2. Fourth report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/96/Add.1).

CONTENTS

GENERAL INTRODUCTION

1. The present study is the fourth in a series of reports prepared by the Secretary-General[1] to assist in the work on international shipping legislation by the United Nations Commission on International Trade Law (UNCITRAL). At its fourth session, UNCITRAL decided to establish an enlarged Working Group on International Legislation on Shipping[2] and further resolved that:

"The rules and practices concerning bills of lading, including those rules contained in the Interna-

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

[2] *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8717, para. 19; UNCITRAL Yearbook, vol. II: 1971, part one, II, A).

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

2. At its sixth session the Working Group decided that at its seventh session it would consider, *inter alia*, the following topics: the contents of the contract for carriage of goods by sea, the validity and effect of letters of guarantee, and the protection of good faith purchasers of bills of lading.[4] At that session the Working Group requested the Secretary-General to prepare a report dealing with these matters and, also to consider in the report "a possible definition of 'contract of carriage' and the position, with respect to the carrier, of the person entitled to take delivery of the goods".[5]

3. This report is presented in response to the request of the Working Group referred to at paragraph 2 above. Part one deals with the topic of the contents and legal effect of documents evidencing the contract of carriage; part two examines the validity and effect of letters of guarantee; part three considers possible definitions of the terms "contract of carriage" and "consignee" and discusses the legal position with respect to the carrier of the person entitled to take delivery of the goods.

4. The Secretary-General circulated a questionnaire to Governments and interested international organizations on the topics of the contents of documents evidencing the contract of carriage, the validity and effect of letters of guarantee, and the protection of good faith purchasers of bills of lading. The replies received by the Secretariat, as well as a copy of the questionnaire, were made available to the Working Group as documents A/CN.9/WG.III/L.2 and A/CN.9/WG.III/L.2/Add.1 and Add.2. In addition, in response to a supplementary questionnaire, the Secretariat has received a reply dealing with a possible definition of the term "contract of carriage" and with the legal relationship between the carrier and the person entitled to take delivery of the goods; this reply is reproduced as document A/CN.9/WG.III/WP.18. The comments and replies received by the Secretariat are referred to at relevant points in the present report.

[3] *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 [the Commission's] fourth session". (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).

[4] Report of the Working Group on the work of its sixth session, Geneva, 4-20 February (hereinafter cited as Working Group report on sixth session) (A/CN.9/88, paras. 148-149; UNCITRAL Yearbook, vol. V: 1974, part two, III, 1). Draft provisions approved by the Working Group at its first six sessions may be found in document A/CN.9/WG.III/WP.16 (Revised compilation of draft provisions on carrier responsibility: note by the Secretariat).

[5] Working Group report on sixth session, para. 151.

PART ONE: CONTENTS AND LEGAL EFFECT OF ISSUANCE OF BILLS OF LADING OR OTHER DOCUMENTS EVIDENCING THE CONTRACT OF CARRIAGE

INTRODUCTION

1. The Working Group at its sixth session decided that at the seventh session it would consider, among other topics, the contents of the contract for carriage of goods by sea and the protection accorded to a good faith purchaser of a bill of lading,[1] and requested the Secretary-General to prepare a report dealing, *inter alia*, with these topics.[2] The Working Group further decided that this report "should focus, as regards 'contents of the contract of carriage', on the contents of the bill of lading or other document evidencing the contract of carriage, bearing in mind that different provisions may be necessary to deal with the various types of documents. In particular, it would seem necessary to require that the bill of lading contain information different from that required in relation to transport documents of a more simple type."[3]

2. The subject-matter under discussion encompasses two distinct problems: first, the contents and legal effect of the document known as "bill of lading"; second, the development of rules on the contents and legal effect of other, less formal documents evidencing the contract of carriage. Chapter I of this report will examine the rules applicable to bills of lading. Chapter II of the report will examine the possible development of rules governing the contents and legal effect of any documents other than "bills of lading" that may be issued evidencing the contract of carriage.

CHAPTER I. BILLS OF LADING

A. PROVISIONS IN THE BRUSSELS CONVENTION OF 1924 AND THE BRUSSELS PROTOCOL OF 1968 CONCERNING CONTENTS AND LEGAL EFFECT OF BILLS OF LADING

3. The provisions quoted below are from the Brussels Convention of 1924,[4] with the exception of the underscored language at the end of article 3 (4) which would be added pursuant to article 1 (1) of the 1968 Brussels Protocol.[5]

[1] Report of the Working Group on International Legislation on Shipping on the work of its sixth session, Geneva, 4 to 20 February 1974 (A/CN.9/88; UNCITRAL Yearbook, vol. V: 1974, part two, III, I, hereinafter cited as "Working Group, report on sixth session"), paras. 148-149.

[2] *Ibid.*, para. 151.

[3] *Ibid.*, para. 152.

[4] 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*).

[5] Hereinafter referred to as the "Brussels Protocol". Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels on 25 August 1924; Brussels, 23 February 1968; *Register of Texts*, p. 180.

Article 3

. . .

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 of 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 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.

B. AMBIGUITIES IN THE PRESENT RULES AND SUGGESTED CLARIFICATIONS

(1) *Meaning of the term "bill of lading"*

4. The term "bill of lading" is not defined either in the Brussels Convention of 1924 or in the 1968 Protocol thereto. While the phrase "bill of lading" appears repeatedly,[6] the only provision resembling a definition may be found in article 1 (*b*) of the 1924 Convention, where "contract of carriage" is defined as applicable only to "contracts of carriage covered by a *bill of lading or any similar document of title*".

5. The terms "bill of lading" and "document of title" are given different meanings in various legal and commercial settings. As was noted in the third report of the Secretary-General, in some settings "bill of lading" may include a non-negotiable (or "straight") bill of lading; similarly, the term "document of title" is also given varying interpretations.[7] Consequently, a more precise definition of the term "bill of lading" may be useful, particularly if the Working Group should decide to establish rules as to the contents and legal effect of "bills of lading" that differ from the rules applicable to other, less formal documents evidencing the contract of carriage.

6. At its sixth session the Working Group approved, for the purpose of its deliberations, the following provisional definition: "bill of lading means a bill of lading or any similar document of title".[8] It will be noted that the above provision does not define the term "bill of lading" except by repeating that term and by adding the phrase "or any similar document of title", which is likewise subject to the ambiguities outlined above.

7. The replies of a number of States, focusing on the negotiable character of bills of lading, proposed that the required contents of "negotiable" bills of lading be expanded and made more definite by including provisions as to the person to whom the bill of lading could be made out, the method for transferring bills of lading and the person to whom the carrier must deliver the goods covered by a bill of lading.[9] One reply suggested that the revised convention

[6] See articles 1 (*b*), 3 (3), 3 (4), 3 (6), 3 (7), 4 (5), 5, 6, 10 of the Brussels Convention of 1924, and articles 1 (1), 2 (*a*), 2 (*c*), 2 (*f*), 2 (*h*), 5, 6 of the 1968 Protocol.

[7] See third report of the Secretary-General on responsibility of ocean carriers for cargo: bills of lading, part three, section B, paras. 4-13 (A/CN.9/88/Add.1; UNCITRAL Yearbook, vol. V: 1974, part two, III, 2).

[8] Working Group report on sixth session, para. 48 (*b*) (ii).

[9] See Sweden (A/CN.9/WG.III/WP.10/Add.1, pp. 126-127), Norway (A/CN.9/WG.III/WP.10/Add.1, pp. 19-20), Australia (A/CN.9/WG.III/L.2, pp. 7-8), Czechoslovakia (A/CN.9/WG.III/L.2, p. 14), Ethiopia (A/CN.9/WG.III/L.2, p. 16), France (A/CN.9/WG.III/L.2, p. 19), Italy (A/CN.9/WG.III/L.2, p. 25), Pakistan (A/CN.9/WG.III/L.2, pp. 36-37, 41), Secretariat of the Asian-African Legal Consultative Committee (A/CN.9/WG.III/L.2, pp. 54-56, 60), International Union of Marine Insurance (A/CN.9/WG.III/L.2, p. 67). The third UNCITRAL questionnaire on bills of lading dealt, *inter alia*, with the contents and legal effect of documents evidencing the contract of carriage. The replies to that questionnaire may be found in replies to the third questionnaire on bills of lading submitted by governments and international organizations for consideration by the Working Group (hereinafter referred to as replies to third UNCITRAL questionnaire) (A/CN.9/WG.III/L.2 and Add.1 and Add.2 thereto).

should give "a definition of bill of lading as negotiable document".[10] It should be noted that definition of the term "bill of lading" need not involve issues concerning the allocation of rights between successive holders of the bill of lading when a bill of lading is in fact transferred or negotiated. It is presumed that the Working Group would wish the definition cast in the setting of rules that involve only the rights between the consignee (or other holder of the bill of lading) and the carrier.[11]

8. It has been proposed that the revised convention include a provision to the effect that a "bill of lading" under the Convention must be issued either to "the order" of a designated person or to "bearer".[12] In considering this proposal the Working Group will wish to reconcile two conflicting interests: (1) the interest in uniformity and definiteness, and (2) the interest in flexibility and adaptability to the varying forms of expression used in different commercial and language settings.

9. Limiting the phrase "bill of lading" to documents bearing the precise "to order" or "bearer" language responds to the first interest mentioned in the preceding paragraph. On the other hand, the interest in flexibility and adaptability would be served by formulating the required designation of the consignee in more general terms. The essential consequence of providing in the bill of lading that the goods are to be delivered only "to order" of a designated person or to "bearer" is that the carrier, to be safe, may only deliver the goods to the possessor of the document.[13] It is this result that makes such a document a safe and effective device for controlling the right to delivery of the goods while they are in the possession of the carrier. Recognition of the fact that this document will often be utilized for transactions involving transfer of "title" to the goods provided the reason for the provision added by the 1968 Brussels Protocol to article 3 (4) giving protection to the consignee or other third person who took the bill of lading in good faith.

10. Draft provision A-1, which follows, reflects an attempt to reconcile the interest in uniformity with the desire to preserve flexibility:

Draft provision A-1

"Bill of lading" means a document which evidences [the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods only to a person in possession 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.

11. The first sentence of draft provision A-1 states as a general rule that under a bill of lading "a carrier undertakes to deliver the goods only to a person in possession of the document". Thus a document could qualify as a bill of lading by employing provisions which achieve this result, even if the words "to order" or "bearer" do not appear in the document. This flexibility may be desirable in view of the reference in some documents "to order or assigns" or "to assigns" of the document,[14] and in view of the problems that could arise under a more rigid rule when the document is issued in various languages which arguably deviate in form, but not in substance, from the terminology ("order" or "bearer") specified in the Convention. In the interest of clarification, the second sentence of the draft provision adds that "a provision in the document that the goods are to be delivered to the order of a named person, or to bearer" constitutes the undertaking described in general terms in the first sentence; as a consequence there could be no doubt that documents employing the specified terminology would be "bills of lading" under the convention.

12. Should the Working Group prefer to emphasize uniformity in the terminology employed in bills of lading, it may wish to consider the following draft provision A-2:

Draft provision A-2

"Bill of lading" means a document which evidences [the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods to the order [or assigns] of a named person, or to bearer.

13. Both draft provisions A-1 and A-2 would define "bills of lading" in a manner that is consistent with commercial practice, i.e., as documents controlling delivery of the goods, while avoiding complications which would arise from utilization of the concepts of "negotiability" and "document of title" which carry varying connotations under different national legal systems.[15]

(2) *Introductory provision of article 3 (3)*

14. The introductory provision of article 3 (3) of the 1924 Brussels Convention reads as follows: "3. After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand

[10] Czechoslovakia (A/CN.9/WG.III/L.2, p. 14).

[11] Several replies observed that rules on the negotiability of ocean transport documents with respect to the rights of successive holders needed to be related to national laws concerning documentary credits and their negotiability, and expressed the view that the revised convention should not be extended to cover such questions traditionally resolved by legislation dealing specifically with negotiable instruments. See Belgium (A/CN.9/WG.III/L.2, p. 12), Khmer Republic (A/CN.9/WG.III/L.2, p. 28), Netherlands (A/CN.9/WG.III/L.2, p. 29), United Kingdom of Great Britain and Northern Ireland (however, without any objection in principle) (A/CN.9/WG.III/L.2, p. 46), International Chamber of Commerce (A/CN.9/WG.III/L.2, p. 65), Canada (A/CN.9/WG.III/L.2/Add.1). The reply of the Comité Maritime International noted that "such a regulation may very well be too ambitious, particularly considering the diminished use of bills of lading in modern carriage of goods by sea" (A/CN.9/WG.III/L.2, p. 64).

[12] See foot-note 9, above.

[13] A further implication of such a provision, generally recognized in national law and reinforced by specific clauses to this effect in bills of lading, is that the person to whose "order" the bill of lading was issued must make an appropriate endorsement when transferring the bill of lading to a third person. In addition, bills of lading are often issued in a specified number of originals and state that the goods may be delivered to the possessor of one of the originals. Although bills of lading are rarely issued to "bearer", there seems no reason for excluding such a document from the definition of the term "bill of lading".

[14] See T. G. Carver, Carriage by Sea, vol. II, 12th ed., London, 1971, pp. 1048-1049.

[15] See paragraphs 5 and 7, above.

of the shipper, issue to the shipper a bill of lading showing among other things:".

15. Under this provision the carrier is only obligated to issue a bill of lading containing the information required by article 3 (3) of the 1924 Convention if the shipper makes a demand on the carrier to issue a bill of lading.[16] Commercial flexibility is preserved by giving the shipper the option of deciding whether or not he wishes that the goods be covered by a bill of lading. The information that must be included in the bill of lading, once the shipper has made a demand for its issuance, is set forth in article 3 (3) of the 1924 Brussels Convention. Three types of required information are specified in article 3 (3), under subparagraphs (*a*), (*b*) and (*c*). This report will first consider each of these subparagraphs separately, and will then examine the general proviso at the end of article 3 (3) since that proviso relates to the whole of article 3 (3).

(3) *Article 3 (3)* (a)

16. Under article 3 (3) (*a*) of the Brussels Convention of 1924 the bill of lading shall show:

> "(*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 coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage."

17. According to the terms of article 3 (3) (*a*), the carrier must note on the bill of lading "the leading marks necessary for identification of the goods" as furnished by the shipper, provided such marks appear clearly "in such a manner as should ordinarily remain legible until the end of the voyage." This subparagraph (*a*) has not been the subject of comment in the replies to the Secretariat inquiry,[17] and it appears that this provision may be retained without substantial change. The Working Group may wish to consider deletion of the phrase "before the loading of such goods starts", since in cases where bills of lading are to be issued only after the loading process has commenced, there seems no reason to require that the shipper's statement as to the marks be furnished prior to the commencement of the loading process.[18]

(4) *Article 3 (3)* (b)

18. Under article 3 (3) (*b*) of the 1924 Brussels Convention the bill of lading shall show:

> "(*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;".

19. Article 3 (3) (*b*) requires the carrier to show on the bill of lading only those items that are "furnished in writing by the shipper". In addition, subparagraph (*b*), like subparagraph (*a*), is subject to the general proviso at the end of article 3 (3) of the 1924 Convention whereby the carrier need not show on the bill of lading such items furnished by the shipper which the carrier "has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking".

20. Under subparagraph (*b*), problems of construction have arisen which may be illustrated by the following case. The shipper furnishes in writing the following information: "25 bags; weight 2,500 kilos." Since subparagraph (*b*) provides that the carrier shall state "the number of packages or pieces, *or* the quantity *or* weight", may the carrier in the above example choose to state in the bill of lading *either* "25 bags" or "2,500 kilos", at his discretion?

21. A second problem of construction arises if the carrier in the above example states in the bill of lading both "25 bags" and "2,500 kilos". In this event, do the rules of article 3 (4) of the 1924 Brussels Convention, binding the carrier to statements made in the bill of lading, apply to both statements?[19] Or, is the carrier's responsibility under article 3 (4) satisfied if only one of the statements is correct (i.e., 25 bags, weighing, however, only 10 pounds each)? The latter interpretation has been urged on the following ground: article 3 (4) gives effect to bills of lading "as therein described *in accordance with paragraphs* (a), (b) *and* (c)", and only the quantity or the weight was such a description (not both), since only one was required under subparagraph (*b*); therefore, the carrier is given the benefit of the alternative provided in subparagraph (*b*) even if he lists both quantity *and* weight.[20] Such a result has considerable practical importance because it seems to be common practice to state in bills of lading both the number of packages and the quantity or weight of the goods.[21]

22. On the other hand, it has been held in some jurisdictions that, if the carrier lists both the number of packages and the quantity or weight of the goods and fails to note on the bill of lading any appropriate reservation to the shipper's statements, under article 3 (4) the carrier is bound by both statements appearing on the bill of lading.[22] This approach is supported by the view that the phrase "in accordance with paragraphs 3 (*a*), (*b*) and (*c*)" in article 3 (4) is designed to limit the carrier's responsibility to the types

[16] According to Carver, "the carrier is not bound by this rule to deliver any bill of lading at all, or a bill of lading complying with the rule, unless the shipper demands it. If the shipper is issued with a bill of lading which does not comply with the rule, and makes no complaint, the rights of the indorsees of the bill will be governed by its actual terms." T. G. Carver, Carriage by Sea, vol. I, p. 237. See also P. Manca, International Maritime Law, vol. II, Antwerp, 1970, p. 176.

[17] A/CN.9/WG.III/L.2 and Add.1 and Add.2.

[18] The general proviso to article 3 (3) as a whole is believed sufficient to protect the carrier in cases where he suspects that the information as to marks furnished by the shipper is inaccurate or where the carrier lacks reasonable means for checking the marks. (For discussion of the proviso see paragraphs 31-37 below).

[19] For the purpose of the illustration it is assumed that the general proviso to article 3 (3) is inapplicable, and that the carrier did not note on the bill of lading any reservation as to such statements.

[20] See S. Dor, Bill of Lading Clauses and the Brussels International Convention of 1924 (Hague Rules), 2nd ed., London, 1960, p. 88; W. E. Astle, Shipowner's Cargo Liabilities and Immunities, 3rd ed., London, 1967, p. 96.

[21] Dor, Bill of Lading Clauses and the Brussels International Convention of 1924 (Hague Rules), p. 87.

[22] *Ibid.*, pp. 88-89; also W. Tetley, Marine Cargo Claims, London, 1965, p. 60.

of statements embraced within those three subparagraphs, but does not relieve the carrier of responsibility for statements of this type when he notes them on the bill of lading.

23. The legislative history of the 1921 Hague Rules, which formed the basis for the 1924 Brussels Convention, supports the position that when the carrier lists on the bill of lading both the number of packages and the quantity or weight of the goods, he should be responsible for both statements under article 3 (4). In their original draft form the 1921 Hague Rules required the carrier to list: "(1) the number of packages or pieces *and*; (2) as the case may be, the weight, quantity or measure." During the 1921 Hague Conference these requirements were combined into one subparagraph as a drafting matter; apparently there was no intention to alter the substance of the provision.[23]

24. The ambiguities that have developed under article 3 (3) (*b*) of the 1924 Convention could be resolved by the following draft provision, which closely follows the original version of the 1921 Hague Rules:

Draft provision B

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

25. It will be noted that under draft provision B the carrier would not be required to show on the bill of lading both the quantity and weight of the goods, even if both are furnished by the shipper; in such a case the carrier would have to note only the number of packages or pieces and *either* the quantity *or* the weight of the goods. This approach is proposed in view of the added burden on the carrier, and possible delay in loading, that would occur if the carrier needed to verify the accuracy of the shipper's statement both as to quantity and as to weight.[24]

(5) *Article 3 (3)* (c)

26. Under article 3 (3) (*c*) of the 1924 Brussels Convention, the bill of lading shall show:

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

27. Under this subparagraph, unlike subparagraphs 3 (*a*) and (*b*), the inclusion of the required statement in the bill of lading does not depend on the shipper's furnishing of a written statement. However, the obligation of the carrier is limited by the fact that he need only show the "apparent" order and condition of the goods.

28. The present language of subparagraph (*c*) is perhaps somewhat misleading in requiring that the carrier note the apparent order and condition of the "goods". In most situations the carrier can only examine the exterior of the shipment and thus is in a position to observe and describe only the condition of the packaging of the goods. Consequently, writers interpreting subparagraph (*c*) have assumed that it permits the carrier to note the apparent order and condition of unpackaged goods or the apparent condition of the packaging of goods received by the carrier in sealed crates, packages or containers; the carrier is not normally expected to open packages to ascertain the condition of their contents.[25] It may be noted that under article 8 (1) (*b*) of the 1956 CMR (road) Convention[26] and under article 12 (3) of the 1970 CIM (rail) Convention,[27] the carrier is to note on the transport document the apparent condition of the packaging of the goods. The Working Group may wish to consider the following draft provision designed to avoid possible future difficulty:

Draft provision C

(*c*) The apparent order and condition of the goods including *their packaging;*

29. There is, however, a further and more fundamental problem concerning the packaging of goods. The basic rules on responsibility of the carrier, approved by the Working Group at its sixth session,[28] make the carrier liable for damage "resulting from loss of or damage *to the goods*, as well as from delay in delivery". If read literally, the above provision would arguably free the carrier from responsibility for loss of or damage to the crates, containers or packaging within which the goods are enclosed.[29] To avoid possible misunderstanding on this score, the Working Group may wish to consider enlarging the definition of "goods"[30] to include crates, containers or other packaging of the goods if such were furnished by the shipper. This result could be achieved by amending the definition of "goods" in the following manner:

Draft provision D

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

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[23] See foot-note 22, above.

[24] If the Working Group is of the view that it would not unduly burden the carrier to require him to note on the bill of lading both the quantity and weight of the goods when both are furnished by the shipper, the Working Group may wish to consider the following draft provision as an alternative for draft provision B: "(b) The number of packages or pieces, the quantity and the weight, as the case may be, as furnished in writing by the shipper;".

[25] R. Rodière, Traité Général de Droit Maritime, Vol. II, Paris, 1970, para. 453; M. Pourcelet, Le transport maritime sous connaissement, Montreal, 1972, p. 24. The reply of France shows that in some jurisdictions at least, the carrier is already required to note any inadequacy in packing since it affects the "apparent order and condition of the goods".

[26] Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva, 19 May 1956; United Nations, *Treaty Series*, vol. 399, p. 189 (hereinafter cited as "CMR Convention").

[27] International Convention Concerning the Carriage of Goods by Rail, signed at Berne, 25 October 1952; United Nations, *Treaty Series*, vol. 241, p. 336, as amended in 1961 and 1970. Although the 1970 revision is not yet in force, that version, hereinafter cited as "1970 CIM Convention", is cited throughout this report since it is expected to come into force during 1975.

[28] Working Group report on sixth session, para. 26 (*a*); revised compilation of draft provisions on carrier responsibility (hereinafter referred to as "revised compilation") (A/CN.9/WG.III/WP.16), article II-B.

[29] On the other hand, containers were specifically taken into account in the formulation of the limits on carrier liability. See article II-C, paragraph 2, in the revised compilation.

[30] Revised compilation, article I-C (2).

30. The Working Group may decide that adoption of draft provision D would make draft provision C unnecessary, since draft provision D would make it clear that the term "goods" included any packaging furnished by the shipper. Therefore, when describing "the apparent order and condition of the goods", in the case of containerized or packaged goods the carrier would have the obligation to describe the condition of those "goods" that he is in a position to evaluate, i.e., the container or packaging.

(6) *General proviso to article 3 (3)*

31. The general proviso to article 3 (3) of the 1924 Brussels Convention reads as follows:

> "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."

32. The present general proviso to article 3 (3), if read literally, merely authorizes the carrier to omit from the bill of lading certain types of statements supplied by the shipper. However, it is common commercial practice for the carrier to include in the bill of lading suspect or unverified information, furnished by the shipper according to 3 (3) (*a*) and (*b*), together with the carrier's reservations as to its accuracy.[31] While most courts have recognized such reservations by the carrier as effective if stated on the bill of lading,[32] some other courts have refused to do so on the theory that the carrier should not have inserted the unverifiable or suspect information in the bill of lading.[33]

33. The shipper and the carrier may also find it useful to include in the bill of lading, albeit with certain reservations, statements by the shipper falling outside the purview of article 3 (3) (*a*) and (*b*) and recognized to be unverifiable by the carrier.[34] An example of such information is a statement by the shipper describing goods that he is shipping in a scaled container and as to which the carrier would note "said to contain".

34. The Working Group may wish to consider an approach whereby the carrier would be obligated to include in the bill of lading any written statements furnished by the shipper that fall within the scope of 3 (3) (*a*) and (*b*), subject to the carrier's privilege to note his reservations in the circumstances described in the present proviso to article 3 (3). In addition, the carrier would be free under this approach to include in the bill of lading descriptions of the goods falling outside of article 3 (3) (*a*) and (*b*), coupled with appropriate reservations.

35. A draft provision, designed to reflect commercial practice as to the entry of reservations in the bill of lading,[35] could read as follows:

Draft provision E

> "3.[36] If a bill of lading contains particulars concerning the description, marks, number, quantity or weight of the goods, which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking, the carrier shall [state] [specify] such reservation in the bill of lading."

36. The bracketed phrases at the end of draft provision E indicate alternative ways of expressing the degree of specificity required of such reservations. Some jurisdictions have held that, in order to avoid responsibility for statements shown on the bill of lading, a carrier's reservation to such statements noted on the bill of lading must be sufficiently specific to advise the consignee or other third party of the relevant facts giving rise to the reservation. These jurisdictions have not accepted vague or general reservations and some have insisted that, to be given effect, a reservation must disclose the grounds for the carrier's suspicion that the shipper's information is inaccurate or why the carrier lacks reasonable means for verifying the information.[37] In other jurisdictions, a reservation noted on the bill of lading will be given effect even though it does not set forth the grounds for the reservation.[38]

37. Draft provision E does not state that the carrier must state the "grounds" or "reasons" for a reservation since these concepts seem to present difficulties of clarity and of practicality in application. It seems that either one of the alternative bracketed phrases at the end of draft provision E would indicate sufficiently that a reservation may not be so general that it would fail to communicate the essential facts to the consignee or other third person.[39]

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[31] e.g., "Weight, quantity and number of packages unknown" and "said to weigh." See Dor, Bill of Lading Clauses and the Brussels International Convention of 1924, pp. 91-93; Temperley, Carriage of Goods by Sea Act, 1924, 4th ed., London, 1932, pp. 33-35; reply of Norway to the third UNCITRAL questionnaire.

[32] See Dor, Bill of Lading Clauses and the Brussels International Convention of 1924, pp. 91-93; Manca, International Maritime Law, Vol. II, p. 182.

[33] See Tetley, Marine Cargo Claims, pp. 61-63. Under such decisions the information in the bill of lading becomes *prima facie* or conclusive evidence of the goods as received by the carrier, with the carrier's reservation being disregarded.

[34] cf. Knauth, Ocean Bills of Lading, 4th ed., Baltimore, 1953, p. 181, stating "While...the bill of lading need state only the number of packages or the quantity or the weight of the cargo, it is often desirable or necessary to state all of the facts and also statements of invoice values, for purposes of export permits, customs-house entries, etc."

[35] Based on reply of Norway to the third UNCITRAL questionnaire (A/CN.9/WG.III/L.2), p. 32.

[36] See *article IV-B: contents of bills of lading*, in the "proposed structure of draft articles on contents and legal effect of documents evidencing the contract of carriage", annexed to part one of this report.

[37] France, Lebanon and Syria by statute, and Belgium, the Federal Republic of Germany, the German Democratic Republic and Yugoslavia by judicial decision, require that carriers note on the bill of lading the reasons for their reservations. The reply of France suggests that the 1924 Convention be modified to bring about this result expressly. The reply of Dahomey proposes that general reservations concerning the condition, quality or quantity of the goods should not be given effect.

[38] According to Dor, Bill of Lading Clauses and the Brussels International Convention of 1924, p. 93, this is the case in the United Kingdom and in the United States.

[39] The draft provision to amend article 3 (4) of the 1924 Convention, at paragraph 59 below, would make it clear that under the Convention only a reservation that is valid under draft proposal E would be given legal effect.

(7) *Bulk cargo*

38. In some countries the national legislation giving effect to the 1924 Brussels Convention includes a specific provision dealing with bulk cargoes.[40] The Working Group may wish to consider a similar provision to the effect that where by trade custom the weight of bulk cargo is ascertained by a person other than the shipper or carrier and is so stated in the bill of lading, then the statement of weight is not *prima facie* evidence against the carrier under article 3 (4).

39. On the other hand, the Working Group may conclude that draft provision E (para. 35, above) is sufficiently broad and flexible to deal with statements of the weight of bulk cargo. The carrier may enter his reservation as to the weight of bulk cargo simply by stating something along the lines of "bulk cargo, weight furnished by X". Draft provision E would give effect to this reservation in the usual case where the carrier lacks commercially reasonable means for verifying the weight of the bulk cargo.

(8) *Containerized cargo*

40. It has been suggested that the recent growth of carriage of goods in sealed containers packed by the shipper presents a special situation and necessitates adoption of a special rule under article 3 (3) of the 1924 Convention.[41] Such a rule would provide that in the case of containerized cargo, the carrier's obligation to state on the bill of lading the description, marks, number, quantity and weight of the goods applied only to the sealed containers themselves and not to the cargo within the containers.

41. Draft provisions C (para. 28, above) and E (para. 35, above) may be held to cover sufficiently the problems posed by carriage of goods in sealed containers packed by the shipper. These problems are not novel; carriers shipping crated or packaged goods have rarely if ever been expected to open up crates or carefully packaged goods received from the shipper in order to check their marks, quantity, weight or apparent condition. Under draft provision C the carrier is only obligated to note on the bill of lading the "*apparent* order and condition of the goods, *including their packaging*"; thus for sealed containers the carrier would only have to describe the apparent condition of the containers. As to marks, number, quantity or weight of the goods, draft provision E permits the carrier to note his reasonable reservations on the bill of lading, such as "received 2 sealed containers in apparent good order and condition, each said to contain 50 bicycles".

(9) *Possible additions to list of required contents of bills of lading*

42. A number of replies have suggested that the information required to be listed on a bill of lading be expanded from what is currently required under article 3 (3) of the 1924 Convention.[42] In practice bills of lading generally contain a great deal of information which is not required, such as the name of the carrier, shipper, consignee and vessel, the ports of loading and discharge, a description of the goods, the number of original bills of lading issued, the freight and whether it was paid, date and place of issuance of the bill of lading, adequacy of the packaging of the goods, invoice values, and various information needed for customs and for obtaining export and import permits.[43] Pursuant to the opening provision of article 3 (3) of the 1924 Convention ("bill of lading showing among other things"), carriers may insert in bills of lading information which they are not required under the Convention to show on bills of lading; the only question is whether the carrier should be obligated to show on the bill of lading certain additional types of information, either automatically or on specific demand by the shipper.

43. It may be noted that the contract of carriage evidenced by the bill of lading forms only a part of the normal documentation generated by the underlying sales transactions; the bill of lading will generally be accompanied by other documents providing information about the goods, such as customs documents, export and import documents, marine insurance policies and invoices.[44]

(a) *Name of the contracting carrier*

44. Several replies indicated that it would be useful to require that all bills of lading contain the name and address of the carrier.[45] Article 6 (1) (*c*) of the 1956 CMR Convention requires that the transport document include "the name and address of the carrier", and a similar requirement appeared in article 8 of the Warsaw Convention prior to its revision in 1955.

45. When a "received-for-shipment bill of lading"[46] is issued, the identity of the contracting carrier will of course be known, but the identity of the actual carrier may not yet be known in some cases. Under draft provisions previously approved by the Working Group, the contracting carrier remains responsible for the

[40] United Kingdom, The Carriage of Goods by Sea Act, 1924, section 5; Canada, Water Carriage of Goods Act, 1936, section 6; United States, Carriage of Goods by Sea Act, 1936, section 11.

[41] See the replies of Australia, Pakistan and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire. See also, M. J. Mustill, "Carriage of Goods by Sea Act, 1971" (Arkiv for Sjørett, Bd. 11 - Hefte 4-5), Oslo, 1972, p. 705.

[42] See the replies of Australia, Austria, Czechoslovakia, Ethiopia, Finland, France, Iraq, Italy, Pakistan, Romania, the USSR, the Asian-African Legal Consultative Committee, Comité Maritime International to the third UNCITRAL questionnaire, and of Norway and Sweden to the second UNCITRAL questionnaire.

[43] See e.g. Liner bill of lading (Liner terms approved by the Baltic and International Maritime Conference), amended 1 January 1950 and 1 August 1952 (CONLINE bill of lading), and the P and I model bill of lading, reprinted in annex III of "Bills of lading", report by the secretariat of UNCTAD TD/B/C.4/ISL/6/Rev.1, pp. 66 and 69. See also foot-note 34, above.

[44] The invoice generally will list the names and addresses of the seller and the buyer, the date, the reference number of the buyer's order, a description of the goods sold, details of the packaging, and marks and numbers appearing on the package, the terms of sale, invoice price, and the details of the shipping. C. M. Schmitthoff, The Export Trade (4th ed., London, 1962), p. 56. See also *Gilmore and Black, the Law of Admiralty (Brooklyn, 1957)*, p. 100.

[45] See the replies of Greece, Iraq, Pakistan, the USSR and the Asian-African Legal Consultative Committee.

[46] "Received-for-shipment bills of lading" have been recognized by article 3 (3) of the 1924 Convention and will presumably remain acceptable under the revised convention.

entire carriage while the actual carrier is only responsible for the segment of the carriage performed by him.[47] Thus is many cases the person with the right to assert claims against a carrier for loss or damage to the goods will prefer to sue the contracting carrier since, often, one cannot determine the particular segment of carriage during which the goods were lost or damaged. The only exception to the contracting carrier's liability for the entire carriage by sea is contained in the draft provision on "through bill of lading" considered by the Working Group.[48] Under that provision the contracting carrier is freed from liability for loss or damage to the goods if such loss or damage was caused by events occurring while the goods were in the charge of an actual carrier and that actual carrier performed the part of the carriage designated in the contract of carriage as to be performed by a person other than the contracting carrier.

46. The Working Group may wish to consider the following draft proposal:

Draft provision F

"1. (*d*)[49] The name and principal place of business of the contracting carrier;".

47. Proposed draft provision F calls for the principal place of business of the contracting carrier since, under article V-C in the revised compilation, that link provides an independent basis for jurisdiction over a carrier.[50] Consideration has been given to a provision requiring the statement of the name and principal place of business of an "actual carrier" to be employed in performing the contract of carriage. However, such a provision has not been included in the above draft since the "actual carrier" may not be known at the time of the execution of the contract of carriage. To state that the name and principal place of business of the "actual carrier" shall be inserted in the bill of lading if those facts are known by the contracting carrier would present difficult practical problems of application and enforcement.

(b) *Place and date of issuance of bill of lading*

48. A number of replies have suggested that one or both these items of information be required to appear on bills of lading.[51] The 1970 CIM Convention and the 1956 CMR Convention both require that the transport document show the date of issuance, but such a requirement was deleted during the 1955 revision of the Warsaw Convention.[52] This information is almost always included in bills of lading, and it is useful as a general indication of the approximate time when the carrier's responsibility for the goods commenced.[53] While the date the carrier first took charge of the goods at the port of loading would be more helpful in establishing the carrier's period of responsibility and in determining whether the carriage involved delay in delivery, insistence on the former date might slow down the issuance of the bill of lading; the carrier's clerk or agent issuing the bill of lading would be required to make inquiries to ascertain the date the carrier first took charge of the goods at the port of loading. Thus, the date of issuance of the bill of lading is a useful and significant item of information which, if required to be included in bills of lading, would not cause administrative problems or slow down the loading process.

49. Today only the CMR Convention requires inclusion of the place of issuance of the transport document.[54] However, under article 10 of the 1924 Brussels Convention, article 5 of the 1968 Protocol, as well as under the draft article on geographic scope approved by the Working Group,[55] the place of issuance of the bill of lading may determine the applicability of the Convention. There are no administrative problems involved in including this information and bills of lading almost always specify their places of issuance in any event. On the other hand, it might be concluded that the practice of indicating on bills of lading the date and place of issuance is so general that the matter does not require regulation.

50. If the Working Group considers that there should be a formal requirement that bills of lading include the date and place of their issuance, it may wish to add the following:

Draft provision G

1. (*e*)[56] The place and date of its issuance;

(c) *Other possible required information*

51. Various replies have proposed that carriers be obligated to include in bills of lading one or more types of information in addition to the requirements already discussed in this report, such as the following:

(i) The ports of loading and discharge under the contract of carriage;[57]

[47] Revised compilation, article II-G.

[48] Revised compilation, article II-H. (The provision was placed within brackets by the Working Group; as to the degree of approval, see foot-note 32 in the revised compilation.)

[49] See article IV-B: contents of bills of lading, in the "proposed structure of draft articles on contents and legal effect of documents evidencing the contract of carriage", annexed to part one of this report.

[50] The second part of article V-C, part A (1) (*a*) "or in the absence thereof, the ordinary residence of the defendant" is somewhat incongruous since it only seems to be relevant if the defendant is an individual (corporations do not have "ordinary residences"). At the second reading, the Working Group may wish to consider deleting this phrase from article V-C.

[51] See the replies of France, Iraq, Pakistan, Romania, the USSR and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire.

[52] The CIM Convention requires the "date of acceptance" of the consignment note by the carrier (article 8 (1)), and the CMR Convention the "date of the consignment note" (article 6 (1)). Before being amended in 1955, the Warsaw Convention called for the date of "execution" of the consignment note (article 8 (*a*)).

[53] The exact time for the commencement of the carrier's responsibility, under article II-A in the revised compilation, is the moment when the carrier is first in charge of the goods at the port of loading.

[54] Such a requirement was deleted from the Warsaw Convention in 1955 and from the CIM Convention in 1970.

[55] Revised compilation, article I-B.

[56] See *article IV-B: contents of bills of lading*, in the "possible structure of draft articles on contents and legal effect of documents evidencing the contract of carriage", which is annexed to part one of this report.

[57] See replies of Finland, Greece, Iraq, Pakistan, the USSR and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire. One may note that the actual port of loading might not yet be known when a "received-for-shipment" bill of lading, proper under article 3 (3), is being issued. In addition, shippers are unlikely to accept bills of

(ii) The name of the vessel on which the goods are loaded;[58]

(iii) Description of the nature of the goods covered by the bill of lading;[59]

(iv) The signature of the carrier;[60]

(v) The freight charges on the shipment;[61]

(vi) The number of originals of the bill of lading;[62]

(vii) The name of the shipper;[63]

(viii) The name of the consignee;[64]

(ix) Detailed provisions as to negotiability.[65]

52. It would appear that if a shipper desires that any of the above information be inserted in a bill of lading, the carrier would not normally have any objection to the inclusion of such information. Consequently, it is doubtful whether the inclusion of such items requires regulation in the Convention.

(10) *"Shipped" bills of lading—article 3 (7)*

53. Article 3 (7) of the 1924 Brussels Convention reads as follows:

"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 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."

54. Article 3 (7) grants a shipper the right to demand a "shipped" bill of lading from the carrier once his goods have been loaded on board. Under this provision, the carrier may transform a previously issued document of title, such as a "received-for-shipment" bill of lading, into a "shipped" bill of lading by making an appropriate notation on the earlier document as to the loading of the goods.

55. As it currently reads, article 3 (7) of the 1924 Convention sets forth the necessary contents of a "shipped" bill of lading only in the specialized situation where a document of title containing less information had been issued previously. The Working Group may wish to consider the following draft proposal which would more closely define "shipped" bills of lading and would also reduce some of the complexity of the present article:

Draft provision H

2.[66] After the goods are loaded on board, if the shipper so demands, the carrier, [master or agent of 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, the date or dates of loading, and the port 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."

56. It does not seem necessary to state explicitly in the revised convention that a "shipped" bill of lading may be created by adding the appropriate notation to an existing document such as a "received-for-shipment" bill of lading. However, if for reasons of clarity such a statement seems advisable, the Working Group may consider adding the following language at the end of draft provision H: "[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.]"

(11) *Contents of bill of lading as evidence against the carrier—article 3 (4)*

(a) *Current law*

57. Article 3 (4) of the 1924 Brussels Convention reads as follows:

"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*)."

58. Article 1 (1) of the 1968 Brussels Protocol would add the following language to article 3 (4):

lading omitting the port of discharge (as such bills would not be transferrable or negotiable) and therefore there may be no need to require insertion of this information.

[58] See the replies of Greece, Iraq, Romania and the USSR to the third UNCITRAL questionnaire. However, the name of the vessel on which the goods are loaded is available only when a "shipped" bill of lading is issued. (See the discussion of article 3 (7) of the 1924 Convention at paragraphs 53-56, below.)

[59] In their replies to the third UNCITRAL questionnaire, Austria favoured and the International Union of Marine Insurance opposed such a provision.

[60] See the replies of France, Iraq, Romania and the USSR to the third UNCITRAL questionnaire. It may be noted that the carrier's signature is required under article 6 (3) of the Warsaw Convention, article 5 (1) of the CMR Convention and article 8 (1) of the CIM Convention.

[61] See the replies of Pakistan, the USSR and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire. It is believed that the thrust of these proposals has been met by the proposed revision of article 3 (4) of the 1924 Convention, at paragraph 63, below.

[62] See the replies of Australia, France, Norway and the USSR to the third UNCITRAL questionnaire, and of Sweden to the second UNCITRAL questionnaire.

[63] See the replies of Iraq, Pakistan, Romania, the USSR and the Asian-African Legal Consultative Committee. Such a requirement is contained in article 6 of the Warsaw Convention, article 6 (1) (*b*) of the CMR Convention and article 6 (5) (*g*) of the CIM Convention.

[64] See the replies of Greece, Iraq, Pakistan, Romania, the USSR, and the Asian-African Legal Consultative Committee to the third UNCITRAL questionnaire.

[65] See discussion of definition of "bill of lading", at paragraphs 4-13, above.

[66] See *article IV-B: contents of bills of lading*, in the "possible structure of draft articles on contents and legal effect of documents evidencing the contract of carriage", annexed to part one of this report.

"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."

(b) *Revision of article 3 (4) of 1924 Convention*

59. The three other transport conventions all provide that the contents of the transport document are *prima facie* evidence of the quantity of the goods, as well as of the apparent condition of the goods and of their packaging.[67] Virtually all the replies expressed satisfaction with the basic rule of article 3 (4). However, in light of the possible expansion of the list of required contents of bills of lading following the Working Group's revision of article 3 (3) of the 1924 Convention, and to ensure that the carrier gets the benefit of any reservation that he is entitled to make and does make, the Working Group may wish to consider this modification:

Draft provision J-1

1. A bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described, subject to the reservations permitted under paragraph 3 of article [IV-B].

The reference at the end of the above draft provision is to draft provision E, (para. 35, above). The draft provisions proposed in part one of this report have been set forth in organized form in an annex.[68]

(c) *Revision of article 1 (1) of 1968 Protocol*

60. Article 1 (1) of the 1968 Brussels Protocol, amending article 3 (4) of the 1924 Convention, protects "a third party acting in good faith," to whom a bill of lading was transferred. Its current wording, however, leaves doubt as to whether a consignee to whose order a bill of lading was issued falls within the class of persons accorded protection under this provision. Such a consignee, or a bank that issued a letter of credit on behalf of the consignee, should be protected as a "third party" under this provision, since the consignee or his bank will often pay for the goods in reliance upon the statements and descriptions appearing in the bill of lading. The commercial function of the bill of lading in promoting the security of transactions would be fully served only if a consignee acting in good faith to whom a bill of lading is transferred would be held to be protected by this provision.[69] In order to avoid any doubt that a consignee other than the shipper will be protected by this provision, the Working Group may wish to consider the following draft provision:

Draft provision J-1 (continued)

1.[70] . . . 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, *including a consignee.*

61. It has been suggested that the revised convention should contain a definition of the term "contract of carriage" and that such definition include the following provision: "Under this contract (of carriage) the person having the right to take delivery of the goods shall be entitled to the rights of the shipper and will assume his obligations."[71] Since draft provision J-1 is designed to give third parties acting in good faith, including consignees, rights superior to those enjoyed by the shipper, draft provision J-1 would specifically have to be noted as an exception to the general rule proposed above which equates the position of the consignees or third party holders of bills of lading with the position of the shipper.[72]

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

62. The 1924 Convention and the 1968 Protocol do not clearly state the effect of omitting entirely from the bill of lading some item of required information. If read literally, the present rules give rise to an evidentiary presumption against the carrier only in cases where information was in some manner noted on the bill of lading and not in cases where the information was omitted entirely.

63. The Working Group may wish to consider a draft provision dealing specifically with the evidentiary value of statements on bills of lading, and with the legal effect of the omission of required information from bills of lading or of the inclusion knowingly of inaccurate information:

Draft provision J-2

"2.[73] When the carrier fails to note on the bill of lading the apparent order and condition of the goods [including their packaging] or that freight charges are due on [arrival of] the shipment, for the purpose of paragraph 1 he is deemed to have noted on the bill of lading that the goods [including their packaging] were in apparent good order and condition and that no freight charges would be due on [arrival of] the shipment."

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[67] The Warsaw Convention specifies in article 11 (2) that the air consignment note is *prima facie* evidence as to weight, number, dimensions, packaging, and apparent condition of the goods. The CMR Convention under its article 9 (2) provides in effect that the consignment note is *prima facie* ("shall be presumed") evidence of the number of packages, their marks and number, and the apparent good condition of the goods and packaging (unless reservations are inserted). It has been claimed that under article 8 (4) of the CIM Convention the carrier is responsible for the weight and number of packages mentioned in the consignment note when the loading has been performed by the carrier. J. Ramberg, The Law of Carriage of Goods—Attempts at Harmonization, Scandinavian Studies in Law, 1973, p. 234.

[68] In "Possible structure of draft provisions on contents and legal effect of documents evidencing the contract of carriage" annexed to part one of this report, the following scheme is envisaged:

Article IV-B: contents of bills of lading.
Article IV-C: legal effect of bills of lading (draft provision J-1 would constitute paragraph 1 of that article).
Article IV-D: documents other than bills of lading.

[69] There is no need to provide such protection to a consignee who is also the shipper, since he will not be relying on any statements in the bill of lading concerning the goods. As the shipper-consignee is not a person to whom "the bill of lading *has been transferred*", he is clearly not protected by article 1 (1) of the 1968 Protocol and he will not be protected by draft provision J-1.

[70] See foot-note 68, above. The reply of Finland to the third UNCITRAL questionnaire criticized the "fiction" inherent in such a rule of irrebuttable presumption.

[71] See the supplementary reply of France (A/CN.9/WG.III/WP.18, and part three of this report.

[72] The proposed definition of "contract of carriage" is considered in detail in part three of this report.

[73] See foot-note 68 above.

64. Draft provision J-2 is designed to eliminate the possibility that a carrier could diminish his responsibility by omitting some item of required information from the bill of lading.

65. Draft provision J-2 does not deal with the broader question of possible sanctions against the carrier for inserting in a bill of lading information known by him to be inaccurate or misleading, or for his knowing omission of any information required by the convention to be shown on bills of lading. It may be noted under draft proposal C in part two of this report dealing with letters of guarantee,[74] a carrier would be held responsible for all loss, damage or expense suffered by the consignee or other third party acting in good faith as a consequence of such an inaccuracy or omission in the bill of lading.[75]

(12) *Indemnity of the shipper—article 3 (5)*

66. Article 3 (5) of the Brussels Convention of 1924 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."

67. Article 3 (5) is intended to hold the shipper responsible for the accuracy of the information he furnishes to the carrier for inclusion in the bill of lading. It has been suggested that the provision be clarified to assure that the responsibility of the shipper under article 3 (5) remains with him even though the bill of lading may have been transferred to a third party.[76] Accordingly, the Working Group may wish to consider the following modification of article 3 (5):

Draft provision K

3.[77] The shipper shall be deemed to have guaranteed to the carrier the accuracy, at the time the carrier took charge of the goods according to article [II-A] of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies in such *information. The shipper shall remain responsible under such guarantee even if the bill of lading has been transferred to a third party.* The right of the carrier to such indemnity shall in no way limit his responsibility under the contract of carriage to any person other than the shipper.

CHAPTER II. DOCUMENTS OTHER THAN BILLS OF LADING EVIDENCING THE CONTRACT OF CARRIAGE

A. CURRENT LAW

68. Neither the 1924 Brussels Convention nor the 1968 Protocol thereto contains provisions requiring the issuance of any document evidencing the contract of carriage other than a bill of lading. Similarly, the contents and legal effect of documents other than bills of lading are not governed by these conventions.

69. Under other transport conventions, the normal transport document is a non-negotiable document designed chiefly to record the shipment and to furnish information to the immediate parties (consignor and consignee) concerning the underlying contract of carriage and the apparent condition of the goods when received by the carrier. The Warsaw Convention provides that the "consignor" (shipper) shall prepare an "air consignment note" (article 5) which is signed by the carrier before the goods are loaded on board (article 6 (3)); the air waybill or air consignment note shall indicate the places of departure and destination (article 8)[78]; the contents of the air consignment note are, generally, *prima facie* evidence against the carrier (article 11), and if the carrier permits loading of goods without prior issuance of an air waybill, he loses the benefits of the provision on limitation of carrier liability (article 9). Under the CMR Convention, the "consignment note" shall be signed by the sender and the carrier (article 5) and shall contain particulars such as date and place of issuance, name and address of sender, carrier and consignee, description of the nature of the goods and of the packing method, the number, marks, weight or quantity of the goods, the charges relating to the carriage, whether transshipment is allowed, and whether any charges are to be paid by the sender (article 6); the contents of the consignment note are considered *prima facie* evidence (article 9). Under the CIM Convention, as revised in 1970, the sender must present a "consignment note" which shall include, among other things, the name and address of the sender and the consignee, the destination station, description of the goods and of the packing, weight, number of packages (article 6); the sender is responsible for the correctness of his statements contained in the consignment note (article 7), but if the consignment note fails to note inadequacy of packing, the burden of establish-

[74] See discussion at paragraphs 24-26, and draft proposal C at paragraph 27 of part two of this report: validity and effect of letters of guarantee.

[75] The replies of Finland and Norway to the third UNCITRAL questionnaire favour this approach. Under draft proposal C (part two of this report, at paragraph 27) the carrier is made liable for all the damage suffered by the consignee or other third party acting in good faith when that person relied on the contents of the bill of lading, and not merely for loss, damage or expense due to *loss, damage or delay of the goods*; furthermore, under that draft provision the carrier would not be able to invoke the convention provisions on the limitation of carrier liability.

[76] See the reply of France to the third UNCITRAL questionnaire. Commentators agree that it is not clear under the present wording of article 3 (5) whether the shipper's guarantee to the carrier continues to operate when the bill of lading has been transferred to a third party. See Scrutton, Charter-parties and Bills of Lading, 17th ed., London, 1964, p. 415; Carver, Carriage by Sea, Vol. I, p. 239.

[77] See foot-note 68, above.

[78] Prior to its 1955 revision, the Warsaw Convention contained a detailed list of required particulars to be inserted in such documents, including, among others, the name and address of the first carrier, and of the consignee, place and date of execution, the agreed stopping places, nature of the goods, the number, marks, weight, quantity of the goods, the apparent condition of the goods and of the packing, the freight and who is to pay it.

ing that the goods were inadequately packaged will rest on the railway (article 12).

B. ALTERNATIVE APPROACHES

70. Opinion was divided among the replies as to whether it was desirable to expand the scope of article 3 (3) of the 1924 Convention beyond bills of lading to include consignment notes, receipts, and other informal documents evidencing the contract of carriage. It may be recalled that at its sixth session the Working Group approved a draft provision which would expand the contracts covered by the revised Convention to "all contracts for the carriage of goods by sea".[79] Consequently, the revised Convention will apply to a considerable number of contracts of carriage which will not be evidenced by a bill of lading.

71. The Working Group may conclude that the revised Convention should not contain any rules concerning the contents of documents other than bills of lading which may be issued evidencing contracts of carriage. Thus, in cases where the shipper does not demand a bill of lading, the parties would be free to agree on the form, nature and contents of any documents that may be issued in connexion with their contract of carriage. This approach would give the parties complete flexibility to follow the varying practices of different trades as to documentation; it could, however, be accompanied by a rule outlining the legal consequences if informal documents are in fact issued, whether by agreement of the parties or by unilateral decision of a carrier:

Draft alternative A

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 receipt by the carrier of the goods as therein described.

72. Another possible approach would be to require the same contents for all documents that may be issued, on demand of the shipper, by the carrier in evidence of the contract of carriage. This would provide the greatest protection to consignees and other third parties, but would curtail flexibility and possible special arrangements between the shipper and the carrier as to the contents of documents. The practical result would be whenever a document was issued to evidence a contract of carriage pursuant to a demand by the shipper, it would in effect have to be a bill of lading. Alternatively, the Working Group may wish to consider an approach whereby the shipper could demand a "quasi-formal" document other than a bill of lading which is to contain, at the shipper's option, one or more of the items of information required to appear on bills of lading.

73. A number of replies, while favouring the extension of some or all of the rules on the required content of bills of lading to other documents evidencing the contract of carriage, expressed the view that the contents of documents other than bills of lading should only be *prima facie* evidence against the carrier. They reasoned that under documents other than bills of lading, the carrier would have to deliver the goods to the consignee named in the contract of carriage, as in most countries such documents were not considered "documents of title" and therefore were not "negotiable"; hence there would be no good faith purchasers of these documents who needed special protection.

74. The Working Group may wish to consider the following draft provision which includes as alternatives the two approaches mentioned in paragraph 72, above, and which would make the contents of all documents evidencing contracts of carriage other than bills of lading only *prima facie* evidence against the carrier:

Draft alternative B

1. If no bill of lading has been issued or demanded concerning the carriage of certain goods, after receiving the goods into his charge the carrier shall issue, on demand of the shipper, a document other than a bill of lading to evidence the contract of carriage. Such document shall show [any item of information specifically requested by the shipper which is] [the information] required under article [IV-B].

2. When [despite specific request of the shipper] the carrier fails to note on the document, issued pursuant to paragraph 1 of this article, the apparent order and condition of the goods [including their packaging] or that freight charges are due on [arrival of] the shipment, the carrier is deemed to have noted on such document that the goods [including their packaging] were in apparent good order and condition [when received by him] and that no freight charges would be due on [arrival of] the shipment.

3. A document evidencing the contract of carriage other than a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described, subject to paragraph 2 of this article and to the reservations permitted under paragraph 3 of article [IV-B].

ANNEX

(1) New definitions proposed in part one

Article I-C: definitions[a]

Paragraph 2. Goods

"Goods" includes goods, wares, merchandise and articles of every kind whatsoever, including live animals *and crates, containers and other packaging furnished by the shipper.* (Draft provision D; see para. 29 above.)

Paragraph 3. Bill of lading

"Bill of lading" means a document which evidences [the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods only to a person in possession 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. (Draft provision A-1, above, para. 10.)[b]

[79] Revised compilation, article I-A.

[a] The reference is to article I-C in the revised compilation.

[b] See in part one above, para. 12, the following draft provision A-2 set forth as an alternative:

"Bill of lading" means a document which evidences [the receipt of goods and] a contract for [their] carriage and by which a carrier undertakes to deliver the goods to the order [or assigns] of a named person, or to bearer.

(2) Proposed structure of draft articles on contents and legal effect of documents evidencing the contract of carriage

Article IV-B: contents of bills of lading

1. 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 coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage; (same as 1924 Convention, article 3 (3) (*a*)).

(*b*) The number of packages or pieces, *and* the quantity or weight, as the case may be, as furnished in writing by the shipper; (draft provision B; see above, para. 24).

(*c*) The apparent order and condition of the goods, *including their packaging*; (draft provision C; see above, para. 28).

(*d*) The name and principal place of business of the contracting carrier; (draft provision F; see above, para. 46).

(*e*) The place and date of its issuance; (draft provision G; see above, para. 50).

2. After the goods are loaded on board, if the shipper so demands, the carrier, [master or agent of 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, the date or dates of loading, and the port 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. (Draft provision H; see above para. 55.)

3. If a bill of lading contains particulars concerning the description, marks, number, quantity or weight of the goods, which the carrier has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking, the carrier shall [state] [specify] such reservation in the bill of lading. (Draft provision E; see above, para. 35.)

Article IV-C: legal effect of bills of lading

1. A bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described, subject to the reservations permitted under paragraph 3 of article [IV-B]. 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, *including a consignee*. (Draft provision J-1; see above, paras. 59 and 60.)

2. When the carrier fails to note on the bill of lading the apparent order and condition of the goods [including their packaging] or that freight charges are due on [arrival of] the shipment, for the purpose of paragraph 1 he is deemed to have noted on the bill of lading that the goods [including their packaging] were in apparent good order and condition and that no freight charges would be due on [arrival of] the shipment. (Draft provision J-2; see above, para. 63.)

3. The shipper shall be deemed to have guaranteed to the carrier the accuracy, at the time the carrier took charge of the goods according to article [II-A] of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damage or expense resulting from inaccuracies in such *information. The shipper shall remain responsible under such guarantee even if the bill of lading has been transferred to a third party*. The right of the carrier to such indemnity shall in no way limit his responsibility under the contract of carriage to any person other than the shipper. (Draft provision K; see above, para. 67.)

Article IV-D: documents other than bills of lading

Draft alternative A

When a carrier issues a document other than a bill of lading to evidence a contract of carriage, such a document shal be *prima facie* evidence of the receipt by the carrier of the goods as therein described. (See above, para. 71.)

Draft alternative B

1. If no bill of lading has been issued or demanded concerning the carriage of certain goods, after receiving the goods into his charge the carrier shall issue, on demand of the shipper, a document other than a bill of lading to evidence the contract of carriage. Such document shall show [any item of information specifically requested by the shipper which is] [the information] required under article [IV-B].

2. When [despite specific request of the shipper] the carrier fails to note on the document, issued pursuant to paragraph 1 of this article, the apparent order and condition of the goods [including their packaging] or that freight charges are due on [arrival of] the shipment, the carrier is deemed to have noted on such document that the goods [including their packaging] were in apparent good order and condition [when received by him] and that no freight charges would be due on [arrival of] the shipment.

3. A document evidencing the contract of carriage other than a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described, subject to paragraph 2 of this article and to the reservations permitted under paragraph 3 of article [IV-B]. (See above, para. 74.)

PART TWO. VALIDITY AND EFFECT OF LETTERS OF GUARANTEE

A. INTRODUCTION

1. The Working Group at its sixth session decided that at the seventh session it would consider, among other topics, the validity and effect of letters of guarantee.[1] Neither the International Convention for the Unification of Certain Rules Relating to Bills of Lading (Brussels Convention of 1924)[2] nor the Protocol to amend that Convention (1968 Brussels Protocol)[3] sets forth rules concerning the validity or effect of letters of guarantee provided by the shipper to a carrier.[4]

B. CURRENT LAW AND PRACTICE

(1) *Why letters of guarantee are issued*

2. The type of letter of guarantee to which this report is addressed is an undertaking by a shipper, or

[1] Working Group, report on sixth session (A/CN.9/88; UNCITRAL Yearbook, vol. V: 1974, part two, III, 1).

[2] 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*).

[3] Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, signed at Brussels on 25 August 1924; Brussels, 23 February 1968; *Register of Texts*, p. 180.

[4] These letters are also referred to as letters of indemnity.

someone acting for the shipper, to indemnify a carrier for any liability the latter might incur toward the consignee or other third party as a result of inaccuracy of the information set forth in a bill of lading regarding the marks, weight, and quantity of the goods and the apparent condition of the goods.

3. Under article 3 (3) of the Brussels Convention of 1924 the carrier is obligated, on demand of the shipper, to issue a bill of lading containing the information provided for in that paragraph. Article 3 (4) of the Convention provides that "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*)". Article 3 (4) is supplemented by language in the 1968 Brussels Protocol which states: "However, proof to the contrary shall not be admissible when the Bill of Lading has been transferred to a third party acting in good faith" (article 1 (1)).

4. The Convention gives the carrier a right to indemnity from the shipper for loss, damage or expense resulting from the inaccuracy of certain of the information set forth on the bill of lading. Article 3 (5) states:

> 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.

The last sentence of article 3 (5) makes it clear that the carrier remains liable to the consignee or other third person to whom the bill of lading has been transferred; only after incurring loss, damage or expense can the carrier expect indemnification from the shipper and then only regarding inaccuracies in statements by the shipper as to marks, number, weight and quantity. Since a claim against the shipper involves delay, risk and expense, it would be expected that the carrier would note on the bill of lading all inaccuracies for which he may be responsible to third parties; this is particularly true with respect to apparent defects in the order and condition of the goods since with respect to this type of information the Convention provides for no recourse by the carrier against the shipper.[5] By making such notations the carrier would protect himself against claims by any transferee of the bill of lading based on the description of the goods in the bill of lading.

5. Sometimes, in practice, however, arrangements are made between shippers and carriers which prevent the making of those notations on the bill of lading which would interfere with the acceptance of the bill of lading by the consignee or a bank. The usual prerequisite for arranging payment through a bank is that the bill of lading be "clean". The problem faced by the carrier may be illustrated as follows. Pursuant to a sales contract between a seller and a buyer, a bank acting on behalf of the buyer issues to the seller a documentary letter of credit whereby the bank engages to pay a draft for a specified sum (reflecting the price for the goods) on the presentation of certain documents, including a "clean" bill of lading which evidences shipment of the goods. At the time of loading the carrier proposes to note on the bill of lading: "cartons torn" or "barrels leaking". Such a notation would render the bill of lading unacceptable under the letter of credit requirement of a "clean" bill of lading. The shipper then proposes that the carrier issue the bill of lading without this notation in return for a letter of guarantee stating: "Upon receipt by you of the captioned shipment, your personnel noted the following exceptions and/or clauses concerning the conditions of the below-listed cargo: '*cartons torn*'. In consideration of the issuance of this bill of lading without the above-noted exceptions and/or clauses being shown thereon we hereby agree, in the event that exceptions and/or clauses are made by consignees or their representatives against the cargo herein referred to, and which are attributable to the above-noted exceptions and/or clauses, you are authorized to arrange for evaluation and payment of the loss or damage involved, and the full amount of such loss, damage and/or expense will be paid to you by us upon demand."

6. The circumstances in which a letter of guarantee is issued may vary. For example, the letter may be issued in cases where the shipper and carrier disagree about the quantity of the goods to be carried or about the adequacy of the packing. On the other hand, a letter of guarantee may be issued although both the shipper and the carrier recognize that the goods are not in apparent good order and condition. In any event, neither the consignee nor any other third party, such as a bank or insurer, will know of the discrepancy between the actual condition of the goods when received by the carrier and their description in the bill of lading. In reliance on the "clean" bill of lading: (1) the bank will pay the sum specified in the letter of credit; (2) the bill of lading may be transferred to third parties acting in good faith and (3) an insurer may indemnify the carrier for liability[6] or may reimburse the cargo owner for damage in transit, when the damage resulted prior to transit.

7. Under the circumstances set forth above, the consignee, bank or other third party will have been misled by the absence of any notation on the "clean" bill of lading.[7] In those cases where the absence of a notation is due to an honest disagreement as to, e.g., the quantity or weight of the goods, one cannot conclude that the shipper and carrier were guilty of wilful misconduct amounting to fraud. In other cases such wilful misconduct may be said to have taken place if the existence of the defect was clear and the carrier refrained from noting it on the bill of lading in order to enable his

[5] In some instances, payment by the carrier to a consignee or other third person would constitute a performance by the carrier of the shipper's duty; in this event the carrier might be entitled to restitution from the shipper outside the Convention.

[6] Reply of France to the third UNCITRAL questionnaire. The questionnaire and the replies are set forth in a Secretariat working document entitled: 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 thereto).

[7] See Pourcelet, Le transport maritime sous connaissement, p. 33 (1972).

customer (the shipper) to secure payment for the goods, or their sale, under circumstances where this would have been impossible had the defect been stated on the bill of lading.

(2) *Legal effect of letters of guarantee*

8. There appears to be general agreement that a letter of guarantee given by the consignor does not impair the rights of the consignee or other third parties against the carrier. This view is expressed in the statutes and case law of a number of States.[8]

9. With respect to the enforceability of the letter of guarantee by the carrier against the shipper or other person who issued it, a distinction seems to be made by some national courts between cases where the carrier intended to mislead third parties and cases in which there was no such intention. Such a distinction was drawn in a leading English case, *Brown, Jenkinson and Co. Ltd.* v. *Percy Dalton (London) Ltd.*[9] a suit by a carrier to recover from the shipper on a letter of guarantee. The opinion by Lord Pearce described the type of letter of guarantee that might be enforced: "In the last twenty years it has become customary, in the short-sea trade in particular, for shipowners to give a clean bill of lading against an indemnity from the shippers in certain cases where there is a bona fide dispute as to the condition or packing of the goods. This avoids the necessity of rearranging any letter of credit, a matter which can create difficulty when time is short... In trivial matters and in cases of bona fide disputes where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, no doubt the practice is useful." The Tribunal de Commerce de la Seine (France) has held: "The practice of issuing a letter of indemnity is only justified when by reason of the speed of the operations necessary for the normal exploitation of regular oceanlines, it is impossible for the master to verify with rigorous precision the information furnished by the shipper before shipment."[10]

10. Where the carrier issuing a clean bill of lading knew that a claused bill should have been issued, it has been held, for example in *Brown* v. *Percy Dalton Ltd.*, cited above, that the letter of guarantee was unenforceable. In that case the Court of Appeal found that on the facts which were not in dispute "the position was, therefore, that at the request of the defendants [shipper] the plaintiffs [carrier] made a representation which they knew to be false and which they intended should be relied on by persons who received the bill of lading, including any banker who might be concerned . . . The premise on which the plaintiffs rely is, in effect, this: if you will make a false representation which will deceive indorsees or bankers, we will indemnify you against any loss that may result to you. I cannot think that a court should lend its aid to enforce such a bargain" (p. 853). The Court of Appeal also pointed out that "each case must depend on its circumstances" (*ibid.*). No clear view with respect to the enforcement of letters of guarantee by the carrier against the shipper, however, appears to emerge from national practice.[11]

C. POSSIBLE APPROACHES REGARDING THE VALIDITY AND EFFECT OF LETTERS OF GUARANTEE

11. Various possible approaches regarding the validity and effect of letters of guarantee are examined below. Three draft proposals are set forth. The first two draft proposals (draft proposals A and B) are alternative proposals. On the other hand, draft proposal C is not incompatible with draft proposal A or B; it would be possible for the Working Group to consider the adoption of either draft proposal A or B together with draft proposal C.

(1) *No provision in the Convention on the subject of letters of guarantee*

12. It has been suggested that the solution to the problem posed by letters of guarantee is not to declare such letters null or void but instead to achieve greater flexibility in bank credit transactions. The reply of South Africa to the Secretariat questionnaire suggested "that the relationship between bills of lading and letters of credit should be examined in the course of the current revision of the Uniform Customs and Practices for Documentary Credits". In a similar vein the Australian reply suggested an examination of the basic reason for maintaining the requirement for the "clean" bill of lading.

13. Netherlands stated in its reply that it "has no sound reason to assume that there is a tendency to abuse clean bills of lading covered by a letter of indemnity. Generally speaking, the purpose of these documents it to facilitate international trade in cases where shipowners intend to clause a bill of lading with some remark that is not essential for the condition or the quantities of the goods." The Netherlands reply then referred to "the suggestion made by the International Chamber of Commerce some years ago, i.e., by registering clauses containing remarks of no essential importance to the condition or the qualities of the goods, as having no consequence as to the validity and negotiability of bills of lading".

14. The reply of the International Chamber of Commerce stated that a convention provision declaring letters of guarantee null and void was at best a partial solution.[12] The ICC did not condone the use of such letters when given for fraudulent purposes. "The problem for the shipper, however, is that he often finds that certain clauses which a carrier might place on a bill of lading, thus rendering it unclean, bear no relation to the conditions of the contract of sale. He is nevertheless subject to difficulties in documentary credit financing." The ICC reply suggested that "to the extent that the

[8] e.g., French law No. 66-420 of 18 June 1966, article 20; article 1212, Québec Civil Code; *Continex* v. *SS Flying Independent* (1952) AMC 1499 (US District Court, S.D.N.Y.); *Brown, Jenkinson and Co. Ltd.* v. *Percy Dalton (London) Ltd.* [1957] 2 All. E.R. 844. The replies from Dahomey, Italy, France and Romania suggested that letters of guarantee be declared to have no effect against third parties.

[9] *Brown, Jenkinson and Co. Ltd.* v. *Percy Dalton (London) Ltd.* [1957] 2 All. E.R. 844, 857.

[10] *Thésée,* 10 March 1958 as reported in Tetley, Marine Cargo Claims 223 (1965).

[11] See Tetley, Marine Cargo Claims, at p. 222, who cites cases in which the courts permitted the carrier to sue the shipper on the letter of guarantee. See also Pourcelet, Le transport maritime sous connaissement, pp. 34-35 (1972).

[12] For a general treatment of the problem of "clean" bills of lading, reservations on bills of lading, and letters of indemnity, see International Chamber of Commerce Brochure No. 223, "The Problem of Clean Bills of Lading" (1963).

practice of issuing a guarantee in favour of the carrier remains necessary, in certain cases, for practical reasons, a broad approach to the problem might be along the following lines:

"Greater care by shippers to reduce the occasion for adverse comment by carriers on the bill of lading,

"A more reasonable attitude by carriers as to the recognition of the practices of certain trades on the suitability of modern forms of packaging and the discontinuance of stereotyped clauses,

"Agreement between buyer and seller as to the acceptability of bills of lading which are not 'clean' in the strict sense but which may be safely deemed for the purpose of the contract of sale to be 'in order'."[13]

15. Other replies to the third UNCITRAL questionnaire indicated that adding a provision to the Convention was not necessary.[14] Thus the United States reply states: "The desirable goal is protection of the consignee from fraud, and it is doubted whether international legislation is necessary to achieve that goal unless the work of UNCITRAL is to be extended to documentary credits."

(2) *Invalidity of letters of guarantee*

16. The purpose of any remedial action with respect to the letter of guarantee is to discourage the inclusion of false statements in bills of lading which would mislead the consignee or other third party. In this connexion, it was pointed out by Lord Pearce in *Brown Ltd.* v. *Percy Dalton Ltd.*, cited above, that "it is not enough that the banks or the purchasers who have been misled by clean bills of lading may have recourse at law against the shipping owner. They are intending to buy goods, not law suits. Moreover, instances have been given in argument where their legal rights may be defeated or they may not recoup their loss. Trust is the foundation of trade; and bills of lading are important documents. If purchasers and banks felt that they could no longer trust bills of lading, the disadvantages to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities" (p. 857).

17. The effect of the invalidity of the letter of guarantee is to free the shipper from his undertaking to indemnify the carrier for the sum paid by the carrier to the consignee or other third party based on the discrepancy between the goods as described in the bill of lading and as they actually were when received by the carrier. The carrier would be faced with the choice of noting the defects on the bill of lading or of accommodating the shipper by not inserting the relevant notations and thereby assuming liability to third parties for the discrepancies without having a contractual recourse against the shipper. The purpose of the invalidation approach is to induce the carrier to make the appropriate notation in the bill of lading. The shipper, who is the real beneficiary of the practice of issuing letters of guarantee in return for "clean" bills of lading, would no longer be able to provide indemnity to the carrier except for the statutory indemnity under article 3 (5) of the 1924 Brussels Convention. It will be recalled that article 3 (5) provides indemnification by the shipper to the carrier for inaccuracies in statements furnished by the shipper regarding marks, quantity and weight, but not for omissions or incorrect statements as to the order or condition of the goods.

18. Opponents of a provision invalidating letters of guarantee argue that such a provision would benefit the shipper, although he, as the party who induced the carrier not to disclose the defect in the goods, was the greater offender against the consignee or other third party.[15]

19. Among supporters of a Convention provision invalidating letters of guarantee, two views appear to emerge regarding the desirable scope of such a provision. One approach is to invalidate all letters of guarantee issued by the shipper to the carrier. The other approach is to invalidate only those letters of guarantee that were issued by a shipper to a carrier who knew or should have known of the inaccuracy or the defect but who still failed to make the appropriate notation on the bill of lading.

(a) *Convention provision invalidating all letters of guarantee by shipper to carrier*

20. Certain replies to the Secretariat questionnaire favoured an approach invalidating all letters of guarantee issued to the carrier by the shipper.[16] One of the reasons given was that, in all cases, letters of guarantee have an effect on the information that is included or omitted from the bill of lading; thus whether or not the carrier intended to mislead the consignee, the result for the consignee will be the same.[17] Another reason for the broader approach of invalidating all letters of guarantee is the difficulty of distinguishing between letters of guarantee issued in cases of genuine disagreement between the shipper and the carrier (e.g. as to quantity or weight) and letters issued in cases where the carrier knew or should have known of the defects in the goods, their packaging or the inaccuracy of the information given by the shipper.

21. A draft provision reflecting this broad approach to invalidating letters of guarantee is as follows:

Draft proposal A

Any promise or agreement made by or on behalf of the shipper to indemnify the carrier with respect to any statement made in the bill of lading, or the omission of a statement required under article [3 (3)], shall be void and of no effect.

(b) *Convention provision invalidating letters of guarantee issued in return for incorrect statement or omission of information on the bill of lading*

22. A second view would invalidate letters of guarantee only when the carrier has knowledge of the inac-

[13] The ICC reply also suggested that in fact the seller who has been issued an unclean bill of lading may obtain payment of the credit by providing a guarantee to the bank which has issued the documentary credit, "thus avoiding any prejudice to the buyer who remains free to contest payment made against such a document."

[14] Replies of the Netherlands and the United States.

[15] See replies of the Baltic and International Maritime Conference (BIMCO) and the International Maritime Committee (IMC).

[16] See replies of Pakistan, Hungary, Turkey.

[17] See reply of Pakistan.

curacy of the information given by the shipper or of the apparent defects in the goods. Supporters of this approach state that letters of guarantee are useful to expedite commercial relations in cases of genuine disagreement between the shipper and the carrier as to the quantity of the goods and minor questions concerning the condition of the goods or of their packaging. This view is also supported by current practice, as stated above at paragraphs 9-10.

23. A draft provision which would embody this narrower approach to the invalidity of letters of guarantee would read as follows:

Draft proposal B

Any promise or agreement made by or on behalf of the shipper to indemnify the carrier with respect to any statement made in the bill of lading, or the omission of information required under article [3 (3)], shall be void and of no effect if the carrier knew [or should reasonably have known on the basis of facts apparent to him] that such a statement was incorrect or that the inclusion of such information was required.

(3) *Full responsibility of the carrier to third persons for knowing mis-statements or omissions*

24. As has been noted (para. 16, above), the central objective of any remedial action in this area is to discourage the inclusion in bills of lading of false statements which may mislead the consignee and other third persons. Draft proposals A and B approach this objective by invalidating all, or some of the letters of indemnity that may be used to induce such false statements. Another approach would be to strengthen the responsibility of carriers to third persons who are misled by such false statements.

25. Article 3 (4) of the Brussels Convention of 1924, as supplemented by article 1 (1) of the Brussels Protocol, provides a basis for responsibility of the carrier for statements in the bill of lading (see para. 3, above). However, any responsibility based on these provisions would presumably be subject to the general limits on the carrier's liability.[18] In view of the serious consequences of false statements in bills of lading, consideration might be given to removing the limits on the liability of the carrier in the situations where the carrier knows that a statement in the bill of lading is false, or where the carrier knows that a required statement is omitted.

26. A similar approach is employed in French and Norwegian legislation, and is recommended in some of the replies to the third UNCITRAL questionnaire.[19]

27. A draft provision implementing this approach is as follows:

Draft proposal C

When the carrier knowingly states inaccurate information in the bill of lading or omits any information required to be included under [revised article 3 (3) and 3 (7)] he shall be responsible to the consignee or other third party to whom the bill of lading has been transferred, for any loss, damage or expense incurred in good faith by such third person as a result of such statement or omission without the benefit of the limitation on carrier liability provided for in this Convention.

[18] See Revised Compilation, arts. II-C, II-D and II-E.

[19] See the replies of Finland, France, Norway and Pakistan. Under this approach even if letters of indemnity by the shipper are valid, the increased direct liability of the carrier, and the increased indirect liability of the shipper under the indemnity, would tend to discourage the offering of such letters by the shipper and the acceptance by the carrier.

PART THREE: DEFINITION OF CONTRACT OF CARRIAGE AND LEGAL POSITION OF THE CONSIGNEE

A. INTRODUCTION

1. At its sixth session the Working Group noted that it might be desirable to formulate in the revised convention a definition of the term "contract of carriage".[1] This part of the fourth report of the Secretary-General responds to the request made by the Working Group that this report also examine "a possible definition of 'contract of carriage' and the position, with respect to the carrier, of the person entitled to take delivery of the goods."[2]

2. The Secretariat has received one substantive reply to an inquiry dealing with these issues; that reply has been circulated as one of the working documents for the seventh session of the Working Group (document A/CN.9/WG.III/WP.18).

B. DEFINITION OF "CONTRACT OF CARRIAGE"

3. Although the Working Group has not yet considered a definition of the term "contract of carriage", that term has been utilized a number of times in the draft provisions approved by the Working Group. Thus, the contracts covered by the revised convention have been identified as "all *contracts for the carriage* of goods by sea",[3] and the geographic scope is examined in terms of "every *contract for carriage* of goods by sea between ports in two different States".[4] Similarly, "carrier" or "contracting carrier" is defined as "any person who in his own name enters into a *contract for carriage* of goods by sea with a shipper"[5] and references to the "contract of carriage" may also be found in the draft provisions on liability of the carrier in tort,[6] on deck cargo,[7] on the through bill of lading,[8] on jurisdiction,[9] on arbitration[10] and on contract stipulations derogating from the convention.[11]

[1] Working Group, report on sixth session (A/CN.9/88, UNCITRAL Yearbook, vol. V: 1974, part two, III, 1).

[2] *Ibid.*, para. 151.

[3] Revised Compilation, art. I-A, para. 1.

[4] *Ibid.*, art. I-B, para. 1.

[5] *Ibid.*, art. I-C (1), para. 1.

[6] *Ibid.*, art. II-D, para. 1.

[7] *Ibid.*, art. II-F, para. 2 (in the reference to "bill of lading or other document evidencing the contract of carriage").

[8] *Ibid.*, art. II-H, para. 1.

[9] *Ibid.*, art. V-C, A (1), B and D.

[10] *Ibid.*, art. V-D, paras. 1 and 5.

[11] *Ibid.*, art. VI-A, paras. 1 and 3.

4. Under article 1 (*b*) of the Brussels Convention of 1924, the term "contract of carriage" was described as applicable "only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea". The other transport conventions do not contain definitions of "contract of carriage" as such; however, in delineating the scope of application of the convention they each use "contract of carriage" in a setting which indicates the meaning of the term:

1956 CMR (road) Convention—article 1 (1)

"1. This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward..."

1929 Warsaw (air) Convention—article 1 (1)

"1. This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking."[12]

1970 CIM (rail) Convention—article 1 (1)

"1. This Convention shall apply... to the carriage of goods consigned under a through consignment note made out for carriage over the territories of at least two of the contracting States...".

5. The Working Group may decide that the identification of "contract of carriage" in the draft provisions on the scope of the revised convention (para. 3 above) is sufficient to show the meaning of the term, and that no definition of the term "contract of carriage" is necessary.

6. Alternatively, the Working Group may find it useful to add to the draft provision in article 1-A the words "for reward" or "in exchange for payment of freight":[13]

Draft provision A

(Article I-A: contracts covered)

1. The provisions of this Convention shall be applicable to all contracts for the carriage of goods by sea [for reward] [in exchange for payment of freight].

7. As a third alternative the Working Group may wish to consider adoption of 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.[14] Such a definition could read as follows:

Draft provision B

"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.

8. As pointed out in document A/CN.9/WG.III/WP.18, article 15 of the French law of 18 June 1966 contains a similar provision. It might be concluded that draft provision B is unnecessary since it expresses the commonly accepted meaning of the term "contract of carriage" for the transport of goods by sea; on the other hand, the Working Group may deem it useful to adopt a definition of this basic term to express the basic obligation assumed by the carrier under his contract with the shipper to carry goods from one port to another[15] and the basic obligation of the shipper to pay the freight charges agreed upon.

C. LEGAL RELATIONSHIP OF CARRIER AND THE PERSON ENTITLED TO TAKE DELIVERY OF THE GOODS

9. In the draft provisions already approved by the Working Group there are references to the "consignee",[16] to the "person entitled to make a claim for the loss of goods" (*l'ayant-droit*),[17] to "the claimant"[18] and to the "claimant in respect of the goods".[19]

10. Under the Brussels Convention of 1924 the person entitled to take delivery of the goods is only referred to in article 3 (6) (the provision on notice of loss or damage); this provision refers at one point to "the person entitled to delivery thereof [of the goods] under the contract of carriage" and at another point to "the receiver". Under the other transport conventions, the legal position of the "consignee" is clearly delineated. Thus articles 12 and 13 of the CMR Convention, articles 16, 21 and 22 of the 1970 CIM Convention, and articles 12 and 13 of the Warsaw Convention, as amended in 1955, deal specifically with the rights of the consignee.

11. The Working Group may wish to consider an approach whereby the revised convention would give explicit recognition to the derivative rights enjoyed by the consignee or other third person against the carrier whether under the contract of carriage directly or pursuant to a transfer of the bill of lading. Such a provision would in no way affect any direct contractual relationship (e.g., under a sales contract) between the consignee and the shipper.

12. In order to give recognition to the rights of the "consignee", the Working Group might adopt a definition of "consignee" and then consider a separate provision outlining the legal position of the consignee.

Draft provision C

1. *Definition of "consignee"*: "Consignee" means the person entitled to take delivery of the goods under the contract of carriage.

2. *Legal position of the consignee*: The consignee shall have the rights of the shipper and, in addition, any rights conferred on him under article [3 (4)].

13. When, under draft provision C, paragraph 2, the consignee enjoys "the rights of the shipper", the con-

[12] Since the 1955 revision, the first sentence of article 1 (1) reads as follows: "This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward."

[13] It may be noted that both the CMR and the Warsaw Convention employ the expression "for reward".

[14] See A/CN.9/WG.III/WP.18.

[15] See Revised Compilation, art. I-B, para. 1 ("ports of two different States").

[16] See Revised Compilation, art. I-B, para. 2; art. II-A, paras. 2 and 3; art. VI-A, para. 3.

[17] See Revised Compilation, art. II-B, para. 2.

[18] See Revised Compilation, art. II-B, para. 3; art. II-C, alternative B, para. 1 (b); art. V-C, parts A (2) (a) and D; art. VI-A, para. 4.

[19] See Revised Compilation, art. VI-A, para. 4.

signee will only have the rights that the shipper would have enjoyed under the circumstances. Thus the consignee will still be bound by any limitations imposed by the convention on the rights of the shipper, such as the time limitation for giving the required notice of the loss or damage to the carrier (Revised Compilation, art. 5-A) or the statute of limitation (prescription) period for bringing actions against the carrier (Revised Compilation, art. 5-B). Furthermore, the provision that the consignee "shall have the rights of the shipper" would not impose on the consignee the obligations of the shipper to the carrier, since these obligations (such as the shipper's liability for shipping dangerous goods under art. 4 (6) of the 1924 Convention) seem peculiarly to be the shipper's own.

14. The draft proposal concerning the legal position of consignees makes special reference to article 3 (4), because under that article consignees (and other third parties in good faith to whom a bill of lading has been transferred) are intended to enjoy greater rights against the carrier than those which the shipper would have enjoyed.

3. Report of the Working Group on International Legislation on Shipping on the work of its eighth session (New York, 10-21 February 1975) (A/CN.9/105)*

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* 18 March 1975.