IV. INTERNATIONAL LEGISLATION ON SHIPPING

1. Report of the Working Group on International Legislation on Shipping on the work of its seventh session (Geneva, 30 September - 11 October 1974) (A/CN.9/96)*

CONTENTS

GENERAL INTRODUCTION

1. The Working Group on International Legislation on Shipping was established by the United Nations Commission on International Trade Law (UNCITRAL) at its second session (1969), and was enlarged by the Commission at its fourth session (1971).[1] The Working Group consists of the following 21 members of the Commission: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Germany (Federal Republic of), Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Zaire.

2. In defining the task of the Working Group, the Commission, at its fourth session, 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 appro-

* 18 November 1974.

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

priate, be prepared for adoption under the auspices of the United Nations."[2]

In addition, the Commission specified a number of topics that, among others, should be considered. The Working Group at earlier sessions has taken action with respect to the following of these topics: (*a*) the period of carrier responsibility; (*b*) responsibility for deck cargo and live animals; (*c*) choice of forum clauses in bills of lading;[3] (*d*) the basic rules governing the responsibility of the carrier; (*e*) arbitration in bills of lading;[4] (*f*) unit limitation of liability; (*g*) trans-shipment; (*h*) deviation; (*i*) the period of limitation;[5] (*j*) liability of the carrier for delay; (*k*) scope of application of the Convention; (*l*) elimination of invalid clauses; (*m*) deck cargo and live animals; and (*n*) definitions under article 1.[6]

3. At its sixth session the Working Group decided to devote the seventh session to the following topics: (*a*) contents of the contract for carriage of goods by sea; (*b*) validity and effect of letters of guarantee; (*c*) legal effect of the bill of lading in protecting the good faith purchaser of the bill of lading; and (*d*) any other topics necessary to complete the initial consideration of the provisions of the 1924 Brussels Convention and the 1968 Protocol.[7]

4. The Working Group held its seventh session at Geneva from 30 September to 11 October 1974.

5. Twenty members of the Working Group were represented at the session.[8] The session was attended by the following members of the Commission as observers: Philippines and Syrian Arab Republic; and by observers from the following international, intergovernmental and non-governmental organizations: United Nations Conference on Trade and Development (UNCTAD), Inter-Governmental Maritime Consultative Organization (IMCO), International Maritime Committee (IMC), International Chamber of Commerce (ICC), International Chamber of Shipping (ICS), International Union of Marine Insurance (IUMI), Office Central des Transports Internationaux par Chemins de Fer (OCTI), International Institute for the Unification of Private Law (UNIDROIT), International Shipowners' Association (INSA) and Baltic and International Maritime Conference (BIMCO).

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

Chairman	Mr. Mohsen Chafik (Egypt)
Vice-Chairmen	Mr. D. M. Lopez Saavedra (Argentina)
	Mr. Stanislaw Suchorzewski (Poland)
Rapporteur	Mr. R. K. Dixit (India)

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

1. Provisional agenda and annotations (A/CN.9/WG.III/L.3)
2. Fourth report of the Secretary-General on responsibility of ocean carriers for cargo; bills of lading (A/CN.9/WG.III/WP.17, vol. I and Corr.1, and vol. II)
3. Revised compilation of draft provision on carrier responsibility (A/CN.9/WG.III/WP.16)
4. Memorandum concerning the structure of a possible new convention on the carriage of goods by sea (submitted by Norway) (A/CN.9/WG.III/WP.15)
5. Reply by France to the questionnaire of 3 April 1974 (possible definition of contract of carriage, and legal position of consignee)
6. Replies to the third questionnaire on bills of lading submitted by Governments and international organizations for consideration by the Working Group (A/CN.9/WG.III/L.2 and Add.1 and 2)

8. The Working Group adopted the following agenda:

1. Opening of the session
2. Election of Officers
3. Adoption of the agenda
4. Consideration of the substantive topics not yet dealt with by the Working Group
5. Future work
6. Adoption of the report

[2] *Ibid.* The Commission decided at its seventh session that the Working Group should "continue its work under the terms of reference set forth by the Commission at its fourth session and complete the work expeditiously". Report of the United Nations Commission on International Trade Law on the work of its seventh session (13-17 May 1974), *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17* (A/9617), para. 53; UNCITRAL Yearbook, vol. V: 1974, part one, II, A.

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

[4] 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 (A/CN.9/63/Add.1, UNCITRAL Yearbook, vol. III: 1972, part two, IV), 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; UNCITRAL Yearbook, vol. IV: 1973, part two, IV, 2) and "Arbitration clauses" (A/CN.9/74, annex II; UNCITRAL Yearbook, vol. IV: 1973, part two, IV, 3).

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

[6] Report of the Working Group on the work of its sixth session, Geneva, 4-20 February 1974 (A/CN.9/88, UNCITRAL Yearbook, vol. V: 1974, part two, III, 1). The Working Group used as its working documents the third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/88/Add.1, UNCITRAL Yearbook, vol. V: 1974, part two, III, 2), part five of the second report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1; UNCITRAL Yearbook, vol. IV: 1973, part two, IV, 4), a study prepared by the International Institute for the Unification of Private Law (UNIDROIT) entitled "Study on carriage of live animals" (A/CN.9/WG.III/WP.11; UNCITRAL Yearbook, vol. V: 1974, part two, III, 3) and a working paper by the Secretariat on the topic of deck cargo (A/CN.9/WG.III/WP.14).

[7] Report of the Working Group on the work of its sixth session, Geneva, 4-20 February 1974 (A/CN.9/88; UNCITRAL Yearbook, vol. V: 1974, part two, III, 1), paras. 148-149.

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

9. The Working Group used the report of the Secretary-General entitled "Fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading" (hereinafter referred to as the fourth report of the Secretary-General) (A/CN.9/WG.III/WP.17) as its working document for the topics examined therein. In that report the Secretary-General examined the following topics: contents and legal effect of issuance of bills of lading or other documents evidencing the contract of carriage (part one); validity and effect of letters of guarantee (part two); definition of contract of carriage and legal position of the consignee (part three).[9]

I. CONTENTS AND LEGAL EFFECT OF DOCUMENTS EVIDENCING THE CONTRACT OF CARRIAGE

A. INTRODUCTION

10. Part one of the fourth report of the Secretary-General dealt with the contents and legal effect of documents evidencing the contract for carriage of goods by sea.[10]

11. The Working Group at its sixth session approved the following rule to define the scope of application of the Convention: "The provisions of this Convention shall be applicable to *all contracts for the carriage of goods by sea.*"[11] By virtue of this provision the scope of application of the Convention is not confined to contracts of carriage evidenced by a bill of lading, but extends to contracts evidenced by simpler documents or by no documents at all. The Working Group decided at its sixth session that, as regards the topic of the "contents of the contract of carriage", the report of the Secretary-General to be prepared for the seventh session of the Working Group should focus "on the contents of the bill of lading or other document evidencing the contract of carriage, bearing in mind that different provisions may be necessary to deal with the various types of documents."[12]

12. In accordance with the suggestion of the Working Group, in part one of the fourth report of the Secretary-General separate consideration was given to two types of documents: bills of lading were considered in chapter I (paras. 3-67) and other types of documents were considered in chapter II (paras. 68-74).

B. BILLS OF LADING

(1) *Provisions of existing conventions*

13. The Brussels Convention of 1924[13] sets forth in article 3 provisions on the contents and legal effect of bills of lading. Article 3 was supplemented by article 1 (1) of the Brussels Protocol of 1968 dealing with the rights of third persons.[14] These provisions are set forth below; the provision added by the Brussels Protocol of 1968, which comprises the second sentence of paragraph 4 of article 3, is indicated by underscoring.

...

3. After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(*a*) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or covering in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(*b*) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

(*c*) The apparent order and condition of the goods.

Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (*b*) and (*c*). *However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.*

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

...

7. After the goods are loaded, the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill

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[9] The fourth report of the Secretary-General is annexed to the present report as an addendum (A/CN.9/96/Add.1; reproduced in this volume, part two, IV, 2 below).

[10] A/CN.9/96/Add.1, part one, paras. 1-74, reproduced in this volume part 2, IV, 2 below.

[11] Working Group, report on sixth session (A/CN.9/88), para. 48 (a). (UNCITRAL Yearbook, vol. V: 1974, part two, III, 1.) This provision appears in the revised compilation of draft provisions on carrier responsibility, hereinafter cited as "Revised compilation" (A/CN.9/WG.III/WP.16), as article I-A (1).

[12] A/CN.9/88, para. 152 (UNCITRAL Yearbook, vol. V: 1974, part two, III, 1).

[13] Hereinafter referred to as the "Brussels Convention". League of Nations, *Treaty Series*, vol. CXX, No. 2764, p. 157; *Register of Texts of Conventions and other Instruments Concerning International Trade Law*, vol. II, p. 130 (United Nations publication, Sales No. E.73.V.3) (hereinafter cited as *Register of Texts*).

[14] 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, 23 February 1968; *Register of Texts*, p. 180.

of lading. At the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of article 3, it shall for the purpose of this article be deemed to constitute a "shipped" bill of lading.

(2) *Definition of "bill of lading"*

(a) *Introduction*

14. Since the report of the Secretary-General proposed the establishment of special rules to govern the contents and legal effect of "bills of lading", it was considered advisable to define the term "bill of lading". The report of the Secretary-General proceeded on the assumption that the Convention's rules with respect to "bills of lading" need not involve issues concerning the allocation of rights between successive holders when a bill of lading is in fact transferred or negotiated. Rather, the report approached the definition solely in the context of the rights between the shipper or consignee (or other holder of the bill of lading) and the carrier.[15]

15. The report pointed out that the terms that are often used to describe bills of lading (e.g. "negotiable"; "document of title") have connotations which vary from country to country, and hence are unsatisfactory for use in the definition of the document for which special rules as to contents and legal effect would be established.[16] The report noted that bills of lading did have one special and identifiable characteristic: they must be surrendered to the carrier in exchange for the goods. It is this characteristic that makes the bill of lading a safe and effective device for the sale and purchase of goods while they are in transit, and necessitates special provisions to protect third persons who purchase bills of lading in reliance on the statements contained therein. The report of the Secretary-General therefore suggested that the definition of "bill of lading" be based on the above-mentioned characteristic.

16. The report also noted that replies to a questionnaire circulated by the Secretary-General showed that "negotiable" bills of lading normally stated that the goods were to be delivered to the "order" of a designated person, and in some instances to "bearer"; some of the replies suggested that only documents that included such a statement should be considered as "bills of lading".[17] In considering this suggestion the report noted that such a rule would serve the interest of uniformity and set forth a draft definition to reflect this viewpoint (draft provision A-2, part one, at para. 12). However, the report also noted that such a requirement for specific wording might prevent commonly used terms with similar meanings (such as documents calling for delivery "to order or assigns" or "to assigns") from coming within the scope of the definition, and could also create difficulties when bills of lading are issued in languages other than those in which the Convention would be drafted.[18] The report therefore set forth an alternative definition of "bill of lading" (draft provision A-1, at para. 10), in which the basic requirement that the carrier undertake to deliver the goods only to a person in possession of the document is supplemented by the rule that a provision in the document that the goods are to be delivered to the order of a named person, or to bearer, constitutes such an undertaking. By virtue of this latter provision, documents which used the "order" or "bearer" language would clearly be "bills of lading" under the Convention, although the use of this specific terminology was not required.

(b) *Discussion by the Working Group*

17. There was general agreement within the Working Group that a definition of the term "bill of lading" would be useful. Most representatives who spoke on the subject favoured the approach taken by the Secretary-General's report toward the definition of "bills of lading".[19] Two representatives stated their preference for a definition that simply incorporated references to relevant operative provisions in the Convention.

18. Several representatives expressed the view that the definition should state clearly that a document was a bill of lading only if it had to be surrendered in exchange for the goods. Some representatives drew attention to the special problems that arose when a bill of lading was lost, or the goods to which it pertained were subject to a court order. One representative observed that in some countries goods must be delivered by the captain to the customs officials at the port of destination rather than to the holder of the bill of lading.

19. At the conclusion of the discussion by the Working Group, the subject of a definition of "bills of lading" was referred to a drafting party.[20]

(3) *Contents of the bill of lading*

(a) *Introduction*

20. The report of the Secretary-General discussed the provisions of article 3 (3) of the Brussels Convention of 1924, which deal with the required contents of bills of lading.[21] The report drew attention to ambiguities that had arisen with respect to certain of the items required to be included under subparagraphs 3 (*a*)-(*c*) of the above article. One of these ambiguities concerns the effect of stating on the bill of lading more than one of the characteristics listed in subparagraph 3 (*b*), or fewer such characteristics than were furnished

[15] A/CN.9/96/Add.1, part one, paras. 5-7 (reproduced in this volume, part two, IV, 2 below).

[16] A/CN.9/96/Add.1, part one, paras. 59-65 (reproduced in this volume, part two, IV, 2 below) (draft provision J). The problem of the scope of the term "bill of lading" has been discussed more fully in the third report of the Secretary-General on responsibility of ocean carriers for cargo (A/CN.9/88/Add.1), part three, section B, paras. 4-13 (UNCITRAL Yearbook, vol. V: 1974, part two, III, 2).

[17] See A/CN.9/96/Add.1, part one, para. 7 (reproduced in this volume, part two, IV, 2 below).

[18] See A/CN.9/96/Add.1, part one, para. 11 (reproduced in this volume, part two, IV, 2 below).

[19] A/CN.9/96/Add.1, part one, paras. 10 (draft provision A-1) and 12 (draft provision A-2) (reproduced in this volume, part two, IV, 2 below).

[20] For the establishment of the Drafting Party, see para. 60 of this report.

[21] A/CN.9/96/Add.1, part one, paras. 14-56 (reproduced in this volume, part two, below).

by the shipper to the carrier. A second problem relates to the fact that subparagraph (*c*) of article 3 (3) requires the carrier to show the apparent order and condition "of the *goods*", whereas notations in this regard more often relate to the packaging; one draft provision in the report was addressed specifically to this problem in subparagraph 3 (*c*), while an alternative draft provision was designed to avoid any doubt that the term "goods" included crates, containers and other packaging furnished by the shipper.[22] The report also considered possible additions to the required contents of bills of lading.[23]

(b) *Discussion by the Working Group*

(i) *Revision of contents required under 1924 Convention*

21. The Working Group decided to retain article 3 (3) (*a*) of the 1924 Brussels Convention. Its text, however, was submitted to the Drafting Party for consideration of a possible simplification of the language.

22. Concerning article 3 (3) (*b*), most representatives expressed support for draft provision B in the report,[24] which would require the carrier to include in the bill of lading both "the number of packages or pieces, *and* the quantity or weight", provided both were furnished by the shipper. The Working Group approved this modification of article 3 (3) (*b*).

23. Several representatives stated that bills of lading should include a brief statement of the nature of the goods. The Working Group approved this suggestion, but several representatives noted that any such statement had to be very general, particularly in cases where the goods were in packages or containers.

24. Concerning article 3 (3) (*c*) of the 1924 Brussels Convention, most representatives favoured the addition of the phrase "including their packaging", as suggested in draft provision C in the Secretary-General's report (part one, at para. 28). They reasoned that the apparent condition of the packaging was often indicative of the condition of the goods within such packaging. Furthermore, since carriers were not expected to open up sealed packages or containers, they were in most cases in a position to examine only the apparent condition of the packaging and not of the goods themselves. Several representatives opposed draft provision C on the ground that the reference to packaging only in this one instance would lead to misinterpretation at other places in the Convention where the term "goods" was used and that carriers would be encouraged by such a provision to enter unnecessary qualifications when describing the condition of packaging.

25. Several representatives supported draft provision D in the Secretary-General's report (part one, at para. 29), which called for the addition of the phrase "and crates, containers and other packaging furnished by the shipper" to the definition of "goods" approved previously by the Working Group (revised compilation, article I-C(2)). It was argued in support of draft provision D that it would clarify not only that the carrier was obligated to note the apparent condition of the packaging on the bill of lading, which was a good indication of the condition of the enclosed goods, but also that the provisions in the revised Convention regarding goods, in particular those concerned with liability for damage to goods, were applicable to the packaging of the goods. Several other representatives opposed draft provision D on the ground that it would create a new liability of carriers for damage to packaging even when there was no damage to the goods contained therein and would reopen the issue of carrier liability and unit limitations on liability. Several representatives supported inclusion of both draft provisions C and D. Several other representatives preferred retention of article 3(3)(*c*) of the 1924 Convention without any amendment of the definition of "goods" previously adopted by the Working Group.

(ii) *Possible additions to required contents of bills of lading*

26. Some representatives stated that the required contents of bills of lading should be kept to a minimum and expressed their opposition to any addition to the contents requirement established under article 3(3) of the 1924 Brussels Convention. They held the view that if any additions were desired to the contents of bills of lading, it should be done by giving shippers the option to request their inclusion.

27. At the suggestion of several representatives, the Working Group decided to require that bills of lading contain a brief statement of the general nature of the goods as supplied by the shipper, but left it to the Drafting Party to find an appropriate place for this provision in the revised Convention.

28. The Working Group approved draft provision F in the Secretary-General's report (part one, at para. 46), which would require carriers to include in bills of lading "the name and principal place of business of the contracting carrier". The suggestion of one representative to delete from draft provision F the word "contracting" in light of the definition of "carrier" previously adopted by the Working Group (revised compilation, article I-C(1)), was referred to the Drafting Party. The proposal of one representative to add the phrase "or his agent at the port of discharge" to draft provision F was not adopted by the Working Group.

29. One representative, supported by several others, proposed that the required contents of bills of lading should include the place of issuance of the bill of lading and the date on which the carrier took over the goods at the port of loading. It was stated in support that the place of issuance was important in determining the geographic scope of application of the Convention, while the date on which the carrier took over the goods at the port of loading established the

[22] Draft provisions C and D on these issues appear at paras. 28 and 29 of part one of the report of the Secretary-General. As was noted in the report (foot-note 29, at para. 29), under a prior decision of the Working Group, containers had been taken into account in the formulation of the limits on carrier liability. See revised compilation (A/CN.9/WG.III/WP.16), at article II-B.

[23] A/CN.9/96/Add.1, part one, paras. 42-52 (reproduced in this volume, part two, IV, 2 below).

[24] A/CN.9/96/Add.1, part one, para. 24 (reproduced in this volume, part two,, IV, 2 below).

commencement of the period of the carrier's responsibility. The Working Group decided to add both the place of issuance of the bill of lading and the date on which the carrier took over the goods at the port of loading to the required contents of bills of lading.

30. Most representatives agreed that the following items of information should be added to the required contents of bills of lading: the ports of loading and discharge under the contract of carriage; the name of the vessel on which the goods are loaded; the number of originals of the bill of lading; and the name of the shipper. There was general opposition to requiring that bills of lading contain detailed provisions as to negotiability.

31. Most representatives favoured a requirement that the signature of the carrier appear on the bill of lading. Some representatives noted that the rule should be wide enough to authorize signature by mechanical reproduction, printing or stamping, since this was in accord with commercial practice. One representative favoured a clarification to the effect that the signature requirement could be met by an agent of the carrier.

32. Most representatives expressed their support for requiring the inclusion, in some form, of the freight charges on the shipment, at least in cases where freight was collectable at the place of destination. Several representatives favoured a mandatory notation on the bill of lading whenever freight had been prepaid.

33. Most representatives were of the view that it would be useful if bills of lading showed the name of the consignee. However, several representatives pointed out that the consignee would not be definitely known where the bill of lading was made out to the order of a named person or to bearer.

34. One representative proposed the addition of the following contents requirement to the bills of lading: "The time used for loading if it exceeded the time provided for in the contract of carriage." It was explained that the provision was intended to prevent the carrier from attempting to collect from the consignee for demurrage that had occurred at the port of loading.

35. Several representatives observed the need for a careful examination of the sanctions that would be attached if one or more of the expanded list of required items of information were omitted from the bill of lading. There was agreement that such an omission should not invalidate the bill of lading. One representative suggested that the issue of sanctions should be left to national courts.

36. Concerning "shipped" bills of lading, the Working Group approved in substance the modification of article 3 (7) of the 1924 Convention proposed in draft provision H in the Secretary-General's report (part one, at para. 55). Draft provision H was designed to clarify article 3 (7) without, however, changing its substance. The Working Group decided to add to draft provision H the bracketed sentence found in paragraph 56 of the report of the Secretary-General.

(4) *Information supplied by the shipper which is inaccurate or which the carrier has no reasonable means of checking; reservations by the carrier*

(a) *Introduction*

37. The Brussels Convention of 1924, after stating the required contents of the bill of lading, added the following as a general proviso to article 3 (3):

> "Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking."

38. The report of the Secretary-General noted that the above provision merely authorized the carrier to omit certain matters from the bill of lading, whereas commercial practice called for the inclusion of such matters, subject to an appropriate notation or reservation by the carrier. The report set forth a draft provision designed to reflect this commercial practice.[25]

(b) *Discussion by the Working Group*

39. One representative, supported by several others, favoured taking as a starting point draft provision E in the Secretary-General's report (part one, at paragraph 35), which would require the carrier to insert in bills of lading statements concerning the description, marks, number, quantity or weight of the goods as furnished by the shipper, but would permit the carrier to specifically note his reservation if he doubted the accuracy of the shipper's statement or had no reasonable means of checking it. It was proposed, however, that draft provision E should be supplemented by a provision stating that, as against third parties acting in good faith, the carrier could only invoke a reservation that made specific reference to the suspected inaccuracy if the carrier knew or should have known of the inaccuracy. Several representatives stated in support of draft provision E, as modified above, that it corresponded to current commercial practice. Some representatives and observers noted that a third party would bear a heavy burden under a rule where he had to show that "the carrier knew or should have known of the inaccuracy".

40. Several other representatives favoured a rule whereby the carrier could refuse to enter on the bill of lading information concerning the goods as furnished by the shipper, provided the carrier gave specific reasons for such refusal.

41. The Working Group decided to refer the question of reservations to the Drafting Party with instructions that it should develop a draft text based on the following principles:

> 1. The carrier shall be obliged to include in the bill of lading all statements furnished by the shipper concerning the general nature, marks, number, quantity and weight of the goods;

[25] A/CN.9/96/Add.1, part one, paras. 31-37 (reproduced in this volume, part two, IV, 2 below). Draft provision E dealing with the matter appears at para. 35.

2. The carrier may add his reservations to the statements furnished by the shipper, giving specific reasons for his reservations;

3. There is no need to develop a special rule dealing with the legal effect, as to questions of proof, of reservations entered by the carrier on the bill of lading.

42. The Working Group decided that the general rule on reservations by the carrier should also apply to shipments of bulk cargo and of containerized cargo, and that there was no necessity for developing special rules that would only apply to these particular types of carriage. However, one representative and one observer noted the relationship of containerization to the unit limitation of liability previously approved by the Working Group (revised compilation, article II-C); under that provision a container constitutes one shipping unit, but if the contents of the container are described the goods in the container may be considered in some countries as several shipping units.

(5) *Contents of the bill of lading as evidence against the carrier*

(a) *Introduction*

43. Article 3, paragraph 4 of the Brussels Convention of 1924, as supplemented by the Protocol of 1968, reads as follows;

4. Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (*a*), (*b*) and (*c*). *However proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.*[26]

44. The report of the Secretary-General (part one, at paras. 57-61) noted that the phrase "as therein described in accordance with paragraph 3 (*a*), (*b*) and (*c*)" presented problems of interpretation, since the shipper often supplied information (including a description of the goods) which the carrier had no means of checking. Under such circumstances it was important to regard the information furnished by the shipper as qualified by the reservations noted by the carrier on the bill of lading. On the other hand, carriers sometimes noted reservations as to matters which they had reasonable means of checking. In addition, reservations entered by carriers on bills of lading were sometimes so general or vague that they failed to give adequate notice to persons relying on the contents of the bill of lading. The report set forth a draft provision (J-1) designed to express more clearly that *prima facie* and conclusive evidentiary effects attached to all statements in the bill of lading, subject only to such reservations noted on the bill of lading as were permitted under the revised Convention.[27]

45. The report also noted that the conclusive evidence rule added by the 1968 Protocol applied to a "*third* party acting in good faith". This provision clearly protected a person to whom the consignee transferred the bill of lading, and usually was construed to include the consignee. However, in some legal systems the position of the consignee was not clear, since it was possible to regard him as an *immediate* party to the contract of carriage rather than as a "third" party. It was suggested that the question should not be left in doubt, since the consignee (or a bank acting for the consignee) often relied on the bill of lading in paying for the goods. A draft provision was proposed to avoid any doubt as to whether the protection afforded transferees extended, in appropriate cases, to the consignee.[28]

(b) *Discussion by the Working Group*

46. The discussion commenced with a consideration of draft provision J-1 in the Secretary-General's report (part one, at paras. 59 and 60). Several representatives made suggestions for drafting changes in draft provision J-1. A number of representatives stated that the phrase "third party acting in good faith" in the second sentence of draft provision J-1 was sufficiently clear and, consequently there was no need to add "including a consignee". Other representatives were willing to accept the addition of "including the consignee", if it was qualified so as to exclude a consignee who was also the shipper.

47. Most representatives emphasized the need to distinguish between cases where the bill of lading contained no reservations by the carrier and cases where the carrier had validly expressed reservations permitted under the Convention. Several of these representatives introduced draft proposals designed to accomplish this aim. It was pointed out that, in the absence of reservations, the bill of lading should be *prima facie* evidence of the goods as therein described, and that as against third parties acting in good faith the carrier should not be permitted to offer evidence that would contradict the description of the goods appearing in the bill of lading. However, where the carrier entered valid reservations under the Convention, to the extent that such reservations were permitted, the particulars to which the reservations applied should not have the effect of presumptions against the carrier.

48. One representative, supported by some others, proposed that the carrier should be permitted to offer evidence to disprove information contained in the bill of lading unless a third party in good faith relied to his detriment on some description or statement in the bill of lading. One representative stated that the rule on the evidentiary effect of the bill of lading should provide expressly that the bill of lading shall be *prima facie* evidence only for the shipper as against the carrier; otherwise the wording now found in article 3 (4) of the 1924 Convention might give rise to needless disputes and divergent interpretations, and would unjustifiably provide this benefit to a person who gained possession of the bill of lading in bad faith.

49. The Working Group decided to refer to the Drafting Party draft provision J-1 together with the proposals made by members of the Working Group during the discussions.

[26] The second sentence in italics in this quotation, would be added pursuant to the Brussels Protocol of 1968.

[27] A/CN.9/96/Add.1, part one, paras. 57-61 (reproduced in this volume, part two, IV, 2 below). Draft provision J-1 appears at paras. 59 and 60. With respect to consideration of permissible reservations, see paras. 37-42 above.

[28] A/CN.9/96/Add.1, part one, para. 60 (reproduced in this volume, part two, IV, 2 below).

(6) *Effect of omitting required information from bills of lading*

(a) *Introduction*

50. The report of the Secretary-General observed that while the Brussels Convention of 1924 required the carrier to state certain information in the bill of lading (e.g., the apparent order and condition of the goods), the Convention did not specify the consequences of the carrier's omission of such information. To clarify the matter, the report set forth a draft provision (J-2) whereby, if the carrier fails to note on the bill of lading the apparent order and condition of the goods, he is deemed to have noted that the goods were in apparent good order and condition.[29] Draft provision J-2 also provides that if the bill of lading does not note that freight charges are due on arrival of the shipment, the carrier is deemed to have noted that no freight charges will be due on its arrival.[30]

(b) *Discussion by the Working Group*

51. The discussion in the Working Group was based on draft provision J-2 in the Secretary-General's report (part one, at para. 63). All representatives who spoke on the subject expressed support for the rule in draft provision J-2, whereby if a carrier fails to include a notation on the bill of lading as to the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition. It was agreed that such a presumption would underscore the duty of the carrier to make a reasonable effort to check on the condition of the goods and to disclose any damage or defect in the goods that he is aware of. It was further agreed that such a rule would provide needed protection for transferees of the bill of lading.

52. Most representatives opposed the provision in draft provision J-2 dealing with freight. Under this provision, if the bill of lading does not state that freight will be due on arrival of the shipment, it is presumed that no freight charges are collectable from the consignee. Several representatives considered that such a rule was needed to protect third persons (including consignees), whereas other representatives considered that such a rule was not necessary since third parties could reasonably expect that the carrier would make an appropriate notation on the bill of lading if freight charges were due at the port of destination. Some representatives favoured a rule that would state that the carrier could not collect any freight from a consignee if the bill of lading included a notation that freight was prepaid.

53. Draft provision J-2 was referred to the Drafting Party for further consideration in the light of the discussion in the Working Group.

[29] A/CN.9/96/Add.1, part one, paras. 62-65, (reproduced in this volume, part two, IV, 2 below) (draft provision J-2 appears at para. 63).

[30] In the setting of the complete structure of draft provisions, which appears in the annex to the report of the Secretary-General (A/CN.9/96/Add.1), such presumed notations are only *prima facie* evidence subject to rebuttal, unless the bill of lading was transferred to a third person acting in good faith. See draft provision J-1, discussed at paras. 43-45, above.

C. DOCUMENTS OTHER THAN BILLS OF LADING EVIDENCING THE CONTRACT OF CARRIAGE

(1) *Introduction*

54. The question of documents other than bills of lading that may be issued as evidence of a contract for carriage of goods by sea was discussed at paragraphs 68-74 in part one of the Secretary-General's report (A/CN.9/96/Add.1). The report pointed out that at its sixth session the Working Group had decided that the revised Convention would be applicable to all contracts for the carriage of goods by sea (revised compilation, article I-A). Although the carrier, on demand of the shipper, must issue a bill of lading (revised compilation, article IV-A), there will be cases where a shipper will not make such a demand and, consequently, where no bill of lading will be issued.

55. Draft alternative A (part one, at para. 71) in the report would leave the parties completely free to agree on the contents of a document other than a bill of lading that they wished to have issued; however, it would lay down the rule that any such document would be *prima facie* evidence of the carrier's receipt of the goods as therein described. Under draft alternative B (part one, at para. 74 of the report), the shipper could demand that such informal document contain one or more of the items of information required to appear on bills of lading and the contents of the informal document would then serve as *prima facie* evidence against the carrier.

(2) *Discussion by the Working Group*

56. Most representatives expressed support for draft alternative A in the Secretary-General's report (part one, at para. 71), since they wished to preserve flexibility in the use of documents other than bills of lading. These representatives pointed out that the Convention's rules on the liability of the carrier would apply to all contracts for the carriage of goods by sea, regardless of whether a bill of lading was or was not issued. They stated that it seemed preferable to have the contents of informal documents governed by commercial practice and the desire of the parties to the contract of carriage, and to provide simply that the contents of any informal documents would be *prima facie* evidence of the taking over by the carrier of the goods as therein described.

57. One representative, supported by another and by an observer, proposed an addition to draft alternative A which would grant to the consignee all the rights, presumptions and privileges that he would have enjoyed if a bill of lading had been issued. This representative explained that his proposal was intended to safeguard the interest of the consignee and would prevent diminution of the consignee's rights by special agreements between shippers and carriers or by the refusal of carriers to issue bills of lading. Several representatives who opposed this proposal stated that it was not necessary since the Convention applied to all contracts for the carriage of goods by sea, regardless of the type of document, if any, evidencing the contract of carriage. It was further stated in opposition to the proposal to modify draft alternative A that serious practical problems would arise from the

presumptive creation of a negotiable document at the wish of a consignee where in fact no such document had been issued.

58. One representative expressed his concern that the protection accorded to consignees under draft alternative A was inadequate and supported draft alternative B, whereby a shipper could demand that the informal document evidencing the contract of carriage contain certain specified items of information from among those required to appear on bills of lading.

59. Two representatives stated that at the second reading consideration should be given to whether the distinctions between negotiable and non-negotiable documents could be made clearer, e.g., by requiring that all documents indicate expressly whether they are negotiable or non-negotiable.

D. REPORT OF THE DRAFTING PARTY

60. At the conclusion of the discussion concerning the contents and legal effect of bill of lading as well as of documents of a more simple type, the Working Group decided to establish a Drafting Party to consider these matters and any others that may be referred to it during the course of the seventh session of the Working Group.[31] The report of the Drafting Party concerning the contents and legal effect of bills of lading and of documents other than bills of lading evidencing the contract of carriage, with some amendments made by the Working Group,[32] reads as follows:

PART I OF THE REPORT OF THE DRAFTING PARTY

Definition, contents and legal effects of the bill of lading

(*a*) The Drafting Party formulated a definition of the term "bill of lading". It also considered provisions regarding the contents and legal effect of bills of lading and of other documents evidencing the contract of carriage, based on the views expressed by the members of the Working Group. The Drafting Party recommended the following draft texts on these topics:

Definition of Bill of lading

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

Contents of Bill of lading

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

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

(*b*) The apparent condition of the goods including their packaging;

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

(*d*) The name of the shipper;

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

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

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

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

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

(*j*) The signature of the carrier or a person acting on his behalf; the signature may be printed or stamped if the law of the country where the bill of lading is issued so permits; and

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

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

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

Bills of lading; reservations and evidentiary effect

1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually taken over or, where a "shipped" bill of lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier shall make special note of these grounds or inaccuracies, or of the absence of reasonable means of checking.

2. When the carrier fails to note on the bill of lading the apparent condition of the goods, including their packaging, he is deemed to have noted on the bill of lading that the goods, including their packaging, were in apparent good condition.

[31] The Drafting Party was composed of the representatives of the following countries: Argentina, Belgium, France, Ghana, India, Japan, Nigeria, Norway, Poland, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and the Union of Soviet Socialist Republics. The Drafting Party elected as its chairman Mr. E. Chr.Selvig (Norway).

[32] The amendments adopted by the Working Group were the following: (*a*) the enumeration of the required contents of bills of lading was combined into one paragraph by the Working Group; the Drafting Party had proposed that the first two subparagraphs be contained in a paragraph 1 and the other 9 subparagraphs in paragraph 2; (*b*) the phrase introducing the list of required contents of bills of lading was changed from "The bill of lading shall set forth" to "The bill of lading shall set forth among other things the following particulars"; (c) in the French text the words *"ainsi que"* were added before the words *"le poids des marchandises"* in subparagraph 1 (*a*) of the article on the contents of bills of lading; (*d*) the phrase "or other indication that freight is payable by him" was added at the end of subparagraph 1 (*k*) of the article on the contents of bills of lading; (*e*) in the English version of the article on the bill of lading: reservations and evidentiary effect, in paragraph 1 the word "general" was added between the words "particulars concerning the" and "nature, leading marks", and in paragraph 3 the phrase "and to the extent that" was changed to "and to the extent to which"; (*f*) in paragraph 4 of the article on bill of lading: reservation and evidentiary effect, the phrase "set forth the freight" was moved from following the words "bill of lading does not" to following the phrase "subparagraph (*k*) of article ( )"; (*g*) in the article on the contents of documents other than bills of lading the word "receipt" was replaced by the phrase "taking over"; and (*h*) note (*k*) was added to the report of the Drafting Party.

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

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

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

4. If the bill of lading does not, as provided in paragraph 1, subparagraph (*k*) of article [ ],[33] set forth the freight or otherwise indicate that freight shall be payable by the consignee, it shall be presumed that no freight is payable by him. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party, including any consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.

Contents of documents other than bills of lading

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

Notes on the proposed draft provisions

(*b*) With respect to the definition of the term "bill of lading", the Drafting Party decided not to deal with all the various questions relating to the negotiability of the bill of lading.

(*c*) With respect to paragraph 1 (*a*) of the article on contents of the bill of lading, one representative was of the opinion that the text should read, "... the number of packages or pieces, *or* the weight of the goods or their quantity...".

(*d*) Concerning paragraph 1 (*b*) of the article on contents of the bill of lading, several representatives stated that if reference is made to "goods *including their packaging*" only in this provision but not elsewhere in the Convention where goods are mentioned (e.g. in relation to the carrier's liability for the goods), *a contrario* conclusions may be drawn as to the scope of the term "goods". As a result, the packaging of goods would not be covered by the term "goods" except in paragraph 1 (*b*). These representatives were of the opinion that this difficulty could be remedied by a revision of the definition of the term "goods", for which the following text could be used as a basis:

> " 'Goods' includes goods, wares, merchandise and articles of every kind whatsoever, including live animals and crates, containers and other packaging furnished by the shipper."

However, several representatives stated that the text of paragraph 1 (*b*) proposed by the Drafting Party did not necessitate any modification of the definition of the term "goods". One representative was of the view that in order to reflect that a sizeable minority in the Working Group opposed the addition of the words "including their packaging" to the text of paragraph 1 (*b*), that phrase should be placed within brackets in that subparagraph.

(*e*) Some representatives were of the opinion that it would be desirable to add the following to the list of required particulars in paragraph 1 of the article on contents of the bill of lading:

"The time used for loading where it was excessive in respect of time allowed which was provided for in the contract of carriage."

(*f*) One representative favoured inclusion of "the date of the issuance of the bill of lading" as a separate requirement under paragraph 1 of the article on the contents of the bill of lading.

(*g*) With reference to the phrase "goods including their packaging" appearing in paragraph 2 of the article on bills of lading, reservations and evidentiary effect, attention was drawn to the opinions expressed above in paragraph (*d*) of these notes.

(*h*) One representative was of the opinion that paragraph 3 (*a*) of the article on bills of lading, reservations and evidentiary effect, should start: "The bill of lading shall be *prima facie* evidence for the shipper or his agent as against the carrier of the taking over...".

(*i*) With respect to paragraph 3 (*b*) of the same article, some representatives stated that the provision should start: "Proof to the contrary shall not be admissible...". One representative stated that the words "including any consignee" in paragraph 3 (*b*) should be deleted, because in cases where a consignee was named, the bill of lading served as a transport document similar to those governed by the CMR (road) and CIM (rail) Conventions.

(*j*) One representative reserved his position with respect to paragraph 4 of the article on bills of lading: reservations and evidentiary effect.

(*k*) Two representatives opposed the addition of any information not required by article 3 (3) of the Hague Rules to the list of mandatory contents of the bill of lading.

E. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY (PART I)

61. The Working Group considered the above part of the report of the Drafting Party and approved the report, including the proposed draft provisions.[34]

62. Some representatives were opposed to adding the words "among other things the following particulars" to paragraph 1 of the article on contents of the bill of lading.

63. It was agreed by the Working Group that the Secretariat would be asked to make the changes that were necessary as a consequence of combining into one paragraph the list of the required contents of bills of lading.

64. Several representatives and observers expressed reservations concerning subparagraph 1 (*k*) of the article on the contents of bills of lading as it had been approved by the Drafting Party. (The text as approved by the Drafting Party had read "the freight to the extent payable by the consignee".) Several other representatives were opposed to any modification of the text as contained in the original report of the Drafting Party. The Working Group decided to reconsider the issue of the form in which freight charges should be reflected in bills of lading. Several representatives noted that in many cases the freight charges would not be known at the time the bill of lading was issued and subparagraph 1 (*k*) as drafted by the Drafting Party seemed to call for the exact amount of freight payable by the consignee. As a compromise the Working Group approved the following text for subparagraph 1 (*k*) of the article on the contents of bills of lading: "(*k*) the freight to the extent payable by the consignee or other indication that freight is payable by him".

65. Several representatives stated that they were opposed to the text of subparagraph 1 (*k*) of the

[33] The reference is to para. 1 (*k*) of the article above on the contents of bill of lading.

[34] See foot-note 32 above.

article on contents of bills of lading as modified by the Working Group, and expressed their strong preference for the language of subparagraph (*k*) originally approved by the Drafting Party.

66. Some representatives noted that they favoured a modification of subparagraph 1 (*k*) of the article on contents of bills of lading so as to require that the amount of freight be included in bills of lading.

67. One representative favoured deletion of paragraph 4 of the article on bills of lading, reservations and evidentiary effect.

68. With reference to the definition of "goods" in the notes on the proposed draft provisions (note (*d*) in part I of the report of the Drafting Party above), one representative proposed that the definition should read:

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

II. Validity and effect of letters of guarantee

A. Introduction

69. The problems regarding the validity and effect of letters of guarantee were considered in part two of the fourth report of the Secretary-General. The type of letter of guarantee to which the report was addressed is an undertaking by a shipper, or someone acting for the shipper, to indemnify a carrier for the liability the latter might incur toward a consignee or other party as a result of inaccurate information in the bill of lading regarding matters such as the weight, quantity and condition of the goods.

70. The Brussels Convention of 1924 does not contain any provision addressed specifically to letters of guarantee. Under the Brussels Convention of 1924, as supplemented by the Protocol of 1968, the carrier must issue a bill of lading containing certain particulars (article 3 (3)). The bill of lading is *prima facie* evidence (and in some instances conclusive evidence)[35] of the goods as therein described, and the carrier has a right to indemnification from the shipper for damages resulting from the inaccuracy of information regarding the marks, number, quantity and weight of the goods that was set forth in the bill of lading, as furnished by the shipper to the carrier (article 3 (5) of the 1924 Convention). The provision for indemnification under article 3 (5) does not extend to inaccuracies in the description of the apparent "condition" of the goods.

71. The report of the Secretary-General indicated that shippers sometimes request carriers not to make notations on bills of lading which would make such bills "unclean" and would therefore interfere with the acceptance of the bill of lading by a consignee or a bank. Carriers sometimes accede to such a request in exchange for a letter of guarantee which promises to indemnify the carrier against liability resulting from the absence of the specified notation.

72. The circumstances in which a letter of guarantee may be issued vary. The letter may be issued when the parties genuinely disagree as to the quantity, the weight, or the adequacy of packing of the goods. On the other hand, the letter of guarantee may be issued in cases where both parties recognize that the bill of lading contains inaccuracies. It was noted in the report that in the latter situation the letter of guarantee would be void in some national legal systems because of its use to mislead third parties. The report concluded, however, that no clear rule with respect to letters of guarantee appeared to emerge from national practice.

73. Alternative approaches regarding the validity and effect of letters of guarantee were examined in the report. One approach to the problem is to encourage greater flexibility in documentary credit transactions; under this approach no provision regarding letters of guarantee would be needed in the revised Convention. A second approach was directed to the invalidity of letters of guarantee. Two draft proposals were made along these lines: the first proposal (draft proposal A, part two of the report, at para. 21) would invalidate all letters of guarantee; the second proposal (draft proposal B, part two of the report, at para. 23) would invalidate any letter of guarantee relating to a statement in the bill of lading or the omission of information required under the Convention if the carrier knew or should reasonably have known that such a statement was incorrect or that the conclusion of such information was required. A third draft proposal (draft proposal C, part two of the report, at para. 27) provided that a carrier, who knowingly states inaccurate information in the bill of lading or omits any information required by the Convention to be included in the bill of lading, shall be liable to the consignee or other transferee of the bill of lading for damages incurred because of such a statement or omission, and shall not have the benefit of the Convention limitation on carrier liability.

74. Part one of the fourth report of the Secretary-General, at paragraphs 66 and 67, examined article 3 (5) of the Brussels Convention which reads as follows:

> "The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper".

The report stated that article 3 (5) was intended to hold the shipper responsible for the accuracy of the information he furnishes to the carrier for inclusion in the bill of lading. A draft proposal (draft provision K, part one of the report, at para. 67) was formulated in the report with the aim of modifying article 3 (5) of the Brussels Convention so as to make clear that the responsibility of the shipper to the carrier under article 3 (5) remained even though the bill of lading may have been transferred to a third party.

[35] Article 1 (1) of the 1968 Brussels Protocol adds to article 3 (3) of the 1924 Convention that "proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith".

B. DISCUSSION BY THE WORKING GROUP

75. The Working Group decided that it would be appropriate to consider proposals regarding the liability of the shipper for inaccurate particulars in the bill of lading in conjunction with the consideration of the validity and effect of letters of guarantee. In the light of this decision, the Working Group examined article 3 (5) of the 1924 Brussels Convention. Most representatives who spoke on the subject favoured the modification of article 3 (5) of the 1924 Brussels Convention contained in draft provision K of the Secretary-General's report, mentioned above, which aimed at clarifying the language of article 3 (5) without altering its substance. The effect of draft provision K would be to ensure that the shipper's warranty to the carrier continued even after he had transferred the bill of lading to a third party. The Working Group approved draft provision K in substance and referred it to the Drafting Party.

76. The Working Group then discussed the desirability of including a provision on the validity and legal effect of letters of guarantee. Many representatives favoured the inclusion of such a provision in the Convention. It was stated that the practice of shippers to issue letters of guarantee was open to abuse and that in many cases the current practice perpetuated fraud and bad faith; a third party holder of a bill of lading often knew very little about the goods and had to rely on the information stated in the bill of lading. It was essential that the bill of lading be accurate since third parties, including banks and credit institutions, relied on its contents. However, divergent opinions were expressed as to the most effective method to protect third parties from being misled by information stated in the bill of lading or by the omission from the bill of lading of certain information, including appropriate reservations, which under the Convention should have been noted on the bill of lading.

77. On the other hand, some representatives and observers were of the view that there was no need for a provision specifically approving or disapproving letters of guarantee. It was argued that to invalidate letters of guarantee was to absolve the shipper from liability, although it was usually the shipper who requested a clean bill of lading which did not accurately describe the goods and who profited from its issuance. It was indicated that national law was adequate to deal with fraudulent letters of guarantee. It was also noted that it would be extremely difficult to frame a sufficiently flexible rule which would only invalidate those letters of guarantee that had been issued in bad faith; this complex matter had been satisfactorily solved in practice and a rule in the Convention would inevitably be inflexible and would have a negative effect on international commerce. One representative added that it would be desirable to harmonize the Working Group's work in this field with that of the International Chamber of Commerce, as the latter was currently engaged in a revision of its regulations concerning documentary letters of credit.

78. The greater part of the discussion by the Working Group was concerned with finding the most appropriate means for curbing the fraudulent use of the letter of guarantee so as to protect consignees and other third parties.

79. It was generally agreed that the letter of guarantee should have no effect on the rights of the consignee against the carrier. Several representatives considered that this principle should be stated in the Convention. One of these representatives observed that the principle of the invalidity of the letter of guarantee with respect to the consignee was based on the generally accepted legal principle that an agreement between two parties cannot injure the rights of third parties. Some representatives were opposed to the inclusion of a provision declaring letters of guarantee invalid with regard to consignees and other third parties. It was the opinion of these representatives that, since the letter of guarantee would bind only those who were parties to it, the letter of guarantee had no relevance to the relationship between the shipper or the carrier and the consignee, and that the inclusion of a statement dealing with this extraneous matter could lead to misinterpretation.

80. The Working Group examined the desirability of a Convention rule invalidating letters of guarantee as between the carrier and the shipper. Several representatives and some observers stated their opposition to any Convention rule invalidating letters of guarantee. It was stated that letters of guarantee served a valuable purpose in faciliting international trade and that their continued use should be favoured; the protection of third parties against fraud could be assured by other means. Most members of the Working Group were of the opinion that the Convention should include a provision on the invalidity of letters of guarantee since such a provision would serve to deter carriers from accepting letters of guarantee. Two approaches were put forward. The first approach, favoured by some representatives, was to provide, along the lines of draft proposal A (part two of the report, at para. 21) for the invalidity of all letters of guarantee. However, most representatives preferred the approach of draft proposal B (part two of the report, at para. 23) under which letters of guarantee were null and void only where the carrier knew, at the time he accepted the letter of guarantee, that the bill of lading did not accurately describe the goods. It was noted that in such cases the carrier was acting in concert with the shipper to mislead the consignee or other third party. It was stated in support of this second approach that it would not invalidate letters of guarantee in cases were there was a bona fide dispute concerning the description of the goods. However, some representatives expressed the opinion that it would not be possible to draft a rule that would only invalidate letters of guarantee in those circumstances where the carrier knew of the inaccuracy in the bill of lading and thus acted fraudulently. It was stated in this connexion that, since in all cases where a letter of guarantee was issued the carrier knew of the inaccuracy of the bill of lading, letters of guarantee would always be invalid under such an approach; this result was deemed unsatisfactory.

81. Some representatives suggested that in cases where a letter of guarantee would be invalid as against the shipper, it should follow that the carrier should not be entitled to recover under the implied guarantee

provided for in draft provision K in the report of the Secretary-General (A/CN.9/96/Add.1, part one, at para. 67, reproduced in this volume, part two, IV, 2 below).

82. Many representatives expressed the view that in cases where it could be shown that the carrier knew of the inaccuracy of the description of the goods in the bill of lading and thereby had misled the consignee or other third party, the carrier should be liable for the loss, damage or expense incurred by the consignee, without benefit of the limitation on carrier liability provided in the Convention. Such a rule, which was embodied in draft proposal C (part two of the report, at para. 27) was supported both by representatives who favoured a general rule invalidating all letters of guarantee and by representatives who were opposed to such a general rule. It was observed that the removal of the limitation on carrier liability would not only bring about full recovery by the consignee for the loss, damage and expense resulting from his having been misled, but would also deter the carrier from acting to mislead the consignee. One representative, who opposed the inclusion of a special rule as to the limitation of carrier liability in the context of letters of guarantee, stated that the Working Group had already adopted a provision on wilful misconduct (Revised compilation, article II - E); this provision on wilful misconduct would deprive a carrier, who knowingly acted to mislead the consignee, of the benefit of the Convention limitation on carrier liability.

83. Some representatives were of the view that an article in the Convention relating to letters of guarantee should include a provision giving the consignee or other third party a direct right of action against the shipper whenever the shipper has issued a letter of guarantee. Most representatives were opposed to a Convention rule on direct action by the consignee against the shipper. In this connexion it was observed that the relationship between the shipper and the consignee was adequately regulated by the sales contract.

84. After detailed discussion by the Working Group, the Drafting Party was requested to prepare a provision reflecting the discussion in the Working Group.

C. REPORT OF THE DRAFTING PARTY

85. Following the discussion by the Working Group, this subject was referred to the Drafting Party. The report of the Drafting Party, with some amendments made by the Working Group[36], reads as follows:

PART II OF THE REPORT OF THE DRAFTING PARTY

The validity and effect of letters of guarantee

(*a*) On the basis of the opinions expressed by members of the Working Group, the Drafting Party formulated draft provisions on letters of guarantee, together with a provision concerning the liability of the shipper for furnishing inaccurate particulars for inclusion in the bill of lading. The Drafting Party recommended the following draft provisions:

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

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

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

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

Notes on the proposed draft provisions

(*b*) Several representatives were of the view that the first sentence of paragraph 3 should be placed within brackets. Some of these representatives were against the inclusion of any provision along the lines of this paragraph. The Drafting Party was equally divided as to whether the first sentence of paragraph 3 should be placed in square brackets and recommended that the question be considered by the Working Group. One representative was of the opinion that the following language should be added to the first sentence of paragraph 3 after the phrase "in paragraph 2 of this article": "concerning the grave discrepancies in the particulars or the apparent defective condition which seriously affect the commercial value of the goods as a whole".

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY (PART II)

86. The Working Group considered the above part of the report of the Drafting Party and approved the report, including the proposed draft provisions.[37]

87. With respect to paragraph 1, one representative was of the opinion that the wording of the last sentence should be aligned with the 1924 Convention and should read in relevant part "such indemnity shall in no way limit his responsibility and liability".

88. With respect to paragraph 2, one representative favoured the addition of the following sentence at

[36] The amendments adopted by the Working Group were the following: (*a*) in para. 1, first sentence, the word "general" was added before the word "nature"; (*b*) in para. 1, first sentence, the word "numbers" was changed to "number".

[37] See foot-note 36 above.

the end of the paragraph: "However he may rely on it as against the shipper".

89. With respect to paragraph 3, most representatives stated that they supported this paragraph on the ground that it would discourage the issuance of inaccurate and misleading bills of lading and would help to unify the rules on this subject. Other representatives who favoured this paragraph referred to the comments they had made during the earlier discussion of the topic by the Working Group.

90. Several representatives noted their reservations regarding the inclusion in the Convention of a provision along the lines of paragraph 3. These representatives also reserved their position as to the reference to paragraph 3 in paragraph 4. In the view of one of the representatives, paragraph 3 would entail a modification of national laws concerning the validity of letters of guarantee as between shippers and carriers. In the absence of such a provision, national laws would continue to be applicable, with the modification agreed to by the Working Group that letters of guarantee were null and void in respect of third parties. That was, in the view of this representative, the meaning of paragraph 2 of the draft text on letters of guarantee that had been approved by the Working Group. At the least, this provision could be enlarged so as to enable the injured third party to have recourse against the shipper.

91. Finally, in the view of several representatives, if paragraph 3 were deleted, it would be desirable to modify paragraph 4 in order to specify that the carrier would be liable if he omitted a reservation referred to in paragraph 2 although he knew that the indications furnished by the shipper regarding the apparent state of the goods were incorrect. A modified text which would reflect this view could read as follows:

> "Where the carrier intentionally does not insert the reservation referred to in paragraph 2 although he knew of the inaccuracy of the particulars furnished by the shipper, or of the apparent condition of the goods, the carrier guarantees . . .".

92. With respect to paragraph 4, one representative opposed inclusion of such a provision.

III. Definition of contract of carriage and of consignee

A. Introduction

93. Part three of the fourth report of the Secretary-General responded to a request by the Working Group that possible definitions of contract of carriage and consignee should be examined.

94. With respect to the definition of contract of carriage, it was stated in the report that under article 1 (*b*) of the Brussels Convention of 1924 the term "contract of carriage" was applicable "only to contract of carriage covered by a bill of lading or any similar document or title, in so far as such document relates to the carriage of goods by sea". It was also noted in the report that other transport conventions did not specifically define contracts of carriage, although in delineating the scope of application of these Conventions the expression "contract of carriage" was used in a setting which indicated the meaning of the term.

95. The report of the Secretary-General set forth alternative approaches on the subject of the definition of contract of carriage. Under one approach, no definition of the term "contract of carriage" would be necessary in view of the fact that the revised Convention identified contracts covered as "all contracts for the carriage of goods by sea" (Revised compilation, article I-A) and that geographic scope was determined in terms of "every contract for the carriage of goods by sea between ports in two different States" (Revised compilation, article I-B, para. 1). Another approach would add the words "for reward" or "in exchange for payment of freight" to the provision on contracts covered by the Convention (draft provision A; part three of the report, at para. 6). A third alternative called for a separate definition of the term "contract of carriage" along the lines proposed by France in response to an inquiry by the Secretariat to members of the Working Group (A/CN.9/WG.III/WP.18). Draft provision B, set forth in the report of the Secretary-General (part three, at para. 7) read as follows: "contract of carriage" means a contract whereby a carrier promises a shipper [in exchange for payment of freight] [for reward], to move specified goods from one port to another.

96. Part three of the report of the Secretary-General was also concerned with the definition of consignee and the feasibility of including in the revised convention a provision on the legal position of the consignee. The report noted that, unlike the Brussels Convention of 1924, other transport conventions clearly delineated the legal position of the consignee. An approach was considered whereby the revised Convention would contain a definition of "consignee" and would give explicit recognition to the rights enjoyed by the consignee or other third party under the contract of carriage. On the subject of the rights to be enjoyed by the consignee, draft provision C (part three of the report, at para. 12) stated: "the consignee shall have the rights of the shipper and, in addition, any rights conferred on him under article [3 (4)]".

B. Discussion by the Working Group

(1) *"Consignee"*

97. Most members of the Working Group supported the inclusion of a definition of the term "consignee" along the lines proposed in draft provision C (part three of the report, at para. 12), which provided: "'Consignee' means the person entitled to take delivery of the goods under the contract of carriage". Some representatives were in favour of deleting the reference to "contract of carriage" in the definition, while some other representatives preferred the substitution of "bill of lading" for that term. Other representatives favoured the retention of the definition as it appeared in draft provision C. It was also proposed that the words "in accordance with this Convention" be added at the end of the definition of "consignee".

98. The Working Group considered the desirability of including a general provision on the legal position of the consignee. Some representatives observed that

formulating such a provision was difficult, since the legal position of the consignee would vary according to whether or not a bill of lading was issued. It was noted that specific aspects of the position of the consignee were set forth in rules already approved by the Working Group and that a general provision on this question was not necessary. One representative noted that it was important to state the rights of the consignee in the absence of a bill of lading. The Working Group decided not to include a general provision on the legal position of the consignee.

(2) *"Contract of carriage"*

99. The Working Group considered the issue of a possible definition of the term "contract of carriage". Some representatives stated that such a definition was necessary since the Working Group had decided to make the revised Convention applicable whenever there was a contract for the carriage of goods by sea, and not to make the application of the Convention dependent on the issuance of a bill of lading. It was also noted that a definition of the term was desirable since its meaning might be unclear in some legal or linguistic settings. One representative was of the view that since the Working Group had decided at its sixth session not to define the term "charter-party", it should not now define "contract of carriage". On the other hand, other representatives stated that the lack of a definition of "charter-party" made it important to include a definition of "contract of carriage" in order to clarify the distinction between these terms. In reference to this point, one representative noted that the reference to the agreement to move "*specific* goods" in the proposed definition would be useful in distinguishing contracts of carriage from charter-parties. Some other representatives stated that the term "contract of carriage" was well known, much utilized in practice, and it was difficult to imagine that it would be given any meaning other than the obvious one.

100. Some of the representatives favouring the inclusion of a definition of "contract of carriage" in the Convention noted that the definition should include a reference to the carrier's obligation to deliver the goods. In this regard it was noted by one representative that if a definition was to be included in the Convention, it would have to be a comprehensive one covering every aspect of the carrier's responsibilities.

101. Some representatives expressed concern about the proposed phrase "from one port to another", since what constitutes a port is uncertain. One representative was of the view that use of this phrase was too narrow since the goods could suffer damage in the course of their delivery to the consignee, which would be later than the time the goods had reached the port of destination.

102. One representative was of the opinion that adoption of either the French proposal or of draft provision B in the report of the Secretary-General would create difficulties in those jurisdictions which considered the consignee to be a party to the contract of carriage.

103. The Working Group decided to include a definition of "contract of carriage" in the Convention, along the lines of either the proposal made by France in its additional reply to the UNCITRAL questionnaire (A/CN.9/WG.III/WP.18) or draft proposal B in the report of the Secretary-General (part three of the report, at para. 12).

C. REPORT OF THE DRAFTING PARTY

104. Following the discussion by the Working Group, this subject was referred to the Drafting Party. The report of the Drafting Party read as follows:

PART III OF THE REPORT OF THE DRAFTING PARTY

Definitions of "consignee" and "contract of carriage"

(*a*) The Drafting Party formulated draft texts to reflect the views expressed during the Working Group's discussion on definitions of "consignee" and "contract of carriage". The Drafting Party recommended the following definitions:

(1) "Consignee" means the persons entitled to take delivery of the goods.

(2) "Contract of carriage" means a contract whereby the carrier agrees with the shipper to carry by sea, against payment of freight, specified goods from one port to another where delivery is to take place.

Note on the proposed draft definitions

(*b*) With respect to the definition of "consignee", some representatives favoured the addition of the words ". . .under the contract of carriage" at the end of the definition.

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY (PART III)

105. The Working Group considered and approved the above part of the report of the Drafting Party, including the draft definitions proposed therein. The following reservations and comments were made with regard to the report of the Drafting Party:

(*a*) One representative reserved his position with respect to the definition of "consignee", since the word consignee appeared in different contexts in the draft provisions already approved by the Working Group. As a result, the definition could lead to confusion and inconsistency.

(*b*) A number of representatives expressed the view that the words "under the contract of carriage" should be added to the definition of "consignee".

(*c*) Several representatives were of the opinion that the definition of "consignee" should be completed by a provision which would define the legal relationship between the carrier and the person entitled to take delivery of the goods. Such a provision was not needed in the 1924 Brussels Convention since that Convention applied only to carriage under bills of lading. However, in the context of the draft provisions prepared by the Working Group, such a provision was necessary in order to cover cases where no bill of lading had been issued. In national legislations there did not exist any legal mechanism which would permit the consignee to exercise the rights of the shipper who concluded the contract of transport.

(*d*) One representative suggested that a definition of "shipper" be added to the revised Convention.

IV. FUTURE WORK

106. Under the terms of reference set forth by the Commission at its fifth session, the Working Group was requested, *inter alia*, to "keep in mind the possibility of preparing a new convention as appropriate, instead of merely revising and amplifying the rules in the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924 Brussels Convention) and the Brussels Protocol, 1968".[38] Accordingly, the Working Group considered whether the provisions prepared by it in respect of the responsibility of ocean carriers for cargo should be incorporated in a second protocol to the 1924 Brussels Convention or should, instead, form the subject-matter of a new convention.

107. Some representatives were of the opinion that, in view of the possible economic implications of the new rules and the interrelationship between those rules and the 1924 Brussels Convention and 1968 Brussels Protocol, a decision on this point should be deferred. However, most representatives took the view that the scope of the draft provisions approved by the Working Group would make it difficult to link them, by way of a protocol, to the 1924 Brussels Convention and that to do so would create confusion. The Working Group therefore decided that its future work in respect of carrier responsibility should be carried out with a view to establishing a new convention. Accordingly, it requested the Secretariat to structure the draft provisions approved by the Working Group in the form of a convention and to submit a draft of such a convention to its eighth session for a second reading. It was noted that the revised compilation of draft provisions on carrier responsibility (A/CN.9/WG.III/WP.16) could be used as a basis for the preparation of such draft convention.

108. Since time was not available to permit full consideration of all the topics indicated in the provisional agenda and annotations (A/CN.9/WG.III/L.3), it was agreed to take up the topics not yet considered at the eighth session of the Working Group. These topics are the following:

General rule on liability of the shipper

Dangerous goods

Notice of loss

General average

Relationship of convention with other maritime conventions.

In order to facilitate the preparation of the documentation for the Working Group's eighth session, the Secretariat suggested, and the Working Group was agreed, that any comments and observations regarding these topics and other relevant matters from members of the Working Group and observers should reach the Secretariat before 1 December 1974.[39]

109. The observer of UNIDROIT submitted and introduced to the Working Group a document entitled "First results of the UNIDROIT enquiry on gold clauses in international conventions", prepared by that organization. The Working Group took note with appreciation of this document.

110. The Working Group noted that under the schedule of meetings envisaged by the Commission at its seventh session, the Working Group would hold its eighth session at United Nations Headquarters in New York from 27 January to 7 February 1975.[40] Several representatives observed that the fourth session of the UNCTAD Working Group on International Shipping Legislation was scheduled to take place at Geneva at the same time. Since several representatives serving on the UNCITRAL Working Group also served on the UNCTAD Working Group, the Secretariat was requested to arrange, if possible, for the rescheduling of the eighth session of the UNCITRAL Working Group.

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

[39] For consideration by the Working Group at its eighth session, one representative introduced a proposal dealing with the situation where the consignee or holder of a bill of lading fails to collect the goods within a reasonable period after their arrival at the port of discharge. Another representative introduced a proposal, also for consideration at the next session, defining the relationship between the revised Convention and the rules of other conventions and of national law dealing with liability for damage caused by a nuclear incident. One observer introduced the observations of his organization regarding the draft texts approved by the Working Group at its previous sessions and reproduced in the revised compilation (A/CN.9/WG.III/WP.16); the Working Group decided to consider these observations during the second reading of the revised Convention at its forthcoming eighth session.

[40] Report of the United Nations Commission on International Trade Law on the work of its seventh session, *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17* (A/9617), para. 85 (*d*); UNCITRAL Yearbook, vol. V: 1974, part one, II, A.