; if a normally diligent carrier would have made this delivery in less time, there was delay. The customs of the particular trade and ports concerned and the characteristics of the vessel involved will be the crucial factors in determining whether or not there was any delay.

21. Of course, the existence of "delay" does not automatically establish carrier liability since the carrier may show that he was not at fault as "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or the delay and its consequences".²⁸ Furthermore, the draft is based on the view that under the rules on the basic responsibility of carriers, the respective burdens of proof of carriers and cargo-owners should be the same in cases of delay as in other cases of loss or damage.²⁹ Thus under the modified rule on basic responsibility of carriers discussed at paragraph 13 and the above definition of delay, the cargo owner only has to show a *prima facie* case of "delay" in order to shift to the carrier the burden of proving that neither he, nor his agents or servants, were to blame for the delay.³⁰

G. Application of limitation of liability rules to delay

22. Case law has generally held that the rules limiting carrier liability under the 1924 Brussels Con-

²⁷ In the converse situation, however, a carrier may still escape liability based on a very short deadline for delivery, by proving that he was not to blame for the delay. See the discussion on carrier responsibility for delay at para. 21, *infra*.

²⁸ Draft provision A at para. 13 *supra*, the operative section imposing carrier liability for delay, frees the carrier from liability if "the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or delay and its consequences".

²⁹ The response of the Union of Soviet Socialist Republics advocates treating delay in the same way as the draft provision imposing general carrier responsibility for loss or damage to the goods in case of carrier fault. See Compilation, part D (reproduced in this volume as annex to the preceding section).

³⁰ It is believed that the "fault" concept incorporates automatically a consideration of the special circumstances both of the particular voyage and of sea transport in general; a number of responses received by the Secretariat were concerned that any definition of delay take into account such special circumstances. Damage from delay occasioned by steps for saving lives and/or property at sea has already been dealt with by the Working Group at its fifth session when it adopted the provision that "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" (Working Group, report on fifth session, paras. 54 (2), 55) (UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5); see also Compilation, part F, reproduced in this volume as annex to the preceding section.

vention are applicable to loss from delay.³¹ Article 4 (5) of that Convention is as follows:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to *or in connexion with goods* in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."³²

23. The phrase "in connexion with goods", in italics in the quotation above, was the vehicle permitting case law to hold that the provision on limitation of carrier liability extended to economic loss from delay. Consequently the maximum total carrier liability for physical loss or damage to the goods and economic loss suffered by the shipper or consignee combined could not exceed the limitation established by article 4 (5) of the Brussels Convention.

24. However, the Working Group at its fifth session adopted a draft provision on limitation of liability, stating in part:³³

Article A

"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 or gross weight of the goods lost or damaged, whichever is the higher."

25. As the foregoing formulation omits the general term "in connexion with goods" that appeared in the Brussels Convention in favour of the more limited phrase "loss of or damage *to the goods*", in its present form the draft limitation of maximum carrier liability probably does not apply to economic loss incurred by the shipper as a result of delay or even as a result of the physical loss or damage of the goods. If the Working Group takes the view espoused in draft provision A regarding the definition of carrier liability,³⁴ then retention of the restrictive terminology of "loss of or damage *to the goods*" in the provision on limitation of carrier liability would mean that the per unit or per package

limitation covered only physical loss or damage while these would be no limitation on liability for economic loss.

26. Consequently, the Working Group may wish to consider the following amendment to the rule on limitation of liability developed at the fifth session (words to be added are in italics; words to be deleted are enclosed in square brackets):

Draft provision C

Article A

"1. The liability of the carrier [for loss of or damage to the goods] *relating to a contract of carriage under this Convention* 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] *affected*, whichever is the higher."

Article B

"1. The defenses 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)] *relating to [the goods covered by] a contract of carriage whether the action be founded in contract or in tort.*"

27. It will be noted that draft provision C prescribes a single standard for calculating the carrier's limits of liability, without any reference to the nature of the carrier fault giving rise to the carrier's liability or to the type of loss or damage suffered by the goods directly or by the shipper, consignee, as a consequence of the fault of the carrier. On the other hand, two major transport conventions incorporate special limitation rules which are applicable only to cases of carrier liability for delay:

CMR Convention, article 23

"5. In the case of delay, if the claimant proves that damage has resulted therefrom the carrier shall pay compensation for such damage not exceeding the carriage charges."

CIM Convention, article 34

"2. If it is proved that damage has, in fact, resulted from the delay in delivery compensation not exceeding the amount of the carriage charges shall be payable."³⁵

28. The Working Group may wish to consider a similar approach, providing for a special limitation on

³¹ Com. Court of Antwerp, 13 June 1955. J.P.A. 1955, p. 371; *Badhwar v. Colorado* 1955, A.M.C. 2139, affirmed 1957, A.M.C. 1972; *Comercio Transito v. Lykes Bros.* 1957, A.M.C. 1188; *Renton v. Palmyra*, 1956 (2) L.I.I. Rep. at p. 87. See also Stephane Dor, Bill of Lading Clauses and the Brussels International Convention of 1924, 2nd ed., London 1960, p. 165 *et seq.* *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt G.m.b.H.* (1963) A.M.C. 665 Commentators are in accord with this view: 1 Carver's *Carriage by Sea*, 12th ed., 1971, p. 193. II-Rodiére, *Traité général de droit maritime*, 1968, p. 417.

³² Article 2 (a) of the 1968 Brussels Protocol is substantially similar: "Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to *or in connexion with the goods* in an amount exceeding the equivalent of Frs. 10,000 per package or unit or Frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher."

³³ Italics added for emphasis; see Compilation, part J; reproduced in this volume as annex to the preceding section.

³⁴ See discussion at paras. 6-7 as to the effect of the draft provision on basic carrier responsibility that the Working Group had adopted at its fourth (special) session.

³⁵ Under the 1970 revision of the CIM Convention, maximum carrier liability for actual damage from delay has been increased to twice the rail freight.

Article 34 of the 1970 CIM Convention provides: "(1) In the event of the transit period being exceeded by more than 48 hours and, in the absence of proof by the claimant that loss or damage has been suffered thereby, the railway shall be obliged to refund one-tenth of the carriage charges, subject to a maximum of 50 francs per consignment. (2) If proof is furnished that loss or damage has resulted from the transit period being exceeded, compensation not exceeding twice the amount of the carriage charges shall be payable."

recovery for economic loss from carriers, such as the following:³⁶

Draft provision D

Article A

"1. The liability of the carrier under this Convention 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. The liability of the carrier under this Convention, other than for loss of or damage to the goods under paragraph 1 of this article, shall not exceed the amount of [twice the] freight charges attributable to the goods with respect to which such liability was incurred."

"3. In no case shall the aggregate liability of the carrier, under both paragraphs 1 and 2 of this article, exceed the limitation which would be established under paragraph 1 of this article for total loss of the goods with respect to which such liability was incurred."

29. Draft provision D establishes a general per weight or per package limitation on carrier liability for physical loss of or damage to the goods from any cause for which the carrier is held responsible under the Convention. It further provides as a special limitation the amount of [twice the] freight for any damage to the shipper/consignee other than physical loss of or damage to the goods. Draft provision D makes no distinction based on the nature of the act or omission of the carrier giving rise to his liability; the distinction between paragraphs 1 and 2 turns on the nature of the loss or damage suffered. For example, paragraph 1 of draft provision D covers all physical loss or damage to goods, such as spoilage, regardless of whether the spoilage was a consequence of improper handling (e.g. improper refrigeration on board) or of delay in delivery or of a combination of improper handling and delay. In a parallel fashion, under paragraph 2 of draft provision D the special limitation amount of [twice the] freight is applicable to any liability for loss other than physical loss of or damage to the goods (economic loss) and would have particular relevance to such loss resulting from delay.

30. Paragraph 3 of draft provision D makes it clear that the limitations on carrier liability under paragraphs 1 and 2 are not cumulative.³⁷ By virtue of paragraph 3, maximum carrier liability will never exceed the per package or per weight limitation established by paragraph 1 since that is the maximum for which the carrier would be liable in the case of total loss of goods. The application of the above draft provision

may be explained in the setting of the following concrete situation.

Case No. 1: Assume that in the course of carriage the goods are physically damaged to the value of \$600; in addition, the shipment is delayed and as a result thereof the consignee suffers, because of the unavailability of the goods, economic loss in the amount of \$300. Assume further that the limitation on liability under paragraph 1, based on the weight, package formula, is \$500 and the limitation on liability under paragraph 2, based on the freight charges, is \$200. By virtue of the rule of paragraph 3, the carrier's total liability would be limited to \$500, which is the maximum recovery under paragraph 1 for total loss of the goods in question.

Case No. 2: As a variation on the above facts, assume that the goods had been physically damaged only to the extent of \$50, while the economic loss resulting from the delay (as in the above example) is \$300. On these facts, the carrier's total liability would be limited to \$50 (paragraph 1) plus \$200 (paragraph 2), a total of \$250.

Case No. 3: The goods were subject to physical damage of \$600 resulting from faulty refrigeration during carriage; there was additional physical damage of \$300 resulting from spoilage because of delay in carriage, so that total physical damage was \$900. The limitation of \$500 under paragraph 1 would govern the aggregate of both types of physical loss; it would not be necessary to ascertain the degree to which each of these factors produced the loss. Since the recovery for physical loss exhausts the paragraph 1 limitation on liability, there would be no recovery for economic loss resulting from the delay or other cause.

31. It may be useful to note the limitations that would result in the above cases under draft provision C. In cases 1 and 3, the result would be the same under draft provision C as under draft provision D—\$500—since the sole weight/package limitation under draft provision C applies to all types of damage. In case No. 2, under draft provision C, by virtue of its single \$500 limitation, the shipper/consignee could recover the physical damage (\$50) plus his economic loss (\$300), a total of \$350.

32. Alternatively, the Working Group may wish to modify draft provision D so as to have the limitation in paragraphs 1 and 2 operate independently and therefore potentially cumulatively. This consequence could be achieved by deleting paragraph 3. Under such a formulation, maximum carrier liability would be the aggregate of the two limitations which could arise in a case of total loss or heavy physical damage coupled with extensive economic losses. Under another possible approach, draft provision C might be subject to an exception that liability as a consequence of delay, regardless of whether the damage be physical or economic or a combination of the two shall be limited to [twice the] freight.³⁸ A disadvantage of this approach is that it makes maximum carrier liability depend on the nature of carrier fault and is likely to

³⁶ The replies of France, the International Chamber of Commerce, the International Union of Marine Insurance, UNIDROIT, Comité Maritime International all favour freight as the maximum amount of carrier liability for delay; (the French response also mentions the possibility of establishing "twice the freight" as the limitation of carrier liability for delay).

³⁷ The reply of the Comité Maritime International supports this approach. Similarly, article 34 (3) of the 1970 CIM Convention provides that compensation for delay "shall not be payable in addition to that which would be due in respect of total loss of the goods".

³⁸ Such modification of draft provision C would lead to the following results in the cases discussed in paragraph 30, *supra*: case No. 1, \$500; case No. 2, \$250 assuming none of the \$50 physical damage was due to delay; case No. 3, \$500.

create litigation over the underlying basic cause behind acknowledged physical damage from one of several possible causes for each of which the carrier is responsible under the Convention.

H. *Presumption of loss of delayed cargo: Subsequent recovery*

33. If goods have not arrived within a reasonable period, it may not be readily apparent whether they have been lost or merely delayed. The uncertainty may persist indefinitely in cases of loss, or until the goods are finally delivered in cases of delay.

34. The Working Group may wish to consider the adoption of a provision that would enable cargo owners to recover as if the goods were known to have been lost, after an extended period of unexplained non-delivery but prior to a conclusive showing that the goods were in fact lost by the carrier. This provision would specify a fixed point at which goods are presumed lost, but preferably would also include a procedure for preserving both the cargo owner's right to the goods and his course of action for delay should the goods be in fact recovered subsequently.³⁹ Two transport conventions contain rules on presumption of loss and subsequent recovery:

35. CMR (Road) Convention, article 20:

"1. The fact that goods have not been delivered within thirty days following the expiry of the agreed time-limit, or, if there is no agreed time-limit, within sixty days from the time when the carrier took over the goods, shall be conclusive evidence of the loss of the goods, and the person entitled to make a claim may thereupon treat them as lost.

"2. The person so entitled may, on receipt of compensation for the missing goods, request in writing that he shall be notified immediately should the goods be recovered in the course of the year following the payment of compensation. He shall be given a written acknowledgement of such request.

"3. Within the thirty days following receipt of such notification, the person entitled as aforesaid may require the goods to be delivered to him against payment of the charges shown to be due on the consignment note and also against refund of the compensation he received less any charges included therein but without prejudice to any claims to compensation for delay in delivery under article 23, and, where applicable, article 26.

"4. In the absence of the request mentioned in paragraph 2 or of any instructions given within the period of thirty days specified in paragraph 3, or if the goods are not recovered until more than one year after the payment of compensation, the carrier shall be entitled to deal with them in accordance with the law of the place where the goods are situated."

36. CIM (Rail) Convention, article 30:

"1. The person entitled to make a claim for the loss of goods may, without being required to furnish further proof, treat goods as lost when they have not been delivered to the consignee or are not being

held at his disposal within thirty days after the expiry of the transit periods.

"2. (Language identical to article 20 (2) of the CRM Convention quoted above, i.e. request for notification on receipt of compensation by cargo owner.)

"3. Within the 30 days following receipt of such notification, the person entitled as aforesaid may require the goods to be delivered to him at any station on the route, against payment of the charges arising on the consignment from the forwarding station where delivery is made and also against refund of the compensation he received, less any charges included therein but without prejudice to any claims to compensation for delay in delivery under article 34 of this Convention and, where applicable, article 36 of this Convention.

"4. In the absence of the request mentioned in paragraph 2 above or of any instructions given within the period of thirty days specified in paragraph 3 above, or if the goods are not recovered until more than one year after the payment of compensation, the railway shall be entitled to dispose of them in accordance with the law and regulations of the State to which the railway belongs."

37. Should the Working Group decide to adopt provisions with respect to the presumption of loss and subsequent recovery of goods, it may wish to consider the following draft proposal based on the CMR and CIM Conventions provisions quoted above:

Draft provision E

Presumption of loss: subsequent recovery

"1. The person entitled to make a claim for the loss of goods may, without being required to furnish further proof, treat the goods as lost when they have not been delivered to the consignee as required by article [] within [sixty] days following the expiry of the agreed date for delivery, or, if there is no delivery date agreed upon, within [sixty] days following the expiry of the date a diligent carrier would have made delivery under the circumstances.

"2. The person so entitled may, upon receipt of compensation from the carrier for the missing goods, request in writing that he shall be notified immediately should the goods be recovered within [one year] from the date the payment of compensation was received. Such person shall be given a written acknowledgement of the request.

"3. Within the thirty days following receipt of such notification, the person entitled as aforesaid may require the goods to be delivered to him against payment of the charges shown to be due for the shipment of such goods and also against refund of the compensation for loss which the claimant may have received less any charges included therein but without prejudice to any claims to compensation for delay in delivery under article [].

"4. In the absence of the request mentioned in paragraph 2 or of any instructions given within the period of thirty days specified in paragraph 3, or if the goods are not recovered within one year from the date the payment of compensation was received,

³⁹ The response of the Comité Maritime International points out that such a provision will become necessary if the Working Group should adopt freight as the maximum carrier liability for delay.

the carrier shall be entitled to dispose of the goods in accordance with the law of the place where the goods are situated."

38. The procedure outlined above provides a relatively simple method of recovery to the consignee in cases of extended, unexplained delay in the delivery of goods. Although under the circumstances of paragraph 1 the person entitled to delivery of the goods may treat them as lost, the carrier may rebut the presumption of loss by meeting the burden of showing that in fact the goods are merely delayed and are not lost. At the same time, the draft rules on presumption of loss and subsequent recovery of goods offer protection to the consignee of presumptively lost but subsequently recovered goods of a value greatly in excess of the maximum carrier liability under the Convention and thus guard against a quick windfall profit to the carrier as a result of his extended delay in delivery. The Working Group may wish to consider a longer period of possibly two years for the recovery period during which the consignee has the option of relinquishing the compensation for presumptively lost goods in favour of the recovery of the goods.

PART TWO. GEOGRAPHIC SCOPE OF APPLICATION OF THE CONVENTION

A. Introduction

1. The Working Group¹ at its fifth session decided that the sixth session should consider, among other topics, the scope of application of the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading (Brussels Convention of 1924).²

2. This part of the third report of the Secretary-General responds to the request made by the Working Group to the Secretary-General that a paper be prepared dealing with issues regarding the scope of the Convention in a geographical sense, i.e. the contacts between the carriage of goods and a contracting State that render the rules of the Convention applicable.

B. Provision defining the scope of the Brussels Convention of 1924

3. 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."

4. This brief provision has been considered unsatisfactory because of the narrow scope given to the Convention and also because of difficulties of interpretation which have resulted in a variety of different national solutions to the problems of scope.³ It may also be noted that some Contracting States in incorporating the substantive rules of the Convention into

their national legal system, have given those rules wider scope than required by article 10.⁴

5. Major problems resulting from the formulation of article 10 of the Brussels Convention of 1924 are the following:

(a) Article 10 does not specifically limit the application of the Convention to the *international* carriage of goods; consequently, under a literal reading of the article the Convention would apply to a contract for carriage from one port to another in the same State. This approach has been followed by some contracting States⁵ while others have refused to apply the Convention to what have been termed to be legal relations of a predominantly "internal" character.⁶ Legal systems employing the Convention only for international carriage have focused on the foreign destination of the cargo (e.g. Italy) or on the nationality of the parties to the contract of carriage (e.g. France).

(b) Under article 10, if the bill of lading is "issued" in a non-contracting State the Convention will not be applicable even though the goods are loaded in a port in a contracting State. In the majority of cases the bill of lading is issued at the port of loading, but there are instances in which the bill of lading is issued in another State.

Many national enactments of the Brussels Convention of 1924 (even prior to the Brussels Protocol of 1968) adopted the criterion of the State where the carriage by sea began instead of the Convention criterion of the State of issuance. For example, the United Kingdom Carriage of Goods by Sea Act states that the rules shall have effect with respect to "ships carrying goods from any port in Great Britain".⁷ The United States Carriage of Goods by Sea Act states that it shall apply:

"To all contracts for carriage of goods by sea to or from ports in the United States . . .".⁸ (Italics added.)

(c) The Convention does not apply in cases where the bill of lading was issued in a non-contracting State even though the State at whose port the goods were discharged was a contracting State. Thus if the State where the goods were discharged is a contracting State but the place of issuance of the bill of lading (or the place of loading) is not a contracting State, the court in a contracting State will not be required to apply the Convention; the court will refer to its rules on conflict of laws to find the applicable law. This issue has been the subject of much discussion; divergent

¹ Report of the Working Group on International Legislation in Shipping on the Work of its fifth session, Geneva, 5 to 16 February 1973 (A/CN.9/76) para. 75; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

² League of Nations, *Treaty Series*, vol. CXX, p. 157; reproduced in *Register of Texts*, vol. II, ch. II, 1.

³ See International Maritime Committee, XXIVth Conference held at Rijeka, 1959 Proceedings (herein referred to as Rijeka Conference Proceedings), pp. 134-137; Legendre, *La Conférence Diplomatique de Bruxelles de 1968, Droit Maritime Français*, pp. 387, 392-395 (1968).

⁴ e.g. United States Carriage of Goods by Sea Act 46 U.S.C.A. 1300-1315, sec. 13; Belgium, Law of 28 November 1929, Article 91, Belgian Commercial Code as quoted in 2 Carver, *Carriage by Sea*, p. 1344 (12th ed., 1971); France, Law of 18 June 1966, article 16.

⁵ e.g. United Kingdom, Carriage of Goods by Sea Act, 1924, Art. 4.

⁶ e.g. France and Italy, Carver, *Carriage by Sea* (12th ed., 1971) pp. 1345, 1347.

⁷ A question has been raised as to whether the Act applies only to goods which are loaded on board in Great Britain or whether it also applies to goods which were loaded on board elsewhere but which were on board when the ship called at a British port during its voyage. Scrutton on *Charter Parties* (17th ed., 1964) p. 400.

⁸ United States Carriage of Goods by Sea Act, section 13.

solutions have been offered which will be discussed below. In this connexion it will be recalled that some national enactments such as those of the United States, Belgium and France have extended the scope of application of the rules of the Convention so that these rules will govern whenever goods are carried to their ports.⁹

(d) Many contracting States have not given full effect to article 10 in their national version of the Convention. Article 10 states that "the Convention shall apply to all bills of lading issued in *any* of the Contracting States" (italics added). However, the text on scope of application as adopted in many contracting States provides that the statutory rules shall apply to bills of lading issued in the *enacting* State or to the carriage of goods from the *enacting* State. Under such enactments the question has arisen whether the courts of a contracting State (C1) will apply the rules of the Convention to a bill of lading issued in another contracting State (C2). If the legislation of C1 provides only that all bills of lading issued in or goods carried from C1 shall be governed by the Convention rules, the courts in C1 may thus not be required to apply those rules for carriage from another contracting State (C2). For example, this problem exists under the United Kingdom Carriage of Goods by Sea Act of 1924, which states in article 1:

"1. Subject to the provisions of this Act, the rules shall have effect in relation to and in connexion with the carriage of goods by sea in ships carrying goods *from any port in Great Britain or Northern Ireland* to any other port whether in or outside Great Britain or Northern Ireland."¹⁰ (italics added.)

It will be noted that this language directs the courts in the United Kingdom to apply the Act (Convention rules) to the carriage of goods from a United Kingdom port, but does not direct application of the Act to carriage from the port of another State even though that State is a party to the Convention. The British court will look to its own conflict of laws rules for the proper law to be applied.¹¹ The conflicts rules may

⁹ e.g. the Belgium Law provides: "A negotiable bill of lading for the carriage of goods by any vessel, of whatever nationality from or to a port of the Kingdom or the colony is subject to the following rules: ..." See Carver at foot-note 4 above.

¹⁰ The problem is less acute with respect to national enactments such as that of the United States. The United States Carriage of Goods by Sea Act states at sec. 13: "This Act shall apply to all contracts for the carriage of goods by sea *to or from ports in the United States* in foreign trade." Thus as long as the carriage was *to* a port in the United States the Convention will apply. However, if the carriage of goods was neither from nor to the United States the bill of lading does not require the application of the U.S. COGSA, and the U.S. courts would not be bound to apply the Convention (or COGSA rules) although the bill of lading was issued in another contracting State, and involved carriage between other ports of contracting States.

¹¹ At the Rijeka Conference of the International Maritime Committee the delegate for Great Britain stated: "under British law the first question which the court has to determine is what is the proper law of the contract, or in other words what is the law that governs the contract. Once it has done that it then looks to see whether or not under the proper law of the contract the Hague Rules shall compulsorily apply. Thus, if a Bill of Lading is issued in a foreign country for a shipment to England, and that country has Hague Rules legislation but the

well lead to the application of the Convention when the goods have been shipped from a State which is a party to the Convention; but the result is not clearly predictable and in such a case the application of the Convention, expected by the States parties to the Convention, may be defeated.

C. Rijeka/Stockholm draft on scope of application

6. Criticism of the rule on scope of application set forth in article 10 of the Brussels Convention of 1924 led to thorough discussion of the subject at the XXIVth Conference of the International Maritime Committee (CMI) held at Rijeka. A draft of a proposed revision of article 10 was adopted at the Rijeka Conference;¹² this draft became part of the draft Protocol adopted at the XXVIth Conference of the International Maritime Committee held in Stockholm in 1963.¹³

7. The Rijeka/Stockholm draft of article 10 reads as follows:

"The provisions of this Convention shall apply to every bill of lading for carriage of goods from one State to another, under which bill of lading the port of loading, the port of discharge or one of the optional ports of discharge, is situated in a Contracting State, whatever may be law governing such bill of lading and whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person."

8. The Rijeka/Stockholm draft was designed to widen the scope of application and to overcome the ambiguities in the formulation of the Convention provision on scope of application which resulted in divergent national interpretation. The aims of the draft were to be accomplished by setting forth precise criteria to determine the application of the Convention. Significant features of the Rijeka/Stockholm draft included the following:

(a) "from one State to another." This phrase eliminated the possibility raised in article 10 of the Brussels Convention of 1924 that the Convention rules would govern carriage of goods from one port to another of the same Contracting State. This phrase made it clear that application of the Convention was mandatory only with respect to the international carriage of goods, and thus met objections (see paragraph 5 (a) above) to the application of the Convention to coastal trade.

(b) "The port of loading, the port of discharge or one of the optional ports of discharge, is situated in a Contracting State." Unlike article 10 of the Brussels Convention of 1924, the Rijeka/Stockholm draft provided three alternative bases for applying the Convention:

(i) "The port of loading";

bill of lading is nevertheless governed by English law, the English court will not apply the Hague Rules because under our law, the Hague Rules only apply compulsorily outwards from the United Kingdom." Rijeka Conference Proceedings, p. 377. See also Carver, *Carriage by Sea* (12th ed., 1971) pp. 266-268, commenting on *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277.

¹² CMI Rijeka Conference Proceedings, p. 391.

¹³ CMI Stockholm Conference Proceedings, p. 551.

(ii) "The port of discharge", named in the bill of lading;

(iii) "One of the optional ports of discharge".

This third term was defined in the report of the International Sub-Committee on Conflicts of Law which was presented to the Rijeka Conference as follows: "if for one reason or another, the goods do not reach the port of discharge originally stipulated, the Convention should apply both when the original port of destination is situated in a Contracting State and when the *actual port of discharge* is so situated."¹⁴ It appeared from the discussion at the Stockholm Conference that the rule would apply only if the bill of lading contained a stipulation regarding an optional port or optional ports.¹⁵

(c) "Whatever may be the law governing such bill of lading." This phrase is designed to make it clear that courts of contracting States may not rely on national conflict of law rules to determine whether the Convention applies, provided the bill of lading involved is covered by the definition of article 10. For example, under this rule English courts would not be permitted to resort to English conflict of laws to find the law applicable to a carriage from another contracting State to the United Kingdom; in such a situation British courts would accept the Convention rules as the applicable law.

(d) "Whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person." This phrase is designed to preclude the use of the nationality of the ship or any person involved in the carriage as a criterion for the application of the Convention. Article 10 of the Brussels Convention of 1924 does not specifically preclude the use of nationality as a criterion and, as has been stated above, in certain cases national courts have made use of this criterion, particularly in a negative sense to prevent the application of the Convention where the contract of carriage had no international element.¹⁶

D. Provision of the 1968 Brussels Protocol defining the scope of the application of the Convention

9. Article 5, the provision in the 1968 Protocol to amend the Brussels Convention of 1924¹⁷ dealing with scope, retained some features of the Rijeka/Stockholm draft, but it also made substantial changes in that draft. Article 5 of the Protocol reads as follows:

Article 5

Article 10 of the Convention shall be replaced by the following:

"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."

10. The first paragraph of article 5 of the 1968 Brussels Protocol provision contains the following features:

(a) "Carriage of goods between ports in *two different States*." Like the Rijeka/Stockholm draft, but unlike article 10 of the Brussels Convention of 1924, the Protocol provision expressly limits the application of the Convention to the international carriage of goods.

(b) "Bill of lading is issued in a contracting State." By this language, subparagraph (a) of the Protocol provision retains the basic criterion of the 1924 Brussels Convention for scope of application of the Convention.

(c) "From a port in a Contracting State." Subparagraph (b) adds (in modified language) one of the three alternative criteria found in the Rijeka/Stockholm draft.

(d) Subparagraph (c) requires the application of the Convention whenever the parties to the contract of carriage have specified by a "clause paramount" in their contract that the rules of the Convention should apply.¹⁸ Under this rule, even if none of the above tests for applicability is met, when the parties specify that the Convention rules are to govern their contract, the courts of a contracting State must apply those rules. Subparagraph (c), like the Rijeka/Stockholm draft, also excludes the nationality of the ship or persons concerned as criteria for the application of the Convention.

11. The second paragraph of article 5 of the 1968 Protocol appears to be designed to emphasize that contracting States undertake to apply the Convention not only to bills of lading relating to shipment originating in their own ports, but also to shipment originating in ports of any *other* contracting State; expressed more generally, the contracting State will apply the Conven-

¹⁸ A "clause paramount" is a clause in the bill of lading providing that the Brussels Convention of 1924 shall govern the contract of carriage. For example, the CONFLINE liner bill of lading states: "2. *Paramount clause*. The Hague Rules contained in the International Convention for the Unification of certain Rules relating to Bills of Lading, dated at Brussels the 25th August 1924, as enacted in the country of shipment shall apply to this contract. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply." Report by the secretariat of UNCTAD on bills of lading, TD/B/C.4/ISL/6/Rev.1 (United Nations Publication Sales No. E.72.II.N.2), Annex III, B. Some national enactments of the Convention require a "clause paramount" to be inserted in all bills of lading (e.g. United States, United Kingdom) and many carriers insert a "paramount clause".

¹⁴ Rijeka Conference Proceedings, p. 137.

¹⁵ Stockholm Conference Proceedings, p. 516.

¹⁶ See paragraph 5 (a) above.

¹⁷ Protocol to amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading signed at Brussels on 25 August 1924, Brussels 1968, *Register of Texts*, vol. II, ch. II.

tion whenever one of the tests set forth in paragraph 1 is met. This paragraph is addressed to the problem raised by national enactments of the Convention (such as the United Kingdom Carriage of Goods by Sea Act) which require the application of the Convention's rules only if the carriage is from a port of the enacting State. This problem is more fully discussed above at paragraph 5 (d).

12. The third paragraph of article 5 of the 1968 Brussels Protocol emphasizes that contracting States may widen the scope of application of the Convention in their national enactments of the Convention; for example contracting States may include the port of discharge in their national enactment of the Convention as a criterion for the application of the Convention.¹⁹

E. *Provisions on scope of application in conventions on carriage of goods by rail, air and road*

1. *Carriage of goods by rail: CIM Convention*²⁰

13. Article 1 (1) provides:

"This Convention shall apply, subject to the exception set forth in the following paragraphs, to the carriage of goods consigned under a through consignment note for carriage *over the territories of at least two of the Contracting States*. . .". (Italics added.)

2. *Carriage of goods by air: Warsaw Convention*²¹

14. Article 1 provides:

"1. This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

"2. For the purpose of this Convention the expression 'international carriage' means any carriage in which, according to the contract made by the parties, *the place of departure and the place of destination* whether or not there be a break or a trans-shipment, *are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention*. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purpose of this Convention." (Italics added.)

¹⁹ The reply of the Norwegian Government indicates that "in the new legislation based on the protocol, Norway—like the other Nordic countries—has exercised the *option* contained in the last paragraph of article 5 to extend the scope of application and make the rules applicable also to carriage from a non-contracting State to any of the Nordic States."

²⁰ International Convention concerning the Carriage of Goods by Rail (CIM), 1952, United Nations, *Treaty Series*, vol. 241.

²¹ The Convention for the Application of certain Rules relating to International Transportation by Air, 1929, League of Nations, *Treaty Series*, vol. CXXXVII, p. 13. The 1955 Hague Protocol to the Warsaw Convention changes some language in article 1 but does not change the substance.

3. *Carriage of goods by road: CMR Convention*²²

15. Article 1 (1) states the following:

"This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when *the place of taking over of the goods and the place designated for delivery*, as specified in the contract, *are situated in two different countries, of which at least one is a contracting country*, irrespective of the place of residence and the nationality of the parties." (Italics added.)

4. *Comparison of provisions of the three transport Conventions*

16. The Carriage of Goods by Rail Convention (CIM) provides that carriage of the goods through the territory of at least *two contracting States* is a prerequisite for its application. The Warsaw Convention (Carriage by Air) requires that both the place of departure and the place of destination be in a contracting State; the requirement that the carriage be international is preserved in cases where the place of departure and destination are in the same contracting State by considering the carriage international if there is an agreed stopping place in any other State.

17. The Carriage of Goods by Road Convention (CMR) is applicable if either the State where the goods are taken over or the State designated as the place for delivery is a contracting State. It will be noted that this approach is similar to that taken in the Rijeka/Stockholm draft.²³

F. *Alternative draft proposals*

1. *Introduction*

18. The Rijeka/Stockholm draft and article 5 of the 1968 Brussels Protocol are similar in approach in a number of important ways. Both provisions reject the use of the nationality of the parties or of the ship to provide a criterion for applying the Convention. Both formulations reject the unqualified application of the Convention to all international carriage of goods by sea; both provisions also reject the general principle underlying the Warsaw Carriage by Air Convention and the Carriage of Goods by Rail Convention under which application of the Convention depends on contact by the goods during carriage with at least *two contracting States*. In addition, both the Rijeka/Stockholm draft and the 1968 Brussels Protocol adopt the prerequisite that the carriage must be international before it may be governed by the Convention. Both accept the principle of using a geographical contact between *one contracting State* and the specific carriage of goods as a criterion to determine whether or not the Convention will be applied.

19. There is one important difference between these two provisions. Under the Rijeka/Stockholm draft both the port of loading and the port of discharge are considered as having sufficient links with the specific carriage.

²² The Convention on the Contract for the International Carriage of Goods by Road (CMR) United Nations, *Treaty Series*, vol. 399, p. 189.

²³ The CMR Convention is also similar to the Rijeka/Stockholm draft and the 1968 Protocol in specifically excluding use of the nationality of the parties as a criterion for determining the application of the Convention.

age of goods to be used as alternative criteria for applying the Convention; article 5 of the 1968 Protocol does not set forth the port of discharge of the goods as a criterion for the application of the Convention as amended by the Protocol.

2. *Draft proposal based on article 5 of the 1968 Brussels Protocol*

20. Draft proposal A is based on article 5 of the 1968 Brussels Protocol.²⁴ Some adjustments in the language of the provision have been made to reflect the general approach both as to substance and as to drafting that has been taken by the Working Group; these adjustments are indicated by brackets.

21. Draft proposal A reads as follows:

Draft proposal A

"1. The provisions of the Convention shall apply to every [bill of lading] [contract of carriage] relating to the carriage of goods between ports in two different States if:

"(a) The [bill of lading] [document evidencing the contract of carriage] is issued in [a] [any] Contracting State, or

"(b) The carriage is from a port in [a] [any] Contracting State, or

"(c) The [bill of lading] [document evidencing the] contract of carriage provides that the rules of this Convention or 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 contract of carriage.

"4. 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."

22. Paragraph 1: the first phrase, subparagraphs (a) and (b) and the last phrase of the paragraph have been described above at paragraph 10. Subparagraph (c) (see paragraph 10 (d) above) appears to have been added to the 1968 Protocol provision partly in order to compensate for the absence of the criterion of the place of discharge.²⁵

²⁴ The replies of the Governments of the United Kingdom, Norway and Sweden indicate support for article 5 of the 1968 Brussels Protocol. Support for the 1968 Brussels Protocol provision was also set forth in the replies of the International Chamber of Commerce (ICC), the Baltic and International Maritime Conference (BIMCO), the International Maritime Committee (CMI), and the Office Central des Transports Internationaux par Chemin de Fer.

²⁵ Proceedings of the Diplomatic Conference on Maritime Law, 12th session (1st phase), Brussels 1967, p. 313. At the Diplomatic Conference no strong objection was made to the inclusion of this provision. Proceedings of the Diplomatic Conference on Maritime Law, 12th session (2nd phase), Brussels 1968, pp. 69-70. The Australian reply raises a question as to the necessity of subparagraph (c) (which is identical to paragraph 5 (c) of the 1968 Brussels Protocol) "which seems to have no substantive effect".

23. Paragraph 3: this rule which is discussed above at paragraph 11 directs the contracting States to use exactly the same formulation of the criteria for application of the Convention rules as does the Convention provision.²⁶ This rule is aimed at preventing the approach found in a number of national enactments of the Convention which would substitute "is issued in the enacting state" for "is issued in any Contracting State" in subparagraph (2) of the first paragraph of draft proposal A and which would substitute "the carriage is from a port in the enacting state" for "the carriage is from a port in a Contracting State" in subparagraph (b) of draft proposal A. As was stated in paragraph 5 (d) above this problem has arisen in the United Kingdom. It may be of some significance that the United Kingdom Carriage of Goods by Sea Act 1971 (1971 C. 19), which is to come into effect when 10 States ratify the Brussels Protocol of 1968, incorporates article 5 of the Protocol with no change in language.²⁷ The Working Group may, nevertheless, wish to consider whether the purpose of paragraph 3 is stated in a sufficiently clear manner to generally evoke the type of response made by the United Kingdom in its revision.

24. Paragraph 4: this paragraph is the result of a compromise made at the Diplomatic Conference of 1968 in response to the proposal to add the port of discharge as a criterion for the application of the Convention.²⁸

²⁶ In comments in response to the *note verbale*, the Government of Pakistan and the Asian-African Legal Consultative Committee secretariat indicate that this paragraph "appears to perform a double duty. It imposes an obligation on contracting states to see that their domestic law giving effect to the Convention is applicable to bills of lading" which fulfil the criteria set forth in the preceding paragraphs. "It also appears to create a mandatory choice of law rule which the courts of contracting states must observe." In view of the diverse interpretations presently given to the provision on scope of application (article 10), the reply proposes the following alternative language for paragraph 3: "Each contracting State shall make applicable, and the courts of each contracting State shall apply the provisions of this Convention to the bills of lading mentioned above."

²⁷ The general note on the provision in 41 Halsbury's Statutes of England (3rd ed., 1971) at p. 1330 states: "Under the Carriage of Goods by Sea Act 1924, S.3 Vol. 31, p. 524, the Hague Rules applied only to bills of lading issued in Great Britain or Northern Ireland. The object of the present article is to give the Rules as wide a scope as possible, and they will be applied as a matter of law in the United Kingdom where the bill of lading is issued in a Contracting State or where the carriage is from a port in a Contracting State, or where the contract itself voluntarily provides that the Rules are to apply to it."

²⁸ Proponents of the inclusion of the port of discharge as a criterion introduced a compromise proposal which failed but which may, it would appear, have helped to bring acceptance of the third paragraph of article 5 of the Protocol. The compromise proposal reads as follows:

"The provisions of this Convention shall apply to every bill of lading for the carriage of goods from one State to another, under which bill of lading the port of loading, of discharge or one of the optional ports of discharge, is situated in a State party to the Convention, whatever may be the law governing such bill of lading and whatever may be the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

"2. However, a party to this protocol may reserve the right not to apply the provisions of the Convention as amended by the Protocol to bills of lading issued in a State which is not a party to this Protocol."

Proceedings of the Diplomatic Conference on Maritime Law, 12th session (2nd phase), Brussels 1968, p. 66.

3. *Draft proposal based on article 5 of the 1968 Brussels Protocol and the Rijeka/Stockholm draft*

25. Draft proposal B contains parts of both article 5 of the 1968 Protocol and of the Rijeka/Stockholm draft. While following most of the provisions of article 5 of the 1968 Protocol, draft proposal B adds the port of discharge as an alternative criterion for applicability of the Convention. The principal variation from draft proposal A would be effected by the italicized language of paragraph 1 (b) below.

26. Draft proposal B reads as follows:

Draft proposal B

"1. The provisions of the Convention shall apply to every [bill of lading] [contract of carriage] relating to the carriage of goods between ports in two different States if:

"(a) The [bill of lading] [document evidencing the contract of carriage] is issued in a Contracting State, or,

"(b) The port of loading *or the port of discharge or one of the optional ports of discharge provided for in documents evidencing the contract of carriage* is located in a Contracting State, or,

"(c) The 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."

27. Subparagraph (a): the criterion of the State of issuance, the only criterion for application under article 10 of the 1924 Convention, was retained in the revision of the rule in the 1968 Brussels Protocol, although it had been eliminated in the Rijeka/Stockholm draft.

28. Subparagraph (b): the phrase "ports of loading . . . in a Contracting State" is consistent with that used by the Working Group in drafting the provisions on period of responsibility, choice of forum and arbitration.

29. The alternative criterion of "the port of discharge" for the application of the Convention set forth in draft proposal B specifically supported in the replies of the Governments of France,²⁹ Australia and Pakistan

and is specifically opposed in the reply of the United Kingdom.³⁰

30. The port of discharge was included in the Rijeka/Stockholm draft as a criterion for application of the Convention.³¹ However, it was deleted from the draft provision on scope of application presented to the 1968 Diplomatic Conference. At that Conference the inclusion of the port of discharge as a criterion for application of the Convention was supported along the following lines: "The port of discharge is by far the most important port, because disputes take place mostly and claims for damages are mostly lodged at the place of the port of discharge and not at the port of loading."³²

31. At the 1968 Diplomatic Conference the following points were made against the inclusion of the port of discharge:

(a) "In applying these rules [the Convention Rules] States are performing a governmental act, they are exercising governmental powers, and . . . they must have a scrupulous regard for the jurisdiction of other countries in so doing. The rules regulate the terms on which seaborne traffic is carried. It is true they do not cover such matters as the price or the rate at which those goods may be carried but the principle is very much the same.

"I think that every delegation would object if a single country or a group of countries purported to control the terms on which the rates at which goods arrive in its ports disregarding the rules applicable in the port of departure. That is the simplest explanation of our jurisdictional difficulty."

(b) "In applying the new rules to inward bills of lading, the difficulties of conflict of laws would be increased rather than minimized. The difficulty that the rules under which you carried goods would depend on the court in which you brought your action, rather than the terms which the skipper and shipowner agreed, would be increased."³³

32. With respect to the first objection, the following comment was made at the Diplomatic Conference: "there can in our view be no question of any infringement of the jurisdiction of a non-contracting State, because the provision will only be applicable within the jurisdiction of a Contracting State."³⁴

33. The second objection seems to consist of the view that only the law of the place where the *contract* of carriage was *entered into* should determine whether

The reply of the Government of Pakistan states the following regarding the provision set forth in paragraph 4 of draft proposal A: "If this liberty is used by Contracting States, different national laws may have very different ambits of application, which may produce some uncertainty . . ." This view is followed in the comments of the Asian-African Legal Consultative Committee Secretariat.

²⁹ The reply of the Government of France states that the French law of 18 June 1966 goes further than extending the scope of application of the Convention as provided in the 1968 Brussels Protocol; the Convention is made applicable to carriage from and to any French port. The reply indicates that a certain number of other States which are parties to the Brussels Convention of 1924 have analogous provisions in their national legislation and adds that this solution should be made uniform in the Convention.

³⁰ The United Kingdom reply states that "it would oppose any extension of the 1968 definition to include the port of discharge as a place creating mandatory application of the rules".

³¹ The port of discharge is used as a criterion in the Convention on the Carriage of Goods by Road (CMR) (see paras. 15 and 17 above). In its reply to the questions set forth in the Secretary-General's *note verbale*, the International Institute for the Unification of Private Law (UNIDROIT) recommended the approach taken in the CMR Convention.

³² Diplomatic Conference, 12th session (2nd phase), Brussels, 1968, p. 51.

³³ Diplomatic Conference, 12th session (2nd phase), Brussels, 1968, pp. 71-72.

³⁴ Diplomatic Conference, 12th session (2nd phase), Brussels, 1968, p. 51.

the Convention rules are applied and that the port of discharge does not have an appropriate relationship with the agreement of the parties. However, the same argument might be made with respect to the port of loading. The goods may be loaded on at one port or another without having any particular connexion with the legal system of the particular port; thus it may be without much significance with respect to the shipper and the carrier that the goods were loaded at a particular place or that the document of transport was issued there.

34. It may be recalled that the Convention is not primarily concerned with the question *whether* a contract of carriage has been made, or even with questions concerning the interpretation of the clauses in the contract. Instead, the main aim of the Convention has been to establish uniform minimum standards as to the duties and obligations of carriers which would override inconsistent provisions in the contract of carriage. It may be suggested that the party who is likely to be most directly concerned with the standards established in the Convention is the consignee.³⁵ Damage in transit is usually discovered only when the goods reach their destination, and the damage total can only be calculated with any degree of certainty after the arrival of the goods. In addition, under the most usual forms of sales transactions (FOB port of loading; CIF; C and F) the risk of damage in transit falls not on the seller-consignor but on the buyer-consignee. Hence, the consignee, for reasons of practicality (because of his proximity to the goods at the end of the carriage) and of law (because he usually bears the risk in transit), is the person who must press the claim against the carrier. The State of the consignee, i.e. the State of the place of delivery, has strong reasons to assure to him the protection of the regulatory provisions of the Convention.

35. The clause "one of the optional ports of discharge provided for in the document evidencing the contract of carriage" reinforces the point that the place of discharge is to be used as a criterion for application of the Convention only if its contact with the carriage of the goods is significant and not accidental. This formulation is based on the Rijeka/Stockholm draft with the addition of language to clarify the context in which the words "optional ports" are used.³⁶

36. Subparagraph (c): this provision has been discussed in connexion with draft proposal A. It might be noted that this provision, although useful, would be less significant in the context of draft proposal B, because of the inclusion of the port of discharge as an alternative criterion for the application of the Convention.

37. Draft proposal B contains a provision, identical to the language used in draft proposal A to exclude the use of nationality as a criterion for the applicability of the Convention.

³⁵ In its reply to the *note verbale* the Australian Government indicated its support for the place of discharge as a criterion for application "on the basis that, in practice, most litigation arising out of the relevant contracts is commenced in the port of destination". The reply of the Government of Pakistan makes the same point.

³⁶ This view of the meaning of "optional ports" was set forth at the Rijeka Conference. See para. 8 (b) above.

PART THREE. DOCUMENTARY SCOPE OF APPLICATION OF THE CONVENTION

A. Introduction

1. The Working Group on International Legislation on Shipping decided at its fifth session¹ to consider at the present sixth session the scope of application of the 1924 International Convention for the Unification of Certain Rules Relating to Bills of Lading.² Part two of the third report of the Secretary-General deals with the "geographical" scope of the Convention—the effect of the origin and destination of the carriage by sea. The present part three discusses the "documentary" scope of the Convention—the effect of the use (or non-use) of certain documents evidencing the contract of carriage.

B. Current law and practice

1. *Provision of the 1924 Brussels Convention concerning documentary scope*

2. The Brussels Convention, in article 1 (b), defines the term "contract of carriage" as follows:

(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.

3. The 1968 Brussels Protocol³ to amend the 1924 Brussels Convention did not modify the foregoing definition of "contract of carriage".

2. *Ambiguities of the current test for documentary scope of "a bill of lading or any similar document of title"*

4. Under article 2 of the 1924 Convention "every contract of carriage" falling within the ambit of the Convention is subject to the responsibilities and liabilities set forth in the Convention. Thus the definition of the term "contract of carriage" in article I (b) is a vital element in determining the scope of the Convention. Pursuant to that definition, "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title."

5. Attention must be given to the precise meaning of two operative terms used in the definition, i.e. "bill of lading" and "document of title". The problems presented by these terms include the following:

(i) What documents are included (and, conversely, excluded) by the term "bill of lading"?

¹ Report of the Working Group on the work of its fifth session, New York, 5-16 February 1973 (A/CN.9/76), para. 75 UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 5.

² Hereinafter referred to as the "Brussels Convention". League of Nations, *Treaty Series*, vol. CXX, p. 157; reproduced in *Register of Texts*, vol. II, ch. II.

³ Hereinafter referred to as the "Brussels Protocol". Protocol to amend the International Convention for the Unification of Certain Rules Relating to Bill of Lading; *Register of Texts*, vol. II, ch. II.

(ii) What is the effect of the added phrase "or any similar document of title"? More particularly, is this phrase designed to extend the scope of coverage to documents other than "bills of lading"? Or does this phrase restrict the coverage where a bill of lading is not deemed to be a "document of title"? What is the meaning of the expression "document of title"?

(iii) What is the effect on coverage of the failure or refusal to issue a document evidencing the contract of carriage?

(a) *Meaning of "bill of lading"*

6. The first problem arises from the fact that in international shipping practice there are two distinct types of "bills of lading".

7. One type of bill lading does not irrevocably identify the consignee but provides for example that the goods shall be delivered to "the order of" a designated person.⁴ Under such a bill of lading (often termed an "order" or "negotiable" bill of lading) it is understood that the carrier is obliged to deliver the goods to any person to whom the bill of lading may be endorsed, with the result that the carrier cannot safely deliver (and is not required to deliver) the goods until the bill of lading is surrendered.⁵ Consequently, possession of such an "order" bill of lading controls delivery of the goods. This common, and traditional, type of "bill of lading" falls within the scope of the 1924 Brussels Convention under any of the alternative readings that may be given to the definition of "contract of carriage" in article 1 (b).

8. Problems of interpretation are, however, presented by the fact that in some jurisdictions the contract of carriage may be evidenced by a "bill of lading" in which the identity of the consignee is fixed (e.g., "Consignee: William Buyer"). Under such a bill of lading (often called a "straight" or "non-negotiable" bill of lading), in accordance with its terms and the applicable law, a carrier may safely deliver the goods to the named consignee ("William Buyer", in the above example) without requiring surrender of the document. It follows that possession of such a "non-negotiable" bill of lading does not control delivery of the goods and consequently under widespread (but not universal) usage a straight or non-negotiable bill of lading would not be deemed a "document of title".

9. There is serious doubt as to whether a contract of carriage evidenced by such a "bill of lading" is governed by the 1924 Convention. The problem is complicated by the fact that the functional equivalent of such a "straight" (or "non-negotiable") "bill of lading" may be a document bearing some other label such as "consignment note". In addition, under such documents, the rights as between successive transferees and the obligations of the carrier with respect

to such transferees depend on the varying provisions of the contract and of national law. On the one hand, it has been stated that under French law a bill of lading which is "non-transferable" does not fall within the Brussels Convention.⁶ On the other hand, in the United States certain documents called "straight bills of lading" have received statutory recognition.⁷ In view of this statutory provision, it seems probable that American courts will consider straight "bills of lading" to be "bills of lading or similar documents of title" with the result that the Brussels Convention would cover straight bills of lading. A further source of ambiguity is attributable to the fact that while most jurisdictions recognize received-for-shipment bills of lading as documents of title,⁸ there are some jurisdictions where the national definition of "document of title" may not encompass received-for-shipment bills of lading.⁹

10. In sum, it appears that the term "bill of lading" is subject to serious ambiguity and lack of uniformity since its status under the 1924 Convention depends on whether the carrier employs the term "bill of lading" or some functional equivalent, and on the extent to which the document under local law is characterized as a "bill of lading", as "negotiable" or "transferable", or as a "document of title".

(b) *Meaning of "any other document of title"*

11. It has been stated that "no document of title similar to a bill of lading appears to be generally used in British shipping practice".¹⁰ However, under British law received-for-shipment bills of lading are generally accepted as falling within the scope of the 1924 Convention.¹¹ This result may be reached either by considering received-for-shipment bills of lading as "bills of lading" in the context of the Brussels Convention or by holding them to be "similar documents of title".¹²

⁶ Rodière, vol. 2, *Traité général de droit maritime*, Paris 1969, para. 483, p. 113.

⁷ 1916 Federal Bill of Lading Act, 49 U.S.C.A. 81 *et seq.*

⁸ See, e.g., Carver, *Carriage of Goods by Sea*, vol. 1, 12th ed.; London, 1971, p. 219 (for the British view), and Rodière, vol. 2, *Traité général de droit maritime*, paras. 440-441, pp. 57-58 (for the French view).

⁹ Thus Rodière notes that under the Codes of Greece, Lebanon and Yugoslavia only the on-board bill of lading is recognized as a "document of title"; Rodière, vol. 2, *Traité général de droit maritime*, p. 58, note 3. The question of coverage prior to loading (and, consequently, the acceptability of received-for-shipment bills of lading as "bills of lading" under the Convention) seems to have been resolved by the Working Group at its third session when it revised article 1 (e) of the 1924 Convention so that "Carriage of goods" covers the period during which the goods are in the charge of the carrier at the port of loading. Report of the Working Group on International Legislation on Shipping on the work of its third session, Geneva, 31 January to 11 February 1972 (A/CN.9/63), para. 25 (1); UNCITRAL Yearbook, Vol. III: 1972, part two, IV; see also Compilation, reproduced in this volume as annex to the preceding section.

¹⁰ Carver, vol. 1, p. 218, note 12.

¹¹ Tetley, *Marine Cargo Claims*, Toronto and London, 1965, at p. 2 states the general proposition that the 1924 Convention does apply to received-for-shipment bills of lading. For the same view under British law, see Carver's *Carriage of Goods by Sea*, vol. 1, p. 219; and under French law, see Rodière, vol. 2, *Traité général de droit maritime*, para. 440, pp. 57-58.

¹² For the ambiguities inherent in the term "bill of lading" see the discussion above at paras. 6-10. For the view that received-for-shipment bills of lading fall within the 1924 Convention as "similar documents of title", see Scrutton on *Charter parties and Bills of Lading*, p. 406.

⁴ The person so designated may be the buyer of the goods or a bank that has issued or confirmed a letter of credit providing for payment on the presentation of specified documents, including the bill of lading.

⁵ If the bill of lading is lost or believed to be destroyed, it may be possible to obtain delivery by indemnifying the carrier against his potential liability should there be a claim, subsequently, by an endorsee of the bill who is entitled to receive delivery of the goods.

12. There is substantial doubt as to what, if any, additional types or categories of documents might be held to be "similar documents of title".¹³ Thus, there is authority that the consignment note, the standard document evidencing a contract for carriage of goods by air and a document not infrequently made use of in connexion with the carriage of goods by sea, is not "transferable" and is not a "document of title".¹⁴

13. The relationship between the two parts of the phrase "bill of lading or any similar document of title" is subject to doubt. On the one hand, it can be argued that the concluding phrase ("any similar document of title") reflected an assumption by the drafters that the Brussels Convention should be limited to contracts evidenced by "documents of title". On the other hand, it could be concluded that the drafters expected the 1924 Convention to apply to any "bill of lading" (which was assumed to be a document of title), and that the phrase "any similar document of title" was designed to guard against the possibility that carriers might issue documents which perform the essential function of bills of lading but which are given some other designation.¹⁵ In any event, the term "similar documents of title" has not been a successful vehicle to assure that the 1924 Convention would apply to modern means for evidencing the contract of carriage such as consignment notes, computer punch cards, print-outs or other products of the electronic age.

(c) *Effect of failure to issue a document*

14. Article 1 (b) of the 1924 Convention refers to contracts of carriage as "covered by a bill of lading or any similar document of title". The emphasis on coverage by a document presents problems of construction when, for a variety of reasons, no document is issued or available.¹⁶

15. Articles 3 (3) and 3 (7) of the 1924 Convention give shippers the right to demand the issuance of a bill of lading containing specified provisions. Although, under a literal reading of the Convention, a question may be raised as to its applicability if a carrier wrongfully refuses to issue a "bill of lading

or any similar document of title", there is no indication that courts have permitted a carrier to avoid coverage of the Convention by the simple expedient of wrongfully refusing to issue a bill of lading.¹⁷

16. Questions of greater difficulty arise when the shipper has the right to demand a document, but he does not in fact make such a demand for its issuance and no document is issued. For some courts the crucial issue is whether or not the carrier and the shipper contemplated that a bill of lading will be issued in due course.¹⁸ Another view focuses on the customs of the particular trade and asks whether the parties intended "that, in accordance with the custom of that trade, the shipper shall be entitled to demand at or after shipment a bill of lading" and "(t)o such a contract the Rules will apply even though no bill of lading is in fact demanded or issued".¹⁹ Under the French law of 1966 concerning maritime contracts of carriage, the shipper has a right to demand a bill of lading, but the Act applies whether or not such a demand is actually made.²⁰ However, the above decisions and national legislation do not deal with all of the circumstances in which non-issuance of a document may occur, and there is no assurance that courts in other countries would interpret article 1 (b) of the Brussels Convention in the same manner.

17. There is widespread doubt as to the Convention's applicability to contracts of carriage intended to be covered by and customarily evidenced by a consignment note or simple receipt or where arrangements as to shipment or delivery of the goods are recorded and transmitted only by computer and related electronic devices.²¹ It appears that ocean carriage of goods under documents other than under traditional bills of lading has increased considerably in recent years. This change in practice seems to be the result of several factors: the diminished use in some trades of documentary credits (letters of credit); increased transportation of goods by sea in standard containers; and

¹³ Shipping orders prepared by the shipper and delivery orders prepared by a holder of a bill of lading are not themselves documents of title according to Rodière, vol. 2, paras. 491-495, pp. 122-127.

¹⁴ For a detailed discussion of consignment notes, emphasizing their non-transferability and lack of status as documents of title, and contrasting them with bills of lading, see, McNair, *The Law of the Air*, 3rd ed., pp. 182-183.

¹⁵ Sejersted, *Om Haagreglerne (Konossementskonvensjonen)*, 2nd ed., Oslo, 1949, p. 32. It should be noted that the term "similar document of title" first appeared in the 1910 Canadian Water Carriage of Goods Act.

¹⁶ It may be assumed that the 1924 Convention applies to a particular contract of carriage, if at any point in time during its performance the contract of carriage is "covered by" a bill of lading or any similar document of title, even though the document is subsequently lost or destroyed. Article 5 (2) of the Warsaw Convention (Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw, 12 October 1929, League of Nations, *Treaty Series*, vol. CXXXVII p. 11) and article 4 of the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road, Signed at Geneva, 19 May 1956, United Nations, *Treaty Series*, vol. 399, p. 189), both provide specifically that the "absence, irregularity or loss" of the document concerned shall have no effect on the applicability of the Convention.

¹⁷ An argument that applicability of the Convention is based directly on refusal to issue a bill of lading or similar document of title is subject to difficulty in that the provisions of article 3 (3) and 3 (7) which require such issuance, under a literal reading of article 2 are applicable only to a "contract of carriage" as defined in article 1 (b), which refers to contracts "covered by" a bill of lading or similar document of title.

¹⁸ Carver's *Carriage of Goods by Sea*, vol. 1, p. 202, citing *Pyrene v. Scindia Navigation Co.*, 2 Q.B. 402, 420, and *Anticosti Shipping Co. v. Viateur St. Armand* (1959) (Can. Sup. Ct.) Lloyd's, vol. 1, Rep. 352 (in the latter case a bill of lading was actually prepared although it was not issued). The same view is expressed in Tetley, *Marine Cargo Claims*, pp. 4-5, but only if the carrier did actually receive the goods. The United States Carriage of Goods by Sea Act has similarly been held to apply when the parties contemplated the issuance of a bill of lading although none was actually issued. See *Krawill Machinery Corp. v. Robert C. Herd and Co.*, 145 F. Supp. 554, 561 (1956).

¹⁹ Scrutton on *Charter parties and Bills of Lading*, p. 405. The author then argues that article 6 of the 1924 Convention applies to cases where, otherwise, a bill of lading would be called for by the customs of that trade. *Ibid.*, p. 406.

²⁰ Rodière, vol. 2, *Traité général de droit maritime*, para. 392, p. 14.

²¹ A/CN.9/WG.3(V)/WP.9, a memorandum submitted by the Norwegian delegation to the fifth session of the Working Group on International Legislation on Shipping, emphasizes the recent trend toward ocean carriage under simple receipts akin to consignment notes, under automatic data systems, and even without any documents at all.

greater reliance on computer and electronic data processing.²²

18. To resolve such ambiguities created by use of the terms "bill of lading" and "document of title" the Working Group may wish to consider revision of article 1 (b) of the Brussels Convention. (See part D, below.)

3. *Exceptions in the 1924 Brussels Convention to the application of the Convention*

(a) *Charter parties*

19. The 1924 Brussels Convention excludes charter parties from its scope. The second paragraph of article 5 states in part:

"The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter-party they shall comply with the terms of this convention. . . ."

20. There is no international convention which defines the charter-party or regulates the agreement evidenced by the charter-party. The types of agreements of which charter-parties are evidence and which are commonly entered into have been defined in the legislation of some States,²³ and in the case-law of other States.

21. According to national law and commercial practice, charter-parties normally evidence a contract between the owner of the ship and a charterer for the whole or a major part of the ship's services. The charter-party itself does not serve as a receipt for goods nor is it a document of title for the goods. A charter-party may be made for purposes other than the carriage of goods (e.g., passenger service, or towage or salvage).²⁴ Bareboat charter-parties evidence agreement whereby the ship itself and control over how it is managed and how and where it is navigated are transferred for a period of time to the charterer. On the other hand, time and voyage charter-parties are made for securing the use of a ship for a specific period of time or a particular voyage or series of voyages of the ship; navigation and management may remain in the hands of the shipowner.

22. International standards regarding the liability of the shipowner have not been established. The reason that charter-parties have escaped regulation has been attributed to the fact that "it has been felt, apparently, that the bargaining power of charterers and owners is equal enough that they may be left to contract freely".²⁵

(b) *Exception with respect to certain non-commercial shipments: article 6 of 1924 Brussels Convention*

23. Article 6 of the 1924 Brussels Convention reads as follows:

²² Selvig, *Konnossement og Remburs*, Göteborg, 1970; see also A/CN.9/WG.3(V)/WP.9, para. 6.

²³ French law of 18 June 1966 on charters and maritime transport defines the agreement under which charters are issued and the types of charters issued.

²⁴ Carver, *Carriage by Sea*, vol. 1, p. 263.

²⁵ Gilmore and Black, p. 175.

Article 6

Notwithstanding the provisions of the preceding articles, a carrier, master, or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or concerning his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or concerning the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect:

Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

24. Under article 6 of the Brussels Convention of 1924, in order for a contract for the carriage of goods to be considered outside the scope of application of the Convention, the carriage must fit within the complex guidelines set forth therein.²⁶ Problems have arisen with respect to the interpretation of terms such as "particular goods" and "ordinary commercial shipments made in the ordinary course of trade". This article does not appear to have been frequently invoked perhaps because of difficulties of interpretation. Nevertheless, article 6 makes it possible for carriers, under certain circumstances, to contract for the carriage of goods outside the mandatory rules of the 1924 Brussels Convention. It will be noted that a key element is the non-issuance of a bill of lading and the issuance of a non-negotiable receipt which is marked as such.

C. *Relevant provisions of other transport conventions (italics added)*

1. *Carriage by rail: CIM Convention (1970)*²⁷

25. Articles 1 (1), 6 (1), 8 (1) and 16 (1):

Article 1 (1)

"This Convention shall apply, subject to the exceptions set forth in the following paragraphs, to the carriage of goods consigned under a through consignment note made out for carriage over the territories of at

²⁶ The requirements under article 6 have been summarized as follows: "(a) a non-negotiable receipt must be issued; (b) the carriage must be of particular goods; and (c) the carriage must not be of an ordinary commercial shipment." Tetley, *Marine Cargo Claims*, p. 6 (1965).

²⁷ International Convention concerning the Carriage of Goods by Rail, Berne, signed 7 February 1970. Articles 1 (1), 8 (1) and 16 (1) appear in substantially the same form in the CIM Conventions of 1961 and 1952.

least two of the Contracting States and exclusively over lines included in the list compiled in accordance with Article 59."

Article 6 (1)

"The sender shall present a consignment note duly completed for each consignment governed by this Convention . . ."

Article 8 (1)

"The contract of carriage shall come into existence as soon as the forwarding railway has accepted the goods for carriage together with the consignment note. The forwarding station shall certify such acceptance by affixing to the consignment note its stamp bearing the date of acceptance."

Article 16 (1)

"The railway shall deliver the consignment note and the goods to the consignee at the destination station against a receipt and payment of the amounts chargeable to the consignee by the railway."

2. Carriage by air: Warsaw Convention (1929)²⁸

26. Articles 1 (1), 5 and 9:

Article 1 (1)

"This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking."

Article 5

1. "Every carrier of goods has the right to require the consignor to make out and over to him a document called an "air consignment note"; every consignor has the right to require the carrier to accept this document."

2. "The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention."

Article 9

"If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in article 8 (a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provi-

sions of this Convention which exclude or limit his liability."²⁹

3. Carriage by road: CMR Convention (1956)³⁰

27. Articles 1 (1) and 4:

Article 1 (1)

"This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over the goods and the place designated for delivery, as specified in the contract, are situated in two different countries . . ."

Article 4

"The contract of carriage shall be confirmed by the making out of a consignment note. The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject to the provisions of the Convention."

D. Alternative approaches to scope of application of Convention

1. Scope of application based on reference to additional types of documents

28. As has been noted, the Brussels Convention of 1924 approaches the definition of its scope of application by referring to the issuance of certain types of documents. The difficulties inherent in this approach have been described above (paras. 4-17).

29. One response to the ambiguities and gaps arising under the present formulation would be to list additional types of documents which are now being used or which may be used in the future and which should fall within the Convention. Thus, documents such as consignment notes might be added to the list of documents whose issuance would make the Convention applicable to the contract of carriage. However, this approach probably would add to the complexity and ambiguity of the Convention. In addition, new labels for documents may well be employed in order to circumvent the application of the Convention. Thus, emphasis on the type of document issued (as contrasted with the contract of carriage) appears to be subject to inherent difficulties of draftsmanship, and could needlessly restrict the regulatory objective of the Convention. Gaps in the application of the Convention might well emerge. In order to fill these gaps further additions to the Convention provision would be necessary. For example, a clause would have to be added to the Convention providing for coverage in the case where a document of the type provided for in the Convention is usually issued in the circumstances

²⁸ Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw, 12 October 1929, League of Nations *Treaty Series*, vol. CXXXVII, p. 11. The 1955 Hague Protocol to the Warsaw Conventions left articles 1 (1), 5, and 9 substantially unaltered. In the Protocol the term "air waybill" replaces the term "air consignment note".

²⁹ The Hague Protocol modified article 9 so that it now reads as follows: "If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by article 8, paragraph (c), the carrier shall not be entitled to avail himself of the provisions of article 22, paragraph (2)." [On limitation of carrier liability.]

³⁰ Convention on the Contract for the International Carriage of Goods by Road, Signed at Geneva, 19 May 1956; United Nations *Treaty Series*, vol. 399, p. 189.

of the particular contract of carriage in question but in fact is not issued. It might also be necessary to add a clause in the Convention dealing with the absence or irregularity of a required document. A further clause might be needed to fill a gap in coverage by the Convention when the evidence of the contract of carriage is data recorded by a computer or other electronic processing system.

30. In sum, continuing to focus on the type of document would require a complex set of provisions which would be likely to give rise to a series of new problems of interpretation.³¹

2. *Scope of application extending to all contracts of carriage of goods by sea*

31. Instead of attempting to set forth a list of documents whose issuance controls the application of the Convention, consideration may be given to an approach whereby the Convention is applicable (subject to stated exceptions) to all contracts of carriage of goods by sea. Under this approach, which has been suggested in a number of replies by Governments,³² documents issued

³¹ Some replies indicate satisfaction with the present formulation of the rule on the scope of application of the Convention. The reply by the USSR states that "the arrangements provided for in article 1 (b) of the 1924 Brussels Convention on bills of lading whereby the Convention is valid in respect of carriage covered by a bill of lading or similar document, does not cause any practical difficulties". In its reply the Baltic and International Maritime Conference (BIMCO) states that there would seem to be no "valid reasons whatsoever for imposing strict rules to informal documents or transport under no documents when it is quite obvious under the present system that any shipper can, if he wants to, demand an ordinary bill of lading". The reply of the Office Central des Transports Internationaux par Chemin de Fer indicated that the present formulation of article 1 (b) was satisfactory; however, with respect to cases where there was no document to evidence the contract of carriage, application of the Convention could be provided for if the contents of the contract can be verified in some convenient fashion.

³² Australia, France, Norway, United States and Belgium. In its reply, Australia stated that it "would wish to apply the Hague Rules irrespective of whether the terms of the contract of carriage are evidenced". Similarly, the Norwegian reply makes reference to the Norwegian memorandum (A/CN.9/WG.III/WP.9, paras. 6 and 7) and states that in accordance with the views expressed therein, the Norwegian Government "submits that the new international law on carriage of goods by sea should apply not only when the contract of carriage is evidenced by a bill of lading or a consignment note or other non-negotiable transport document, but also when the parties have not issued any document at all. In other words, the new international law should in principle apply to any contract for the carriage of goods by sea." The French reply indicates that under French law in cases of maritime transport the law applies no matter what type of document was issued or even in the absence of a document. The French Government finds such a solution desirable in the international context; thus the Convention would no longer be focused on the rules regarding bills of lading but rather on the contract of maritime carriage. Similarly, the reply from the International Institute for the Unification of Private Law (UNIDROIT) states that the Convention should not be based on the issuance of a particular document; the Convention should be applicable even when no document was issued. In this connexion the UNIDROIT reply refers to the CMR Convention which makes that Convention applicable even in the case "absence, irregularity or loss" of the consignment note (article 4). In its reply the International Union of Marine Insurance (IUMI) reports that many of its members "suggest that all transports—except shipment under charter parties—shall be the subject of the Convention, irrespective of whether a bill of lading or other document has been issued or not".

would provide evidence as to the existence of a contract of carriage and its content, but the type of document or the absence of a document would not affect the applicability of the Convention to the contract of carriage. This approach to the definition of the scope of the Convention would not preclude a provision that the shipper may demand particular documents and set requirements for their contents.³³ Certain exceptions to the application of the Convention would be preserved; two such exceptions, presently found in the Brussels Convention, would be charter parties (article 5, second paragraph) and special types of agreements for non-commercial carriage or carriage of special types of goods (article 6). In these cases, and perhaps in other cases which the Working Group might wish to add, the Convention would not be applied to the contract of carriage. These issues could be examined by the Working Group in the light of the desirability of retaining article 6 and possible alternative formulations which might be considered.³⁴

32. A draft provision which would embody the essential elements of this broad approach to the scope of application of the Convention would read as follows:

Draft proposal

1. "Contract of carriage" applies to all contracts for the carriage of goods by sea.

Alternative (a)

2. The provisions of this Convention shall not be applicable to charter-parties, but if [bills of lading, consignment notes or other] documents evidencing contracts of carriage of goods are issued in

The IUMI reply adds, however, that other members are more cautious and recommends that "the expression 'any similar document of title' . . . should . . . be precisely defined on the lines of section 1 (4) of the United Kingdom Factors Act of 1889 . . .".

³³ This approach is similar to that taken under French law. The French Law of 18 June 1966 on charters and maritime transport provides (article 15) that the Law is applicable to all contracts for the carriage of goods by sea. Article 18 provides that on demand of the shipper the carrier must issue a bill of lading.

³⁴ The reply of the Government of the United Kingdom states that there are cases where both parties may prefer not to apply the Convention. Such cases would be: "(a) where goods are of no commercial value, but of a value which might be difficult to quantify are carried. (b) Where experimental forms of packing are used. (A case in point was a recently introduced form of refrigeration for carriage of meat from New Zealand.) (c) Where the special nature of the cargo makes application of the Hague Rules undesirable. (A recent case involved the carriage of highly miscellaneous goods which had been adjudged by a Prize Court. The cost of surveying the goods in order to identify them for the purpose of issuing a bill of lading would have been out of proportion to the value of the goods. It was therefore agreed that they should be carried at the risk of the cargo owner.)" The United Kingdom reply notes that article 6 of the present Hague Rules recognizes these special cases. The United Kingdom reply then sets forth the following proposal: "1. These Rules shall apply to all contracts for the carriage of goods by sea where a bill of lading or similar document of title is issued. 2. These rules shall apply to all other contracts for the carriage of goods by sea unless the parties have expressly agreed otherwise and a statement to that effect is inserted in the document evidencing the contract of carriage. 3. These Rules shall not apply to charter-parties."

the case of a ship under a charter-party they shall comply with the terms of this Convention.

Alternative (b)

2. The provisions of this Convention shall not be applicable to carriage under a charter-party whereby a ship or all or [the major] [a substantial] portion of the carrying capacity of a ship is [engaged] for a [stated] period of time or for a particular voyage. However, if [bills of lading, consignment notes or other] documents evidencing contracts of carriage of goods are issued in the case of a ship under a charter-party they shall comply with the terms of this Convention.

33. Paragraph 1 of the draft proposal is similar in approach and language to the Convention on transport of goods by road and the Convention on carriage of passengers by sea.³⁵ This formulation eliminates the need: (1) to specify and define various types of documents upon whose issuance application of the Convention depends, (2) to deal specifically with cases where new types of documents evidencing the contract are employed, and (3) to deal specifically with cases where no document is in existence because of a variety of ascertainable reasons.³⁶ This approach would appear to minimize the ambiguities and gaps inherent in the approach of the 1924 Convention, and would further the Convention's objective of setting mandatory minimum standards of carrier liability for the carriage of goods by sea.

34. Since the text refers to "contract" it might be asked whether the definition would make the Convention applicable to "quantum" or "requirements" contracts or to other contracts whereby the carrier undertakes to carry cargo for the shipper in the future.³⁷ In this connexion, attention may be directed to the revised version of article I (e) of the Convention which provides that: "(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."³⁸ It would appear that the foregoing language would restrict the scope of the Convention to arrangements for the carriage of specific goods resulting from "quantum", "requirements" or similar contracts.

35. Paragraph 1 refers to "all contracts for the carriage of goods by sea". The purpose of the words "by sea" is to exclude the Convention's application to the carriage of goods by inland waterways. This reference may be sufficient to limit the scope of the Convention to carriage by sea.³⁹

36. Paragraph 2 of the draft proposal sets forth two alternatives for dealing with the exclusion of charter-parties from the Convention.⁴⁰ Alternative (a) retains the language of article 5 of the Brussels Convention of 1924. The language of article 5 is retained on the assumption that in practice charter-parties are distinguishable from the contracts regulated by the Convention and that problems of interpreting the law in border-line cases can be resolved by national courts. The words in brackets are included since it may be considered desirable to take into account the issuance of documents other than bills of lading under a charter. (See paragraphs 11-18 above.)

37. Alternative (b) follows the approach proposed in the reply of the United States.⁴¹ Its purpose is to provide a general definition of charter-parties in order to more clearly distinguish such contracts from contracts for the carriage of goods covered by the Convention.

38. In addition to articles discussed in the third report of the Secretary-General the term "bill of lading" appears in the following articles of the Convention:

³⁸ Working Group, report on third session (A/CN.9/63, para. 26); UNCITRAL Yearbook, Vol. III: 1973, part two, IV.

³⁹ Part two of this report, dealing with Geographic Scope of application of the Convention, sets forth two draft proposals (paras. 21 and 26) which, by bracketed language, would make the Convention applicable to a "contract of carriage". If the Working Group adopts this bracketed language, referring to "contract of carriage", the definition of "contract of carriage" in the above draft proposal (para. 32, *supra*) would appear to be sufficient to restrict the scope of the Convention to carriage "by sea". On the other hand, if the Working Group does not adopt the bracketed reference to "contract of carriage" in the definition of geographical scope, it may be necessary to state elsewhere that the Convention applies to carriage "by sea". See, e.g., article 1 (e), as adopted by the Working Group: compilation, part B; Working Group, report on third session, paragraph 14 (1).

⁴⁰ The continued exclusion of charter-parties from the scope of application received support in the following replies: United States, Norway and the United Kingdom. The reply of the Government of Belgium states that the issue of whether the charter-parties should be placed within the scope of application of the Convention should be left open provisionally until after provisions regarding the carriage of goods have been formulated with respect to carriage other than under a complete or partial charter of a ship.

⁴¹ The proposal of the United States reads as follows: "The carriage of goods governed by this Convention does not include carriage under charter whereby the entire carrying capacity or a very substantial portion of such capacity is employed for a stated period of time or for a particular voyage. Nevertheless, this Convention shall apply to the carriage of goods for which the vessel is under charter from the moment at which a bill of lading or similar document issued under or pursuant to a charter-party regulates the relations between a carrier and a holder of the same."

³⁵ Article 1.1 of the Convention on the Contract for the International Carriage of Goods by Road, 1956 (CMR); article 1.b of the International Convention for the Unification of Certain Rules Relating to Carriage of Passengers by Sea, Convention on Maritime Law, Ministère des affaires étrangères et du commerce extérieur de Belgique, Service des traités, 1.V.1968, p. 79.

³⁶ In considering the scope of application of the Convention the Working Group may also wish to examine the need to make specific provision for an appropriate article of the Convention on the effect of computer data used with respect to the carriage of goods. In this connexion the reply of the United States to the *note verbale* of May 1973 states that "it is believed that a further expansion of the coverage of the Convention to the various types of informal documents which are now found in maritime transportation would be appropriate. With respect to those shipments for which no actual documentation is issued because the shipment is tracked through computer tapes the present requirement is an unnecessary complication." The reply by the International Institute for the Unification of Private Law also points out the growing use of electronic and automatic data with respect to the carriage of goods by sea.

³⁷ The Norwegian reply states that "contracts for successive shipment of a certain quantity of goods (quantum contracts) should be treated in the same manner as charter-parties for the purposes of the Convention". The reply of the Comité Maritime International (CMI) indicated that in the view of its international sub-committee on the subject "a mandatory system was not suitable for time-charters, volume contracts, contracts for consecutive voyages and voyage charters". Possibly to be included in such a list were "general booking agreements covering certain periods of time".

article 3 (3), (4), (7), article 4 (5) and article 5 (first paragraph). These articles present issues that are separate from the problems of scope of this Convention with which the present study is concerned. The Working Group will, however, wish to bear in mind the action it takes with respect to article 1 (b) when it deals with the problems presented by the above additional articles.

PART FOUR. ELIMINATION OF INVALID CLAUSES IN BILLS OF LADING

A. Introduction

1. The second report of the Secretary-General, in part six, analysed the basic problems raised by invalid clauses and examined four, not necessarily mutually exclusive, approaches (paragraph 7) aimed at achieving the removal from bills of lading of certain clauses that are normally held to be invalid on the basis of article 3 (8) of the Brussels Convention.¹ This report will not repeat the previous discussion; it will supplement the earlier report with alternative draft texts.

2. In examining the alternative proposals set forth below it is useful to recall that the inclusion of invalid clauses has caused uncertainty in the minds of cargo owners as to their rights and liabilities. The removal of such invalid clauses "would facilitate trade, because their continued inclusion [in bills of lading] has the following onerous effects: (a) the clauses mislead cargo interest, 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".²

B. Clarifying and specifying mandatory requirements of the Convention

3. As was noted in the second report of the Secretary-General, the impact of invalid clauses in the bill of lading can be minimized, and doubt and litigation can be reduced by making the mandatory requirements of the Convention clear and explicit, which is a central task of the Working Group. In this connexion, the Working Group may wish to consider article 3 (8), which reads as follows:

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

4. Such a provision is a vital part of the Convention, but questions have been raised as to its clarity in

some settings. Thus it has been stated that article 3 (8) as presently formulated offers "a too restricted interpretation" as it relates to "the rules of liability only". Therefore, it has been suggested that the Convention "should include a general provision on the nullity of clauses in a bill of lading which directly or indirectly derogate from the provisions of the Convention".³

5. The Working Group may wish to consider the desirability of a provision that would implement this view while also serving to clarify some other issues presented under the present formulation. Such a provision could read as follows;

Draft proposal A⁴

1. Any clause or stipulation in the [bill of lading] [contract of carriage] shall be null and void to the extent that it derogates from the provisions of this Convention. The nullity of such a clause or stipulation shall not affect the validity of the other provisions of the contract of which it forms a part. A clause assigning benefit of insurance of the goods in favour of the carrier shall be deemed to derogate from the provisions of this Convention.

2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention provided such increase shall be embodied in the [contract of carriage] [bill of lading issued to the shipper].

6. The first sentence of paragraph 1 in draft proposal A is designed to accomplish the following results:

(a) A bill-of-lading clause will be invalid to the extent that it derogates from *any* provision of the Convention, and not just the provisions that relate directly to liability (as is the case under the present language of article 3 (8)). This would eliminate the current necessity of trying to fit every type of bill-of-lading clause which should be proscribed into the present narrow formulation of the rule in article 3 (8). It may be noted that where a provision of the Convention provides the parties or one of the parties with an option (e.g., arbitration provision), the exercise of the option is, of course, not in derogation of the provision of the Convention.

(b) However, the bill-of-lading clause will be invalid "*only to the extent*" that it derogates from any of the provisions of the Convention. This clarifies issues, left open under the present language of article 3 (8), where clauses are valid under certain circumstances and invalid under others.⁵

7. The second sentence of paragraph 1 of draft proposal A resolves a basic ambiguity in the Brussels Convention of 1924, namely, what is the effect on the contract of an invalid clause. The reaction of the courts could previously range from (a) declaring that a fundamental breach of the contract has occurred voiding

³ Reply of the Government of Sweden to the Secretariat questionnaire of July 1972.

⁴ At a future stage the Working Group may wish to consider whether the revised language of article 3 (8) may be supplemented by article 6 which gives validity under the Convention to certain special agreements which derogate from the rules of the Convention.

⁵ Second report of the Secretary-General, part six, paragraph 10; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

¹ A fifth possible approach suggested by the reply by Norway to the Secretariat questionnaire of July 1972 would be that "the problems involved should be given serious consideration by the various organizations engaged in elaborating standard transport documents for carriage of goods by sea".

² UNCTAD secretariat report on bills of lading, para. 295 (United Nations publication, Sales No. E.72.II.D.2).

the contract to (b) confining invalidity to the specific contract clause which derogates from the Convention provisions.

8. Paragraph 2 of draft proposal A is added in order to permit the parties to the contract of carriage to depart from certain rules set forth in the Convention, but only if the result of such derogation will be to increase the carrier's responsibilities and obligations under the Convention. The provision thus carries forward the substance of article 5, paragraph 1, of the Brussels Convention of 1924, which states that a carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities, or to increase any of his responsibilities under this Convention provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. For example, the second paragraph of article 3 (6) of the Brussels Convention of 1924 provides that "if the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods". Paragraph 2 of draft proposal A would permit the parties to increase, but not decrease, the notice period beyond the three days set forth in the Convention provision. The requirement that the contract of carriage should not derogate from the provisions of the Convention is designed to prevent the drafter of the contract from directly or indirectly escaping the minimum standards that have been developed to deal with the responsibility of the carrier. The draft proposals set forth below, reflecting some other approaches, assume that the Convention will include a general rule on invalid contract clauses, such as that articulated in article 3 (8) or the modification indicated in draft proposal A.

C. Listing specific types of invalid clauses in the Convention

9. A second approach would be to specify in the text of the Convention those types of clauses that should be considered invalid. It will be noted that the Brussels Convention of 1924 specifically bans "benefit of insurance" clauses (last sentence of article 3 (8)).

10. There are certain basic difficulties inherent in listing specific clauses in the Convention and branding them as invalid. The second report of the Secretary-General discussed some of these difficulties:

(a) Many clauses are "invalid" when applied to some factual situations but are valid when applied to other situations. For example, the so-called "freight" clause which specifies that freight is earned vessels and/or goods "lost or not lost" may be invalid where the carrier is legally responsible for the loss but may be valid where the carrier is not legally responsible.⁶

(b) The identification in the Convention of certain clauses as invalid might well lead legal draftsmen to prepare new wording to achieve the same ends. The new clauses would be defended on the ground that they are not among the clauses specifically proscribed by the Convention.⁷

⁶ Second report of the Secretary-General, part six, paragraph 10, foot-note 9; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

⁷ In replies by Governments to the questionnaire, doubts were expressed on the feasibility of identifying invalid clauses. Second report of the Secretary-General, part six, foot-note 11; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

11. The Working Group has already examined problems regarding invalidity raised by a number of clauses not specifically covered by the Brussels Convention of 1924. These problems have been resolved by specific substantive provisions in the revised texts adopted by the Working Group. Among the bill-of-lading clauses that will be regulated by new provisions in the Convention are choice of forum clauses, arbitration clauses and trans-shipment clauses. It may well be that the problems of invalidity raised by specific bill-of-lading clauses can be resolved within the framework of specific substantive provisions. However, if the Working Group's review of the substantive drafting leads it to the conclusion that a particular type of invalid clause remains outside the framework of substantive provisions, the Working Group may wish to decide whether the draft substantive rules should be clarified or extended, or whether it would be necessary to specifically describe and outlaw such a clause.

D. Setting forth sanctions for invalid clauses

12. A third approach would be to penalize the use of invalid clauses in order to eliminate or at least discourage their use as well as to compensate cargo owners for expenses incurred by them as a result of the carrier's inclusion of invalid clauses.

13. One approach would be the removal of the limitation of liability in cases where the carrier, in a court action or in arbitration proceedings, seeks to rely on a clause in the bill of lading or other document of transport which is inconsistent with article 3 (8).

14. A provision based on this approach would read as follows:

Draft proposal B—alternative (1)

"The carrier shall not be entitled to the benefit of the limitations on liability provided for in article () of this Convention if he asserts in judicial or arbitral proceedings any clause in the [contract of carriage] [bill of lading] which is clearly inconsistent with article [3 (8)]."

15. It must be recognized that the word "clearly" which is used to qualify the word "inconsistent" in draft proposal B—alternative (1), can give rise to problems of interpretation. However, if the provision did not require that the clause in question be *clearly* in derogation of the Convention, it would serve to inhibit the carrier from legitimately asserting a defence which could be successful in cases where the validity or invalidity of the clause in question is arguable.

16. Alternative (1) above would not be penal in nature since it would merely involve a removal of the limitation of liability and would make the carrier liable for the actual damages caused the cargo under the rules. However, it could have a significant deterrent effect in the preparation of standard bill-of-lading clauses.

17. A second alternative below is designed to compensate for the damage caused by the interposition of the invalid clause. A provision embodying this idea would become a second paragraph of article 3 (8) and would read as follows:

Draft proposal B—alternative (2)

"The carrier shall be liable for all expenses, loss or damage resulting from a clause which is null and void by virtue of the present article."

18. This alternative requires the carrier to bear liability for "all expenses, loss and damage" resulting from the inclusion of an invalid clause and makes a causal connexion between the presence of the invalid clause and the harm done a prerequisite for liability.⁸ For example, under such a Convention provision the carrier would bear the cost of litigation between carriers and cargo owners or between shippers and consignees involving the invalid clause.

E. Requiring the contract of carriage to contain a notice clause regarding invalid clauses

19. A fourth approach responds to the need to direct attention of the cargo owners to provisions in the Convention which invalidate clauses in the contract of carriage. Cargo owners, particularly those cargo owners who do not have the experience and legal advice available to large business establishments, might consider themselves bound by an invalid clause in the contract of carriage whose effect would be to relieve the carrier from the liability established under the Convention.

20. To this end, a provision could be inserted into the Convention requiring the contract of carriage to state that any provision that is inconsistent with the Convention will not be given effect. It would appear, however, that such specific requirement would have little effect unless it were accompanied by sanctions.⁹

21. A provision requiring notice that the Convention is applicable and setting forth a sanction for the non-inclusion of such notice in the contract of carriage might read as follows:

Draft proposal C

"1. Every [bill of lading] [contract of carriage] shall contain a statement that: (a) the carriage is subject to the provisions of this Convention, and, (b) that any clause of the [bill of lading] [contract of carriage] shall be null and void to the extent that it derogates from the provisions of this Convention."

"2. If the [bill of lading] [contract of carriage] does not contain the statement specified in para-

graph 1 (a) and (b) the carrier shall not be entitled to the benefit of the limitation of liability provided for in article () of this Convention."

22. Paragraph 1 (a) of draft proposal C is aimed at making the cargo owner aware that the contract of carriage is governed by the Convention. This approach has been taken in both the Warsaw (Air) Convention and in the Convention on Carriage by Road (CMR).¹⁰ Moreover, a number of national enactments of the Brussels Convention of 1924 have incorporated such a clause into the text of the Convention.¹¹

23. Paragraph 1 (b) of draft proposal C is aimed at alerting the cargo owner to the fact that the Convention provides protection against certain types of bill-of-lading clauses.

24. Paragraph 2 of draft proposal C responds to the need for stating the consequences of failing to include the prescribed statement in the contract of carriage. It would appear that in the absence of express sanctions the carrier would have little, if any, incentive to include such a statement.

25. In the absence of a Convention rule imposing specific penalties, the application of sanctions for not including the required statement in the contract of carriage would be left to national law, leading to varying solutions and thereby impairing the uniform application of this provision of the Convention. Solutions under national law could range from imposing strict liability upon the carrier to not applying any sanction at all.

26. In examining paragraph 2 of draft proposal C, the Working Group may wish to consider the following: (a) the feasibility of including a provision in the contract of carriage giving notice to the cargo owner of the applicability of the Convention to the carriage and of the invalidity of clauses inconsistent with the Convention; (b) the limited scope of the sanction, which would make the carrier liable for the actual loss or damage to the cargo owner resulting from the carrier's fault.

27. If the Working Group should adopt a provision along the lines of draft proposal C, the Working Group may wish to consider at a later stage whether the provision should be added to the article on the required contents of the contract of carriage (article 3 (3) of the Brussels Convention of 1924).

⁸ Second report of the Secretary-General, part six, paragraphs 11 and 12 and foot-note 12; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

⁹ *Ibid.*, paras. 13-15; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

¹⁰ Second report of the Secretary-General, part six, foot-note 2; UNCITRAL Yearbook, Vol. IV: 1973, part two, IV, 4.

¹¹ United Kingdom Carriage of Goods by Sea Act, 1924 (14 and 15 Geo. 5, c. 22), Section 3; United States Goods by Sea Act, 46 U.S.C.A. 1300-1315, Section 13.

3. Study on carriage of live animals (A/CN.9/WG.III/WP.11)*

Note by the Secretariat. In accordance with a request made by the United Nations Commission on International Trade Law at its fifth session (1972),** the International Institute for the Unification of Private Law (UNIDROIT) has prepared a study on the carriage by sea of live animals, which is attached hereto.

* 27 December 1973.

** 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)*; UNCITRAL Yearbook, vol. III: 1972, part one, II, A, para. 50.