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RESPONSIBILITY OF OCEAN CARRIERS FOR CARGO: BILLS OF LADING

Report by the Secretary-General

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INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its fourth session approved a programme of work for the examination of rules and practices relating to the responsibility of ocean carriers for cargo in the context of bills of lading.[1/] This programme of work was developed by the UNCITRAL Working Group on International Legislation on Shipping which was established by the Commission at its second session[2/] and by an enlarged Working Group which was established by the Commission at its fourth session.[3/] As will be seen, this programme was developed in the light of recommendations made by the UNCTAD Working Group on International Shipping Legislation.[4/]

2. The programme of work included a request that the Secretary-General prepare a report on four specific topics for consideration by the UNCITRAL Working Group at its third session, which is to meet from 31 January to 11 February 1972. The present report is prepared in response to this request. (The topics are listed in para. 6, infra.)

3. The objectives and scope of this report can best be considered against the background of the resolution unanimously adopted by UNCITRAL at its fourth session. The resolution reads, in part, as follows:[5/]

1/ Report of the United Nations Commission on International Trade Law on the work of the fourth session (1971), Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8417) (herein cited UNCITRAL, Report on the Fourth Session (1971)) Chap. II, paras. 10-23.

2/ UNCITRAL Working Group on International Legislation on Shipping, Report on its second session (22-26 March 1971) (A/CN.9/55) (herein cited UNCITRAL Working Group, Report on Second Session (1971)). This Report set forth recommendations on the field for inquiry and the general objectives of further work in this area.

3/ The enlarged Working Group met in the course of the Commission's fourth session and developed a plan for specific steps to implement the programme of work. The Commission approved this plan. UNCITRAL, Report on the Fourth Session (1971) paras. 22 and 23. A fuller account of the historical background appears in the above-cited reports of UNCITRAL and of the Working Group.

4/ Report of the UNCTAD Working Group on International Shipping Legislation on its second session (TD/B/C.4/86), herein cited, UNCTAD Working Group, Report on Second Session (1970).

5/ UNCITRAL, Report on the Fourth Session (1971), para. 19. Footnotes are omitted.

"The United Nations Commission on International Trade Law,

"Taking note of the resolution on bills of lading adopted by the Working Group on International Shipping Legislation established by the United Nations Conference on Trade and Development, in which the Commission has been invited to undertake the examination of the rules and practices concerning bills of lading as referred to in paragraph 1 of that resolution and, as appropriate, to prepare the necessary draft texts, taking into account the reports of the Working Group of the United Nations Conference on Trade and Development and that of its secretariat;

"Noting with appreciation the report of the Commission's Working Group on International Legislation on Shipping,

1. Decides:

(a) That within the priority topic of international legislation on shipping, the subject for consideration for the time being shall be bills of lading;

(b) That within the subject of bills of lading, the topics for consideration should include those indicated in paragraphs 1 and 2 of the resolution adopted by the Working Group on International Shipping Legislation of the United Nations Conference on Trade and Development at its second session, reading as follows:

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

'2. Further considers that the examination referred to in paragraph 1 should mainly aim at the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others, should be considered for revision and amplification:

(a) responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;

(b) the scheme of responsibilities and liabilities, and rights and immunities, incorporated in Articles III and IV of the Convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;

(c) burden of proof;

(d) jurisdiction;

(e) responsibility for deck cargoes, live animals and trans-shipment;

(f) extension of the period of limitation;

(g) definitions under Article 1 of the Convention;

(h) elimination of invalid clauses in bills of lading;

(i) deviation, seaworthiness and unit limitation of liability.';

it is noted that, by its terms, paragraph 2 of the resolution does not confine consideration to those areas listed in sub-paragraphs (a) through (i);"

4. Following the adoption of the above resolution and during the fourth session of the Commission, the UNCITRAL Working Group met and unanimously adopted a decision setting forth specific steps to carry the work forward. This decision, which was reported to and approved by the Commission, included the following:[6/]

"In response to the request, set forth in paragraph 3 of the resolution by the Commission adopted at the 73rd meeting, on 5 April 1971, that the Working Group plan its programme and methods of work in such a way that the examination of the topics for consideration within the subject of bills of lading, as defined in paragraph 1 of the resolution, may be undertaken as quickly as possible, the Working Group decides:

(a) that with respect to the items defined in paragraphs 2(a), 2(d) and 2(e) of the resolution adopted by the UNCTAD Working Group on International Shipping Legislation at its second session (TD/B .4/86, annex I) and embodied in the resolution adopted by the Commission at its 73rd meeting, on 5 April 1971, the Secretary-General be invited to prepare a report setting forth proposals, indicating possible solutions, for consideration by the UNCITRAL Working Group;

(b) that, with respect to the other areas within the field of work as defined by paragraph 1 of the Commission's resolution, the Secretary-General be requested to prepare a report analysing alternative approaches to the basic policy decisions that must be taken in order to implement the objectives, set forth in paragraph 2 of the UNCTAD resolution and quoted in paragraph 1 of the Commission's resolution, with special reference to establishing a balanced allocation of risks between the cargo owner and the carrier; ..."

6/ UNCITRAL, Report on the Fourth Session (1971), para. 22. Footnotes are omitted.

5. The decision also requested the Secretary-General, to the extent necessary for the preparation of the report on the foregoing items, "to invite comments and suggestions from Governments and from international intergovernmental and non-governmental organizations active in the field". Accordingly, questionnaires were prepared and circulated to Governments and to organizations indicated in the above-quoted decision.7/ In addition, pursuant to the above decision, members of the Working Group were invited to prepare studies and proposals and to transmit them to the Secretary-General. Numerous replies and studies have been received, and have been used in the preparation of the present report.8/ This report also draws on the UNCTAD Secretariat report on Bills of Lading, which was placed before the UNCTAD and UNCITRAL Working Groups.9/

6. The present report, prepared in response to the request by the UNCITRAL Working Group, is divided into four Parts and deals with the following topics:

Part One : The period of carrier's responsibility (before and during loading; during and after discharge)

Part Two : Responsibility for deck cargoes and live animals

Part Three: Clauses of bills of lading confining jurisdiction over claims to a selected forum

Part Four : Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier.

7/ A copy of the questionnaire addressed to Governments appears as Annex I following Part Four of this report. A similar questionnaire, modified to omit inquiries concerning the rules of specific legal systems, was addressed to international intergovernmental and non-governmental organizations active in the field.

8/ It is expected that additional replies and studies will be received subsequent to the preparation of this report. Copies of the replies and studies, in their original languages, will be available at the session of the Working Group.

9/ Document TD/B/C.4/ISL/6 and Corr.1 (herein cited as UNCTAD Secretariat Report on Bills of Lading).

PART ONE: THE PERIOD OF CARRIER'S RESPONSIBILITY (BEFORE AND DURING LOADING; DURING AND AFTER DISCHARGE)

A. Problems and issues

7. This Part of the report is concerned with the basic question of scope of the Hague Rules embodied in the International Convention for the Unification of Certain Rules relating to Bills of Lading (the Brussels Convention of 1924).[10] This Convention was to provide shippers with a measure of protection against clauses in bills of lading which usually were drafted by ocean carriers so as to relieve themselves of much of the responsibility for cargo which the general maritime law had imposed upon them.[11] The scope of the Convention thus fixes the area of protection afforded to shippers.

8. The definition of the scope of the Convention also calls for careful examination from the point of view of clarity. The opportunity for dispute and litigation over the basic question of the applicability of the protective provisions of the Convention seriously impairs the effectiveness of these provisions and leads to disharmony and conflict in an area in which international uniformity is particularly important.

9. The documentation and the discussions at the meetings of the UNCTAD and UNCITRAL Working Groups, and the replies and studies which have subsequently been transmitted to the Secretary-General, raise substantial questions concerning the scope of the Hague Rules in the following important areas: (1) the responsibility of the carrier for damage to the goods while they are being loaded on the ship and unloaded (discharged) from the ship; (2) the responsibility of the carrier, prior to the loading

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10/ League of Nations, Treaty Series, Vol. CXX, p. 157, No. 2764. The substantive provisions of this Convention are often referred to as the Hague Rules.

11/ UNCTAD Secretariat Report on Bills of Lading, paras. 58-59, 63-64. See also S. Dor, Bill of Lading Clauses and the International Convention of Brussels, 1924 (Hague Rules). London, 2d Ed. 1960, p. 20.

and subsequent to unloading, while the goods are in the possession, charge or control of the carrier or of wharfingers, warehousemen or other intermediaries.

B. The Factual Setting: The Practical Operation of Ports

10. The provisions of the Hague Rules can be examined more clearly against the background of the complex arrangements for the handling of goods in ports before and after the carriage of goods by sea.[12/]

11. The shipper, carrier and the consignee usually do not deal directly with each other, but act through intermediaries. The most important of these intermediaries are: (a) warehousemen, wharfingers, master porters and port authorities or similar entities, to whom goods may be delivered before shipment, pending loading, and to whom goods may be delivered after discharge from the ship pending delivery to the consignee or receiver; and (b) stevedores, who may load and unload the goods as servants or agents of the carrier or of the shipper or consignee.

12. In the process of moving cargo from its point of origin until it is delivered to a consignee, at least six distinct periods can be identified:

(1) The period from inland point of origin to a port depository or warehouse that takes possession or charge of the goods.

(2) The period from the time goods are received in the port depository or warehouse until they are removed for loading.

(3) The period of loading from the time goods are removed from the port depository or warehouse for loading until they are loaded onto the ship. (These operations may be performed either by employees of a stevedore company or of the carrier.)

12/ The description of practical operations presented in this section is necessarily somewhat generalized, because operations vary among different ports. Similarly, terms such as "shipper" and "consignee" may not be precisely accurate in all cases, but are used here to designate any person who delivers goods for shipment ("shipper"), or who takes delivery of goods at the port of destination ("consignee"). In preparing this section, the secretariat has drawn upon information contained in several published sources, including: A. W. Knauth, The American Law of Ocean Bills of Lading, Baltimore, 4th Ed., 1953; W. Tetley, Marine Cargo Claims, London, 1965; C. L. Sauerbier, Marine Cargo Operations, New York, 1956; UNCTAD Secretariat report on Bills of Lading. The above treatises will be cited as Knauth, Tetley and Sauerbier.

(4) The period, primarily of ocean carriage, which extends from the time after goods are loaded until the goods are ready for unloading.

(5) The period of unloading from the time when the goods are removed from the ship until they are delivered to the port depository or warehouse. (These operations, as in (3) supra, may be performed either by employees of a stevedore company or of the carrier.)

(6) The period after unloading when the goods may be held in a port depository or warehouse until their delivery to the consignee or other bill of lading holder.

13. Inevitably there is an interval, often of substantial length, between the time when the shipper parts with possession of his goods and the loading of the goods onto the carrier's ship (period (2) above). There is a similar interval between the time when the goods are discharged from the ship and their delivery to the consignee (period (6) above). During these periods, the following situations may exist:

(1) The goods may be in the carrier's actual possession; that is, in possession of his servants or agents on the quayside or in a warehouse or other facility owned or operated by the carrier.

(2) The goods may be in the possession of a port depository, warehouse or other facility designated (a) by the carrier, or (b) by the consignor or his agent.[13/] Most frequently this facility is designated by the carrier. The facility may be treated under local law[14/] as bailee for the carrier, for the cargo owner, or for both. In many instances the facility will be operated by a public authority.

14. In the situations described above, complex questions may arise concerning (a) who is responsible for loss or damage to goods occurring during these periods; and (b) what law governs such responsibility. The situation is complicated further by

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13/ The choice of point of receipt and delivery of goods at ports of loading and discharge is almost invariably governed by local regulations, custom or practice.

14/ As used throughout this study, the term "local law" means any national legislation, case-law, by-laws or regulations, etc., other than the Hague Rules.

the fact that the documents evidencing possession or charge (bailment documents) may be issued to the order of the carrier or his agent, the cargo owner, or his representative, or the port depository or warehouse. The bailment documents usually contain provisions that seek to disclaim or limit liability differently from the Hague Rules, and the extent to which such provisions will be given legal effect may or may not be regulated by local law.

15. Frequently the carrier will receive possession of the goods in advance of the loading operation. On such receipt of the goods, the carrier will normally issue a document evidencing this fact, which may be in the form of a warehouse receipt, a dock receipt or a "received for shipment" bill of lading.

16. As goods are loaded onto the ship, an inspection and tally[15/] of the goods is made by tally clerks appointed by the carrier. This may be done at the quayside, as goods are lifted aboard, or on board the ship. After the tally has been taken one of the carrier's employees, usually the ship's chief officer, issues a document acknowledging to the shipper receipt of the goods on board the ship, and noting any appropriate qualifications as to condition and quantity of the goods. If the carrier has issued a "received for shipment" bill of lading, this document will then be stamped or endorsed "On Board", to evidence the fact that the listed goods have been loaded. In other situations, the first document issued by the carrier acknowledging receipt of the goods may be the mate's receipt, or an equivalent document, which is based on the tally of the goods as they are loaded. This receipt then serves as the document on which the bill of lading is based.

17. A discrepancy between the quantity or condition of the goods noted on the document issued by the depository and that recorded on the mate's receipt or bill of lading indicates that loss or damage occurred after receipt of the goods into the depository and before the inspection and tally by the carrier, which may occur

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15/ A "tally" is the physical observation and notation of the number, marks, type and apparent condition of goods being loaded on board ship. This inspection and notation forms the basis of the statement in the mate's receipt concerning the quantity and condition of goods; this statement in turn forms the basis for the statement on these matters in the bill of lading. Systems of taking tallies at some ports will vary from the general system described herein.

at the quayside or after loading. Difficult questions arise concerning when the loss or damage occurred, who is responsible, and what law is to be applied. There would appear to be at least four different possibilities:

(1) If the loss occurred during loading, the carrier may be liable under the terms of his contract of carriage, subject to the protective provisions of the Hague Rules. (As will be seen,[16/] the applicability of the Hague Rules to loading is subject to doubt.);

(2) If the loss occurred prior to loading, the responsibility of the carrier/ is determined pursuant to the terms of the depository document, subject to the local law and regulations of the port;

(3) If the loss resulted from the faults of the depository or stevedores, the carrier may be liable under local law (regardless of the terms of the depository document), as in instances where the depository or stevedoring company is owned or operated by the carrier, or acts as the carrier's agent;

(4) In the situation described in (3), the depository or stevedoring company may be liable (either in addition to or in place of the carrier) under the terms of the depository document, pursuant to the local law and regulations of the port.

18. Usually there is a considerable difference between the scope of responsibility under (a) the depository documents as regulated by the Hague Rules and (b) the bill of lading as regulated by the local law. Application of the local law, instead of the Hague Rules, could be highly favourable either to the carrier or to the cargo owner, depending upon the circumstances. Therefore, it is extremely important to know as precisely as possible the point at which the Hague Rules begin to apply; however, for practical reasons indicated above, this basic fact is very difficult to ascertain when loss or damage occurs after the goods have been received into the depository but before they have been loaded onto the ship.

19. The situation during the period between the discharge of the goods from the ship and delivery to the consignee differs in some respects from that prior to loading. At the ship's side after discharge there is often no officially recognized inspection and tally made jointly by the carrier and the consignee or depository Nor is any generally acceptable document issued which could in most cases

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16/ See paras. [illegible] below.

authoritatively establish the condition of the goods at that point.[17] A joint inspection and tally is usually possible in most ports only many days (sometimes even weeks) after the goods have been physically discharged from the ship. Thus, it will often be very difficult to ascertain whether loss or damage occurred during carriage, during unloading, or after unloading during the period preceding the inspection and tally.[18]

20. To sum up: In the course of carriage of goods from the port of origin to the port of destination there normally are three different documents which establish the condition of the goods at three different points: (a) the warehouse or other bailment documents which establish the condition of the goods upon receipt at the port; (b) the dock's or mate's receipt and the bill of lading which establish the condition of the goods upon loading; and (c) the receipts which are given after inspection and tally at some point after discharge usually at a warehouse or other depository.

21. As we shall see, the only period during which it is clear that the Hague Rules apply is while the goods are on board the ship; the Rules may (or may not) apply during loading or unloading;[19] the protective provisions of the Hague Rules clearly do not apply before loading or after discharge.[20] Since it may be impossible to determine whether the loss occurred on board the ship or during unloading or on the wharf or in a warehouse at the port of discharge, the consignee-claimant faces virtually insuperable barriers (1) of identifying who was in possession at the time of damage or loss and (2) (even if this can be determined) of ascertaining which legal rules are applicable to the claim.

17/ Carriers themselves often tally goods at point of discharge. However, such unilaterally undertaken tallies are not usually accepted as conclusive evidence of the condition of the goods upon discharge.

18/ In countries where it is possible to take a joint inspection and tally at ship's side after discharge, the condition of goods at that point is readily established in a generally acceptable form by all parties, i.e., the evidence is usually held to be conclusive. The allocation of liability for loss or damage to the goods, as between the carrier and the depository at port of discharge thus poses little difficulty in such countries.

19/ See paras. 22 to 25, infra.

20/ Article VII of the Hague Rules quoted at para. 23, infra.

C. Applicability of the Hague Rules with respect to the carrier's responsibility during loading and unloading; possible clarification

1. Ambiguity under the Hague Rules

22. As was suggested earlier in this report (para. 9, supra), the following questions arise concerning the scope of the Hague Rules: (1) whether the Rules, within their present general scope, can be clarified with respect to the responsibility of the carrier for loss or damage occurring while goods are being loaded on or discharged from the ship; (2) whether the scope of the Hague Rules should be expanded to reach loss or damage prior to loading or subsequent to discharge while the goods are in the possession of the carrier or of wharfingers, warehousemen or other intermediaries. The present part of the report will be addressed to the first question; Section D (paras. 28 to 39, infra) will be addressed to the second.

23. Article VII of the Hague Rules provides:

> "Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea."

24. The above language states that the protective provisions of the Hague Rules have no applicability to loss or damage of the goods "prior to the loading on and subsequent to the discharge from the ship...". Consequently, the Hague Rules do not impair the effectiveness of contract provisions drawn by the carrier limiting or negating his responsibility for loss or damage even while the carrier is in possession and control of the goods on the dock or in his warehouse at the port of origin or at the port of receipt; whether such contract provisions will be effective would depend on varying local rules.

25. While the language of Article VII clearly states that the Hague Rules do not apply prior to loading and subsequent to discharge, other provisions create uncertainty as to when the Rules do apply within this defined period; the area of doubt concerns the processes of loading and unloading (discharge).[21/] Thus,

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21/ See, for example, Dor, op. cit., at p. 109; Knauth, op. cit., at p. 144.

Article I(e) defines "carriage of goods" as "the period from the time the goods are loaded on to the time they are discharged from the ship". The above phrase "loaded on" could be read to exclude the process of loading; this wording, however, is out of harmony with the balance of the phrase, which includes the process of unloading. The reference to "loaded on" in Article I(e) is also inconsistent with Articles II and III(2). Article II provides:

> "Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth." [emphasis added]

Article III provides in paragraph 2:

> "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." [emphasis added]

The ambiguities and inconsistencies of the Hague Rules concerning the carrier's responsibility for loading has led to litigation; the resulting case-law leaves important questions unsettled in many countries.[22] The next section consequently considers the possibility of clarifying the text of the Rules.

22/ One interpretation attempts to resolve these ambiguities by emphasizing the scope of the carrier's undertaking in the "contract of carriage of goods by sea" (see Art. II, quoted supra): Loading comes within the Rules if, and only if, the carrier undertakes to load. This approach requires a narrow reading of the provision in Art. III(2) that "the carrier shall properly and carefully load... and discharge the goods carried"; the extent to which actual loading and discharge are brought within the carrier's obligations under the Rules is left to the parties themselves to decide.

Pyrene Co. v. Scindia Steam Navigation Co. Ltd. (1954) Lloyd's Rep. 321; 2 Q.B. 402. See also Renton v. Palmyra Trading Corporation (1956) 1 Q.B. 462; 2 Ll. L. Rep. 722, affirmed by House of Lords (1957) A.C. 149; 2 Ll. L. Rep. 379. T. G. Carver, Carriage by Sea. 11 Edition (London, Stevens and Sons Limited, 1963) Vol. I, para. 268. On the other hand doubt has been expressed as whether this reading gives adequate effect to the Rules. Dor, op. cit., at pp. 126-129; Com. Court of Le Havre, 27 June 1947, D.M.F. 1949, p. 75; Court of Appeal of Venice, 22 January 1931, Dor, p. 451. In some situations the carrier can contend that the damage during loading or discharging was due exclusively to an act or omission of the shipper or consignee or their agents, and that the carrier is exempt from liability under Art. IV(2)(i). See Com. Court of Rouen, 14 March 1955, D.M.F. 1956, p. 309.

2. Possible clarification with respect to loading and discharge

26. Inconsistency between the various provisions of the Hague Rules would be reduced by amending Article I(e) to read as follows:

> "'Carriage of goods' covers the period from the commencement of loading operations until the completion of discharge of the goods from the ship."[23]

27. While bringing more internal consistency to the language of the Rules, this amendment would clarify the point that the carrier may not relieve himself from responsibility for defective performance of the loading and discharge operations that he undertakes to perform or supply. However, this clarifying amendment, standing alone, would not appreciably alleviate the practical problems summarized in Section B (paras. 10-21 supra). This problem is especially serious when the period commencing with loading and ending with discharge comprises only a portion of the period during which the carrier is in the charge or control of the goods. This larger and more significant problem is dealt with in Section D, which follows.[24]

23/ Underscoring indicates the significant changes in wording. Should this amendment be adopted, Art. III(2) could remain unchanged. Art. III(2), it should be recalled, states in part: "...the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." It might, however, be advisable to amend Art. VII in order to make that Article consistent with the amended Art.I(e). The present Art. VII states that "nothing herein contained shall prevent a carrier or shipper from entering into any...exemption...of the carrier...for loss or damage...prior to the loading on, and subsequent to the discharge from the ship...". In order to make Art. VII consistent with the amended Art. I(e), the terms "prior to the commencement of the loading on, and subsequent to the completion of discharge from" might be substituted for the underlined terms in the current Art. VII /emphasis added/.

24/ The above clarifying amendment for Art. I(e) would not be needed if the scope of the carrier's responsibility is expanded along the lines discussed in Section D, infra. However, if the only amendment in this area is along the lines of the clarifying amendment for Art. I(e), consideration might be given to a possible further clarification that would prevent the carrier from narrowing the scope of the Rules by making separate agreements (1) to load (or unload) and (2) to carry the goods. Specifically, the problem would be presented by an agreement, separate from the bill of lading, whereby the carrier was hired to use its equipment or labour to load or unload the goods, under terms that would exonerate the carrier from liability--a result that would be barred by the Rules if the carrier undertook loading (or unloading) as part of the contract of carriage.

D. Responsibility of the carrier prior to loading and subsequent to discharge

1. Introduction

28. As has been noted, the Hague Rules provide no protection against contract clauses limiting or nullifying the responsibility of the carrier prior to loading and subsequent to discharge of the goods.[25/] However, the carrier is often in charge or control of the goods for substantial periods of time prior to loading and subsequent to discharge. As a result, different legal rules may be applicable to parts of what is functionally a unified operation commencing with receipt of the goods and ending with their delivery. The rules applicable to operation at the ports of origin and destination will often be different from those of the Hague Rules and, of course, will lack uniformity from port to port. Most serious of all (as is explained in detail in Section B, supra) is the fact that the owner of the goods will often have no practicable means of knowing with certainty where the loss or damage occurred.

29. For these reasons, the resolutions of the UNCTAD and UNCITRAL Working Groups called for examination of the question of:

> "responsibility for cargo for the entire period it is in the charge or control of the carrier or his agent".

2. Comparison with other transport conventions and modern national legislation

30. It will be useful to examine the relevant provisions of international conventions governing other means of carriage.

31. The Warsaw Convention [26/] governing international carriage by air, in Article 18, defines as follows the period of the carrier's responsibility:

> "1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.
>
> "2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever."

25/ See paras. 23 to 25, supra, and especially Art. VII of the Hague Rules, quoted in para. 23.

26/ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, October 12, 1929. Emphasis is added throughout. In the Conventions cited in this section, there are certain qualifications and exceptions to basic rules quoted herein.

32. The CMR Convention,[27] governing international carriage by road, provides in Article 17:

> "1. The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery."

33. The CIM Convention, [28] governing international carriage by rail, provides in Article 27:

> "1. The carrier is responsible for the results of delay in delivery, of damage resulting in the total or partial loss of the goods, as well as shortages in the goods, from the time of acceptance for carriage until delivery."

34. It should be noted that in all three of these conventions, the period of the carrier's liability commences before the period of "loading" and continues after "discharge". The terms employed in describing the point at which the carrier's responsibility begins and ends may be useful in considering possible clarification and expansion of the Hague Rules.[29]

35. At the meetings of the UNCTAD and UNCITRAL Working Groups, and in the replies to the questionnaire, attention was directed to the provisions on the period of ocean carriers' responsibility established under the Law of 18 June 1966 enacted by France.[30] The relevant provisions of this Law are as follows:

27/ Convention on the Contract for the International Carriage of Goods by Road (CMR), signed at Geneva, 19 May 1956.

28/ International Convention on the Transport of Goods by Rail, signed at Berne, 25 February 1961. See also the Protocol of 25 February 1961 and Protocol A of 29 April 1964.

29/ The replies to the questionnaire by India and Australia drew attention to the Rules of the Warsaw Convention.

30/ Loi No. 66-420 du 18 juin 1966 sur les contrats d'affrètement et de transport maritime, (Journal Officiel du 24 juin 1966). This approach was recommended in the questionnaires transmitted by France and by Greece.

"Article 27: The carrier is responsible for loss or damage suffered by the goods from taking charge of the goods (prise en charge) until delivery, unless he proves that such loss or damage resulted from:... [There follow nine exceptions based on Hague Rules Art. IV(2).]

"Article 29: Any clause is void and of no effect, which has directly or indirectly as its object or its effect: (a) to relieve the carrier of the responsibility set out in Art. 27". 31/

36. Many replies to the questionnaire endorsed the view that the carrier's responsibility should commence with his receipt of the goods and continue until delivery of the goods.32/ On the other hand, other replies indicated satisfaction with the present scope of the Hague Rules.33/

37. The general tenor of the replies and the practical considerations developed

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31/ The replies reported similarly broad provisions in the Civil Code of Quebec (Arts. 1674 and 1676), the Civil Code of the Philippines (Arts. 1736 and 1738) and the Commercial Code of Iraq (Art. 315, and Art. 195 of the Iraqi Maritime draft law). Somewhat similar approaches seem to be applied in Argentina and Brazil. It is, however, not always clear whether the responsibilities of the carrier are subject to derogation by contract. The replies of Austria, Denmark, Italy, Norway, Poland and Sweden reported that while the period of responsibility is broadly defined, contractual provisions reducing the carrier's responsibility may be effective with respect to acts occurring before loading or after discharge.

32/ This is the tenor of the replies of Argentina ("period of custody of carrier or his agents"), Australia, Brazil, France, Greece, Hungary, India (period from time goods "delivered to the carrier or his agent or otherwise pursuant to the instructions of the carrier" to the time they are delivered to the consignee), Iraq (period of "custody"), Norway (period of "custody and control"), and Sweden ("custody and control"). The reply of Austria suggested that the period of responsibility should be widened. The reply of the United Kingdom, after stating grounds for caution, noted that "loss and damage are generally minimized by matching as closely as possible responsibility for and physical control of cargoes. If therefore liability is to be placed on the carrier for the period in which the goods are under the control of stevedores, warehousemen, etc., it would seem essential that the carrier should have a right of recourse against such parties.... The establishment of a general rule for this will be a difficult exercise...and the Government of the United Kingdom anticipate that considerable work will be necessary to establish suitable rules worldwide. However, they would be in favour of a solution along these lines."

33/ Cambodia, Canada, Ceylon (satisfactory "from a shipowner point of view"), Denmark, Japan, Korea, Nigeria.

above indicate that consideration should be given to broadening the scope of the Hague Rules to conform more closely to the approach of the other international transport conventions and the recent national legislation reported above in Section D-2. Such a proposal could be considered in the context of a possible amendment of Article I(e) of the Hague Rules. Article I(e) as amended (with possible alternative modifications indicated in brackets) might read as follows:

> "'Carriage of goods' covers the period from the time the goods are /in charge of/ /accepted for carriage by/ /received by/ the carrier to the time of their delivery." 34/

38. Even such a brief modification might provide a more coherent and satisfactory approach than the present narrow scope of the Rules.35/ However, it may be useful to consider possible clarification of the application of the concepts that define the point at which the responsibility of the carrier begins and ends.

39. To this end, the foregoing provision might be amplified along these lines:

> "The carrier shall be deemed to have /taken charge of/ /accepted for carriage/ /received/ the goods when they have come into the possession of the carrier or his agent or any third person acting pursuant to the carrier's instructions. The carrier shall be deemed to have delivered the goods when he has surrendered possession of the goods to the consignee

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34/ The modification is indicated by underscoring. If this approach is accepted, appropriate adjustments would be called for in the language of Articles II and III(2) and VII.

35/ Extension of the Hague Rules to periods prior to loading and subsequent to discharge was supported by the UNCTAD Working Group, where it was stated: "It was also felt that the carrier should assume responsibility for the cargo during the entire period for which it remained in his or his agent's charge or control." UNCTAD Working Group, Report on Second Session (1971), para. 8.

or to a third person either pursuant to the instructions of the consignee or on failure by the consignee to give required instructions." 36/

40. The foregoing alternative amendments have been presented in a context designed for maximum conformity with the present structure of the Hague Rules. To this end, the alternative substantive provisions dealing with the period of the carrier's responsibility have been directed to Article I(e) which defines the period of time embraced within the concept "carriage of goods". This seems to be an appropriate setting for the discussion of alternative solutions to the problem at hand; however, once a substantive decision is taken, that decision may call for corresponding modifications in other provisions of the Rules. In this connexion it may be useful to bear in mind that Article I(e) is only a definition; operative provisions imposing responsibility must be found elsewhere. The most important of the operative provisions is Article III(2) which states: "The carrier shall properly and carefully..."

36/ The need for a general provision dealing with the situation when the consignee fails to give instructions is suggested by the provision of Article 1738 of the Civil Code of the Philippines, which was quoted in the reply to the questionnaire, as follows:

"Art. 1738. The extraordinary liability of the common carrier continues to be operative even during the time the goods are stored in a warehouse of the carrier at the place of destination, until the consignee has been advised of the arrival of the goods and has had the reasonable opportunity thereafter to remove them or otherwise dispose of them."

The first sentence of the above definition is similar to a proposal set forth in a reply by India, suggesting that the carrier's responsibility should commence when the goods have been "delivered to the carrier (or his agent or otherwise pursuant to the instructions of the carrier)".

With respect to the second sentence, consideration might be given to whether the reference "required instructions" should be expanded to refer to local regulations, custom or practice governing delivery.

perform specified functions with respect to the goods. If Article I(e) is broadened so that "contract of carriage" embraces the period while the goods are within the carrier's "charge" (or following "receipt" and before "delivery") there might still be doubt as to whether the lack of due care during this period by a stevedore or other legal entity is the act of the "carrier".[37]

41. The above problem relates to the proper phrasing of a provision that is concerned with the standard for the carrier's responsibility. This question is related to the basic issues discussed in Part Four of this report. It seems premature to seek to solve the problem of drafting at this time;[37a] it should be sufficient to note the problem for further attention after decisions have been taken concerning the appropriate standard for the carrier's responsibility.

37/ So long as the test is one of improper conduct by the "carrier", responsibility for the acts of third persons to whom the carrier commits aspects of the contract of carriage might depend on local rules of "agency" or of "respondeat superior". Such rules are not uniform, and may not be sufficient to implement the policy objectives implicit in the amendment of Article I(e).

37a/ Some of the alternative proposals in Part Four of this report would make this problem moot.

PART TWO: RESPONSIBILITY FOR DECK CARGOES AND LIVE ANIMALS

A. Introduction

42. A second subject on which the UNCITRAL Working Group invited the secretariat to prepare a report is that of "responsibility for deck cargoes /and/ live animals ...".[38/] The provision of the Hague Rules that presents the current problem is Art. I(c), which provides:

> "I(c) 'Goods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

The concluding phrase, removing "live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried" from the definition of "goods" leads to the result that the Rules provide no protection against clauses in the bill of lading relieving the carrier of responsibility for loss or damage to such cargoes, regardless of the cause that leads to loss or damage.

43. Problems relating to the exclusion of deck cargoes and live animals from the scope of the Rules were discussed by the UNCTAD Secretariat report on Bills of Lading, which concluded:

> "There appears to be no justification for maintaining this exclusion; if it were abolished carriers would still be protected adequately by the exceptions in the Rules and the limitation of liability. Moreover, a large number of containers are now carried on deck, and it appears reasonable that the same principles should apply to containers carried on deck as to those carried below deck." [39/]

38/ The Resolution of the new UNCITRAL Working Group, (quoted in the Introduction to this report at para. 4) referred to item 2(e) of the UNCTAD Working Group resolution. This latter resolution is incorporated in the UNCITRAL resolution quoted in para. 3 of the Introduction to this report.

"Trans-shipment" originally was included, along with "deck cargoes" and "live animals", under item 2(e). Analysis disclosed that "transshipment" was related to "deviation", which appears in 2(d) of the resolutions, and was not related to the other problems raised in paragraph 2(e). Since, under the decision of the Working Group "deviation" is reserved for later examination, "transshipment" is not examined in this part of the study.

39/ TD/B/C.4/ISL/6, para. 93.

"In order to avoid the present conflicts among the laws of different countries, and also to do justice to cargo owners, deck cargo and live animals might be included in the definition of 'goods' so that the Rules would apply to them as to other cargo."[40]

The report of the UNCTAD Working Group includes the following:

"The representatives of several developing countries stated that the definition of 'goods' in Article I(c) of the Hague Rules should be extended so as to cover the carriage of containers on deck, deck cargo and live animals. In their view cargo traditionally carried on deck was particularly important to the economies of the developing countries."[41]

"The representatives of several developed market economy countries agreed that containers carried on deck should be included within the definition of 'goods' in the Hague Rules. Some other favoured inclusion of all deck cargo in the definition of 'goods' to be covered by the Hague Rules."[42]

44. The problems presented by the exclusion of deck cargoes will be considered in Section B (paras. 45 to 66); the exclusion of live animals will be considered in Section C (paras. 67 to 71).

B. Deck cargo

1. Analysis of relevant laws and practices

(a) Practices

45. In the past, it was considered that "Generally the deck is not a proper place for cargo. Goods placed there obstruct the working of the ship, and are under peculiar risks".[43] When the Hague Rules were introduced, deck cargoes seem to have consisted mainly of timber,[44] and it has been suggested that deck cargoes were excluded from the scope of the Rules "for the relief of the Baltic timber trades, which were thus given local freedom of contract".[45]

40/ Ibid., para. 188.

41/ TD/B/C.4/ISL/8, para. 53.

42/ Ibid., para. 66.

43/ Carver, op. cit., at p. 732.

44/ See proceedings, International Law Association meeting, 30th Conference, Proceedings of Maritime Law Convention, 1921, page 79. Sweet and Maxwell, London, 1922.

45/ Knauth, op. cit. at page 236.

46. The carriage of goods on deck has increased considerably since the introduction of the Hague Rules in 1924, and no longer is timber the main type of deck cargo.[46] Moreover, the traditional reasons for relieving the carrier of responsibility for deck cargo no longer seem valid, since methods of stowage and security measures for deck cargo have improved considerably in recent years.[47]

47. Goods may be stowed on deck for a number of reasons. For example, some goods (such as explosives, chemicals, or fertilizers) may not be permitted below deck because they are considered to be hazardous; others (such as railroad cars, boilers, transformers or timber) are too large or unwieldy to fit below; others might fit below deck, but because of their size occupy an excessive amount of space or, because of their irregular shape, waste space that cannot be filled with other cargo. Finally a large proportion of all containers are stowed on deck.

(b) The International Convention (Hague Rules)

48. The exclusion from the Hague Rules of "cargo which by the contract of carriage is stated as being carried on deck and is so carried" has presented certain problems in application. These include: (i) What is meant by the term "deck cargo"? and (ii) What are the required terms, and effect, of clauses in bills of lading relating to deck cargo.

(i) The meaning of "on deck" carriage

49. "On deck" carriage is not always implied when goods are stowed above the main deck.[48] In some jurisdictions, case law has taken a narrow view of the phrase "on deck". It has been held that stowage within a permanent steel enclosure, such as a hatch-trunk, a bridge-deck, or a hospital space, is included within the Hague Rules. It has also been held that stowage, even though above the main deck, that

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46/ See C.L. Sauerbier, Marine Cargo Operations, New York: John Wiley and Sons, 1956, p. 194.

47/ It has been stated in a modern text that, with regard to deck cargo, "lashings and bracing should be applied with the assumption that during the first night at sea the ship will pass through a full hurricane. Using this philosophy, the ship will generally be stowed safely." Ibid., p. 195.

48/ One leading author has stated that "it is difficult, if not impossible, to make any general definition of what is and what is not deck stowage." W.E. Astle, Shipowners' Cargo Liabilities and Immunities, London, H.F. and G. Witherby Ltd., 1967, p. 43.

is covered so that the cargo is afforded the same security as if it were stowed below deck may not fall within the "on deck" exclusion.[49] In many states the scope of this exclusion remains unclear.

(ii) Conditions for excluding deck cargo from the Rules: The validity of non-responsibility clauses

50. It will be recalled that Art. I(c) of the Hague Rules excludes from the Rules' coverage "cargo which by the contract of carriage is stated as being carried on deck and is so carried". As a result of the phrase "stated as being carried on deck" a clause merely stating that the carrier has liberty to carry goods on deck (although in common use) is not sufficient to exclude the application of the Rules: the bill of lading must state that the goods are in fact carried on deck.[50] Consequently, when cargo is stowed on deck, carriers customarily insert in their bills of lading (either by rubber stamp or by typing) an additional clause stating that the specific goods covered by the bill of lading are being carried on deck at shipper's risk and that the carrier accepts no responsibility for loss or damage to them from any cause whatsoever.[51] In most cases, the insertion of such a clause is effective to remove deck cargo from the scope of the Rules.

49/ The Lossie-Bank, 1938 A.M.C. 1033 (St. Cal); The Fred W. Sargent, 1940 A.M.C. 670 (ED Mich). Knauth, op. cit., at p. 237; Rodière, Traité Général de Droit Maritime, Tome II, p. 155. The shelter deck is still a controversial matter. See Paris, 1925, RDMC, pro; and Rodière, op. cit., contra; Astle, op. cit., at p. 43.

50/ See Svenska Traktors v. Maritime Agencies (1953), 2 Ll.L. Rep. 124.

51/ An example of this type of clause is one that was widely recommended by protection and indemnity (P and I) clubs to their members:

"Carried on deck without liability for loss or damage however caused".

See Selected Circulars 1951-1958, United Kingdom Mutual Steamship Assurance Association Ltd., No. 1, Buerup Mathieson and Co. Ltd., London, undated. Other, similar forms of this clause are: "Goods carried on deck at shipper's risk", or "at the sole risk of owners of the goods". See also the Model "P and I" bill of lading (see "Bills of Lading", Report by the UNCTAD secretariat (TD/B/C.4/ISI/6, Annex III), which states in Clause 4(A): "The carriers shall be under no responsibility ... in the case of ... cargo which in this Bill of Lading is stated as being carried on deck and is so carried (none of which is subject to the Hague Rules at any time when, but for the provisions of this clause such goods would be the responsibility of the carrier)."

51. Clauses that disclaim all responsibility for deck cargo are widely used and are generally valid. The practical result is that carriers rarely are legally responsible for loss or a damage to deck cargo, regardless of the cause or extent of loss or damage.

2. Suggested alternative solutions

52. Alternative approaches that may be considered include the following: (a) Inclusion of all deck cargo within the protection of the Hague Rules; (b) Inclusion only of "containers" carried on deck; (c) Amendment to clarify what constitutes "deck cargo" excluded from the Rules.[52/]

(a) Inclusion of all deck cargo within the scope of the Rules

53. The inclusion of all deck cargo was suggested by the UNCTAD Secretariat report on Bills of Lading,[53/] by representatives both of developing countries and of some developed market economy countries in the UNCTAD Working Group,[54/] and by many replies to the secretariat's questionnaire.[55/]

54. In support of this alternative it may be suggested that the fact that the carriage of deck cargo may be subject to certain special risks hardly justifies total removal of responsibility for deck cargo without regard to the risk that may lead to loss or damage. For example, under the Hague Rules as they now stand, the carrier may be free of responsibility under Art.III(1) toward owners of deck cargo to "use due diligence" to: (a) "Make the ship seaworthy"; or (b) "Properly man, equip and supply the ship". Similarly, under the Hague Rules, the carrier may be

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52/ A fourth alternative would be to maintain the present provisions of the Hague Rules concerning "on deck" cargo. The tenor of the replies received to the questionnaire suggests that this alternative would receive little support.

53/ Op. cit., para. 93: "There appears to be no justification for maintaining this exclusion /of deck cargo/; if it were abolished carriers would still be protected adequately by the exceptions in the Rules and the limitation of liability...".

54/ See para. 43 above.

55/ See para. 59 below.

completely relieved responsibility under Art. III(2) to "properly and carefully load, handle, stow, carry, keep, care for and discharge" deck cargo which he has accepted for carriage.[56]

55. The lack of any carrier responsibility for deck cargo has significant commercial consequences. International sales of goods often provide for payment under letters of credit on the presentation of specific documents, including a bill of lading. Unless specifically authorized in the letters of credit, it is considered a violation of the credit to stow goods on deck, and thus most banks will not accept bills of lading for deck cargo.[57] Naturally this creates practical difficulties in the transfer of such goods. Moreover, many ordinary marine insurance policies exclude deck cargo from their coverage, as underwriters often require that on deck shipments be separately noted and declared in "shipped" bills of lading, and that an additional insurance premium be paid for deck cargo.

56. To some extent, such practical difficulties with resale and insurance may result from the fact that it may be feared that some types of deck cargo may be subject to greater risk as a result of deck carriage. Nevertheless, a contributing factor to the difficulties in resale and insurance is the fact that under the present system it is virtually impossible for the cargo owner (or his insurer) to recover from the carrier for loss/damage to deck cargo. The inclusion of deck cargo within the scope of the Rules might cause bills of lading covering deck cargo to become more effective vehicles for the transfer of such goods, and might improve the terms of their insurance.

57. Problems presented by the exclusion of deck cargo from the Hague Rules have arisen in the preparation of the Draft Convention on the Combined Transport of Goods (known as the TCM Convention) which is to be considered for international adoption at a Joint IMCO/UN Conference in November 1972. This Draft Convention embodies a

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56/ Should deck cargo be included within the scope of the Rules, the carrier would be protected by several of the provisions contained in Art. IV of the Rules.

57/ See Art. 20 of the Uniform Customs and Practice of the ICC: "Banks will refuse a bill of lading showing the stowage of goods on deck, unless specifically authorized in the credit". See also Knauth, p. 237: "A 'clean' bill of lading is an unwritten representation that the cargo will be carried under deck, unless there is a custom or usage of the trade permitting on deck carriage, or custom or usage as between the carrier and the particular shipper." citing The St. Johns, N.F., 1923 A.M.C. 1131, 263 U.S. 119; Davidson v. Flood Brothers, 1929 A.M.C. 213 (9th Circuit Court of Appeals).

concept known as the "network system" of liability, which can be explained (briefly) by the following example: In a Combined Transport Operation, part of which was by sea and part by rail, if it can be proved that a loss or damage occurred during the sea leg, then the liability of the Combined Transport Operator for that loss or damage is to be governed by the Hague Rules instead of the terms of the Draft TCM Convention.[58] And if the Hague Rules are applied under the "network system" of liability, the Draft Convention specifically stipulates that the provisions of the Rules "shall apply to all goods whether carried on deck or under deck".[59]

58. Should it be decided to amend the Hague Rules to cover deck cargo, the simplest approach would be to omit this exception from Article I(c); the relevant language would then read:

> "'Goods' includes goods, wares, merchandise and articles of every kind whatsoever ..."[60]

59. A majority of the replies that expressed an opinion on Article I(c) support such an amendment to this effect.[61]

58/ Similarly, if it could be proved that the loss/damage occurred during the Rail leg, then the CTO's liability would be governed by the CIM (Convention internationale concernant le transport des marchandises par chemin de fer, 25 February 1961.)

59/ See Art. 11(b)(ii) Draft Convention on the Combined Transport of Goods (TCM Convention) (draft text prepared by the Drafting Committee set up at the third and fourth sessions of the Joint Meeting). Report of the Third Session of the Joint IMCO/ECE Meeting to Study the Draft Convention on the Combined Transport Contract (TCM Convention) (28 June-2 July 1971) (TRANS/370/CTC/III/1). Although Combined Transport Operations would in large measure involve containerized shipment the scope of the current drafts is not so restricted. See also BIMCO Combined Bill of Lading (COMBICONBILL).

60/ The question of whether "live animals" also should be included is considered below at para. 6.

61/ Replies supporting removal of the exclusion for "deck cargo" are those of Brazil, Hungary, Greece, India, Iraq, Nigeria, Norway. In addition, the reply of Sweden suggested that removal of the exclusion be given "serious consideration"; the reply of Korea stated that the present rules on this topic need improvement; the replies of France and Austria suggested that "deck cargo" should be brought within the Rules, but indicated that it should be possible to limit responsibility by contract. Finally, the reply of the United Kingdom stated that, with regard to deck cargo, "there is no reason why the shipowners should not be subject to the Rules except for damage arising from the deck carriage itself"; and Poland appeared to favour removal of the exclusion but cautioned that "cargo not resistant to atmospheric conditions ... would not be duly protected." Replies supporting the continued exclusion of "deck cargo" are those of Cambodia, Canada, Ceylon ("as shipowners") Japan, Philippines, Saudi Arabia.

The replies summarized here relate only to the "on deck" exclusion; the responses with respect to live animals will be summarized in Section C, infra.

60. A more qualified approach, proposed in the United Kingdom reply to the questionnaire, would supplement the amendment suggested above by the following addition to Article IV:

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

(b) Amendment of the Hague Rules to include only containers carried on deck

61. The enormous expansion of containerized transport in the past decade has presented special problems concerning the adequacy of the existing Hague Rules provisions on deck cargo.[62] A significant proportion of all containers carried are loaded on deck, and generally very little attention is paid which containers are loaded on deck and which ones under deck. As a result, usually none of the parties - carrier, cargo owner, consignee or insurance company - knows in advance which of the containers will be loaded under deck (hence covered by the Hague Rules) and which will be loaded on deck (hence not covered).[63]

62. If the "on deck" exclusion is not completely removed, consideration might be given to an alternative approach whereby the Hague Rules would be revised to apply to all containers regardless of whether they are carried on deck or in the hold.[64]

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[62] As of 1 July 1970, the world fleet included 167 fully cellular container ships with a combined tonnage of 1,907,801 grt., an average of 11,424 grt. per vessel. As of 31 July 1970, 180 container ships were on order, with a combined capacity of 3,636,020 dwt., an average of 20,200 dwt. per vessel. Review of Maritime Transport, 1970, Report by the UNCTAD Secretariat (TD/B/C.4(V)/Misc.2), 19 January 1971.

[63] Moreover, it is felt by many that containers can be carried as safely on deck as below deck. For example, the Swedish Government, in its reply to the questionnaire, stated that "the risks involved ... in the carriage of containers 12 meters above sea level are not substantially different from the risks to which goods carried in the holds are exposed." This alternative was supported by the reply of Denmark.

[64] Such a revision is anticipated by a bill of lading used by one leading company engaged in the container trade (Associated Container Transportation (Australia) Ltd.), which incorporates the provisions of the Hague Rules, but which defines "goods" as "the cargo accepted from the shipper and includes any containers supplied by or on behalf of the carrier".

63. Revision of the Hague Rules to implement this approach could take several possible forms. Two examples of such an amendment to Art. I(c) are offered below. (Additions to the present provision are underscored).

Art. I(c): - "'Goods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo (other than freight containers) which by the contract of carriage is stated as being carried on deck and is so carried." or

Art. I(c): - "'Goods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. However, 'goods' shall include all freight containers, whether carried on deck or below deck."

64. Amendments such as these suggested above might raise questions concerning precisely what is meant by the term "container".[65/] To meet this problem, consideration might be given to the definition in Recommendation R-668 of the International Organization for Standardization which is as follows:

'A freight container is an article of transport equipment,

(a) of a permanent character and accordingly strong enough to be suitable for repeated use;

(b) specially designed to facilitate the carriage of goods, by one or more modes of transport, without intermediate reloading;

(c) fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another;

(d) so designed as to be easy to fill and empty;

(e) having an internal volume of 1 m^3 (35.3 $ft.^3$) or more.

The term freight container includes neither vehicles nor conventional packing.'"

(c) Amendment to clarify what constitutes "on deck" cargo excluded from the Rules

65. Uncertainties concerning exactly what constitutes "deck cargo" were discussed at paragraph 49 above. Should deck cargo remain outside the scope of the Rules,

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65/ "There are various types of containers, including non-collapsible containers of rigid construction and collapsible ones. Moreover, containers can be classified according to their size, the material used in their construction and the nature of the commodity to be placed in them ... Containers are usually framed with iron, but the walls may consist of various materials, such as plywood, aluminum, steel or stainless steel, or reinforced fibreboard ... From the point of view of specialized accommodation and structure, there are also many kinds of containers, for example, open-top containers for bulk cargoes, mesh containers for livestock, humidity-controlled and air-conditioned containers for vegetables and fruit, refrigerated containers for cold storage cargoes, tank containers for liquid cargoes, etc." Unitization of Cargo, Report by the UNCTAD Secretariat, New York; United Nations, 1970, p. 12 (TD/B/C.4/75; United Nations Sales No. E.71.II.D.2.).

it would be useful to amend Art. I(c) to clarify what is meant by "deck cargo". For example, it was pointed out above that cargo which is stowed above the main deck but within certain types of enclosures, such as hatch-trunks, bridge-decks or hospital spaces, is sometimes considered to be "under deck" and is included within the Hague Rules. It was stated that the test in many cases appears to be whether covered stowage, even though above the main deck, gives the cargo the same security as if it were stowed below deck.

66. There is, however, no uniform acceptance of this test for determining what is to be considered "deck cargo" for the purpose of exclusion from the Rules. Should no other action be taken to amend Art. I(c), it might be desirable to incorporate into Art. I(c) the test given above for determining what constitutes deck cargo. This could be done by adding to Art. I(c) a sentence such as the following:

> "However, cargo that is stowed above the main deck but within permanent enclosures that provide for the cargo substantially the same security as if it were stowed below deck shall not be considered to be "deck cargo" within the meaning of this Article."

C. Responsibility for live animals

1. Introduction

67. As noted above[66/] the definition of "goods" in Art. I(c) of the Hague Rules includes the phrase "except live animals..." so that the carriage of live animals is excluded from the coverage of the Rules. Virtually all carriers insert clauses in the contract of carriage[67/] disclaiming all responsibility for the loss of live animals.[68/] Any limitations upon the carrier's freedom to contract out of responsibility for live animals must be found outside the Hague Rules -- in the general

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66/ See para. 40 above.

67/ Frequently carriers do not issue bills of lading when carrying live animals. Instead they issue a consignment note, or some other form of receipt, the terms of which purport to exempt them from any liability arising from any cause whatsoever. Carriers usually agree with shippers on arrangements to accommodate and feed the animals.

68/ See, for example, the ALAMAR (Asociacion latinoamericana de armadores, or Latin American Shipowners' Association) bill of lading (contained in the UNCTAD Secretariat report on Bills of Lading, op. cit., Annex III), para. 24: "This bill of lading shall not apply to the carriage of live animals. If it should be utilized for that purpose, however, the carrier shall be in no way liable for any injuries, deaths or illnesses of the animals during carriage, loading or unloading, and the immunities and limitations provided for in Art. 4, paras. 1, 2, 4 and 5 of the /Hague Rules/ and such other clauses of this bill of lading as may be appropriate, shall apply." See also the "Model P and I" bill of lading (UNCTAD Secretariat report on Bills of Lading, Annex III) para. 4(A): "The carrier shall be under no responsibility; ...(ii) in the case of live animals...at any time when, but for the provisions of this clause such goods would be the responsibility of the Carrier."

rules of bailment or contract law of national commercial codes or case-law. The objections that have been raised to this result have been noted in paras. 43 supra.

2. Risks in the carriage of live animals

68. The carriage of live animals involves several risks that do not exist in the carriage of inanimate objects. Animals are susceptible to disease and injury, and have requirements of feeding, watering and ventilation about which the carrier may have insufficient knowledge. Animals (especially wild animals) may be accompanied by an attendant or keeper over whom the carrier has no authority.[69] Other international conventions have made special provision for live animals.[70]

69. The exclusion of "live animals" from the Hague Rules seems to have resulted from such special hazards presented by this type of cargo. However, it has not been suggested that carriers should be made liable for losses caused by such hazards but rather that carrier should not be able to avoid responsibility for losses arising from causes other than inherent vice of live animals -- such as the seaworthiness of the ship.[71]

70. If live animals should be brought within the scope of the Rules, carriers could have the benefit of the provision in Article IV(2)(m) that the carrier is not

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69/ It was an exception at common law that a carrier is not responsible for a loss or damage which has resulted from an inherent quality or defect of the thing carried. In the case of animals, he was "not responsible for the progress of disease in them, or for injuries arising from their own vice or timidity." Carver, op. cit., at p. 15.

70/ The International Convention Concerning the Carriage of Goods by Rail (CIM), Berne 1956, Art. 27(3)(g); the Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva 1961, Art. 17(4)(f).

71/ Removal of the exclusion of "live animals" from the Hague Rules was supported by the replies of Brazil, India and Iraq. The replies of France and Austria suggested that "live animals" should be brought within the Rules, but indicated that it should be possible to limit responsibility by contract. Removal of this exclusion was strongly opposed in the reply of Japan, which stated that it is a "considerable risk, almost tantamount to gambling, to undertake the carriage of live animals, while ensuring their life or health" (except "in the trade of sheep on a large scale, where certain mortality rate is agreed upon..."). Removal of this exclusion was further opposed in the replies of Cambodia, Canada, Ceylon ("as shipowners"), Denmark, Greece, Norway, Philippines, Poland, ("the problem of carrying live animals calls for a separate and detailed regulation"), Saudi Arabia and Sweden. Other replies made no specific mention of the subject.

responsible for loss or damage arising from "inherent defect, quality or vice of the goods". On the other hand, it might be considered that the scope of this exception is not clear, and presents particularly difficult problems in relationship to live animals, since the cause that leads to the death or injury of an animal may be difficult to ascertain.

3. Alternative solutions

71. One alternative, supported by several replies, would be to maintain the present provision of the Hague Rules excluding live animals from the scope of the Rules.[72/]

72. A second alternative would include live animals within the scope of the Hague Rules. This would be accomplished by the deletion of the phrase "except live animals" from Article I(e). Article I(c) would then read, in relevant part: "'Goods' includes goods, wares, merchandise and articles of every kind whatsoever."

73. If action is taken to include "live animals", it might be considered that the exception in Article IV(2)(m) with respect to "inherent vice" does not give sufficient protection with respect to the problems of live animals; if so, consideration might be given to this question in connexion with the review of Article IV.

74. Alternatively a provision might be modeled on the appropriate provisions in the International Convention Concerning the Carriage of Goods by Rail (CIM), and the Convention on the Contract for the International Carriage of Goods by Road (CMR).[73/] Article 27(3) of the CIM Convention provides in part:

> "3. ...the railway shall be relieved of liability when the loss or damage arises out of the special risks inherent in one or more of the following circumstances:
>
> ...
>
> (g) the carriage of livestock"

Article 17(4) of the CMR Convention provides in part:

> "... the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:
>
> (f) the carriage of livestock".

72/ For a summary of the replies see note 65 supra.

73/ Those provisions are discussed infra in Part Four of this report at Section D.

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RESPONSIBILITY OF OCEAN CARRIERS FOR CARGO: BILLS OF LADING

Report by the Secretary-General

CONTENTS*

* For introduction and parts one and two, see vol. I. For part four, see vol. III.

71-29653

PART THREE: CLAUSES OF BILLS OF LADING CONFINING JURISDICTION OVER CLAIMS TO A SELECTED FORUM

A. The Setting

1. Decision to examine choice of forum clauses

75. In response to the programme of work developed at the fourth session of UNCITRAL,[74] this Part of the report deals with "jurisdiction" clauses in bills of lading—i.e. clauses providing that claims arising from the contract of carriage may only be asserted in a designated forum.[75] These clauses are normally prepared by carriers in the interest of their convenience in presenting their defences to cargo owners' claims for loss or damage to cargo. On the other hand, it has been contended that the place for suit specified in the bill of lading is often so inconvenient to cargo owners as to impede the full and fair presentation and adjudication of claims. These conflicting interests are analyzed more fully in Section 3, infra.

2. Examples of choice of forum clauses

76. Bills of lading are usually prepared by the carrier, often on the basis of model standard forms prepared by associations of shipowners or liner conferences. One such standard form is the "CONLINE" bill of lading, which is a set of Liner terms approved by the Baltic and International Maritime Conference (BIMCO). The CONLINE bill of lading is typical with respect to the choice of the place where claims must be brought. The bill of lading states:

> "3. Jurisdiction
>
> Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein." [76]

74/ See Introduction to the report supra paragraphs 1-6.

75/ "Jurisdiction" has various meanings but clauses on choice of forum have received primary attention and present the most serious unsolved problems.

76/ The full text of the CONLINE bill of lading is set out in Annex III of the UNCTAD Secretariat Report on Bills of Lading (TD/B/C.4/86, Annex III) p. 14. In Socialist countries the general conditions of liner bills of lading are based on the "CONLINE" terms. Emphasis here and elsewhere has been added.

In January 1971, the Baltic and International Maritime Conference adopted model terms called the Combined Transport Bill of Lading ("COMBICON BILL") whose choice of forum clause is quoted infra in connexion with the ALAMAR Model Bill of Lading. The COMBICON clause provides the plaintiff with a choice of fora.

77. In the standard "Trident Bill of Lading" the place where claims must be brought is a specified city. The choice of forum clause provides:

"Jurisdiction

All actions under the present contract of carriage shall be brought before the Court at Caracas, Venezuela, if Compañia Anónima Venezolana de Navegación is the carrier, before the Judge or Tribunal at Bogotá if Flota Mercante Grancolombiana S. A. is the carrier and before the Court at Amsterdam if the Koninklijke Nederlandsche Stoomboot--Maatschappij N.V. is the carrier and no other judge or Tribunal shall have jurisdiction with regard to any such actions unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto."77/

78. The Model "P and I" bill of lading, which is frequently employed, is designed for the designation of a single forum. Although the designated forum is left blank in the model clause, the litigated cases indicate that the carriers usually designate their principal place of business. The model clause provides:78/

"32. Jurisdiction

The contract evidenced by this bill of lading shall be governed by _____ law and any dispute thereunder shall be determined in /Place/ _____ according to _____ law to the exclusion of the jurisdiction of the courts of any other country."

79. Unlike the foregoing bills of lading, the ALAMAR (Latin American Shipowners Association) model bill of lading gives the plaintiff a choice of three fora. It will be noted that one of the choices is "the defender's country of domicile"; the other two, expressed in general terms, refer to places for performance of the contract of carriage. The relevant provision is as follows:

"3. Competent Court

In any action derived from this Contract of Carriage, the courts of the place in which the obligation whose performance is claimed to be performed shall have jurisdiction, unless the plain-

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77/ The "Trident Bill of Lading" was annexed to the reply by the Government of Venezuela to the questionnaire.

78/ The full text of the Model "P and I" bill of lading is set out in the UNCTAD Secretariat Report on Bills of Lading, Annex III pp. 21, 24 and 40.

tiff opts for the courts of the defender's country of domicile or for those of the place in which the voyage terminated."79/

3. Interests of the parties

(a) The carrier

80. The carrier, in preparing a bill of lading clause requiring that claims only be asserted in a designated forum, is interested in restricting litigation to a place that is convenient. To minimize expense, the carrier is interested in having claims brought in the courts of the country in which he has his headquarters, or at least an office. Moreover, since there are likely to be a number of claims against him, either arising out of one incident or over a period of time, he would not wish to have to defend in as many countries as there are claimants or in all the ports of call of his ships. In some instances, claims arising from damage to the ship and to cargo may be interdependent; in such circumstances there may be a special reason for concentrating the litigation of these claims in a single court.80/

79/ The full text of the ALAMAR bill of lading is set out in Annex III of the UNCTAD Secretariat Report on Bills of Lading, pp. 1, 2. The COMBICON model Bill of Lading (see supra footnote 76) adopted by BIMCO provides with respect to choice of forum:

"5. Law and Jurisdiction

Disputes arising under this B/L shall be determined at the option of the Claimant by the courts and subject to clause 12 of this B/L in accordance with the law at:

(a) the place where the carrier has his habitual residence or his principal place of business or the branch or agency through which the contract of combined transport was made, or

(b) the place where the goods were taken in charge by the Carrier or the place designated for delivery.

No proceedings may be brought before other courts unless the parties expressly agree on both the choice of another court or arbitration tribunal and the law to be then applicable."

80/ If the 1924 Brussels Convention is modified to regulate choice of forum clauses, account will have to be taken of the manner in which the appropriate court is determined under international legislation and rules such as International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels (Brussels 25 August 1924), Conventions on Maritime Law, Ministère des Affaires Etrangères et du Commerce Extérieur de Belgique, I.V. 1968, p. 19, the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships (Brussels, 10 October 1957), Ibid., at p. 67, and the York-Antwerp Rules, 1950 (general average) adopted by the International Maritime Committee and the International Law Association.

81. The carrier also has an interest in assuring that any litigation would be brought to a court with whose procedures and rules the carrier is familiar. The carrier may also fear that the claimant, in selecting the forum for suit, might choose a tribunal with legal rules and outlook that would be favourable to the claimant and hostile to the carrier. Even if both the courts of the country selected by the owner and the courts selected by the carrier in the bill of lading would apply the same legislation there may be differences in interpretation that would have decisive effect on the outcome of litigation; all these factors may be taken into account in drafting the clause in the bill of lading.

(b) The cargo owner

82. Whether the shipper (seller) or the consignee (buyer) will be the owner of the cargo and therefore the claimant in an action against the carrier for damage or loss of goods depends on the contract of sale. The terms of shipping in the sales contract, such as F.O.B., F.A.S., C.I.F., and C. & F., will normally determine when the property passes and when the buyer assumes the risk of loss. The partners to sales transactions involving maritime shipment usually employ a contract term that places the risk of transit loss on the buyer. One reason is the fact that damage in transit is usually discovered only after arrival of the cargo; at that point the buyer is in a better position than the seller to salvage damaged goods, ascertain the extent of the loss, and press a claim for the damage. As a result, the buyer-consignee is more likely to be the plaintiff.

83. The shipper and the consignee (like the carrier) have an interest in the selection of a court that is not remote, or foreign or hostile. Litigating in a foreign court will involve the expense of retaining foreign lawyers, and other costs incidental to the prosecution of a suit such as translation of documents and testimony, travel of witnesses, cables, mailings and telephone communications. Particularly in connexion with small claims, these burdens may be so heavy that the cargo owner may be discouraged from pressing even a clearly valid claim.

84. To avoid possible inconvenience both in expense of litigation and availability of witnesses the cargo owner would prefer to have his claim litigated in his own country's courts or those selected by him in a convenient place. For the shipper,

this would generally be the courts of the place of shipment and for the consignee the courts of the place of delivery.81/

85. The foregoing analysis suggests that the interests of the carrier and cargo owner are often inconsistent. The central problem of this study is whether it will be possible to reconcile the parties' essential interests in a manner that will be reasonably fair to both.

B. Existing Legal Rules with Respect to Choice of Forum Clauses

86. The effectiveness of a choice of forum clause is tested when an action is brought in a court other than a court chosen in the bill of lading. It would appear that "as a practical matter such a clause can have little efficacy unless the courts of the other states will, out of deference to it, refuse to hear suits brought in violation of its terms."82/

87. The International Convention for the Unification of Certain Rules Relating to Bills of Lading (the 1924 Brussels Convention or "Hague Rules") contains no provision specifically aimed at regulating either choice of forum clauses or arbitration clauses.83/ As a result, the effectiveness of such clauses depends on the rules of the national legal systems. These rules vary widely in their answers

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81/ Often the claimant is the insurer who has paid a claim with regard to which the cargo owner has rights against the carrier. The insurer then becomes the owner of these rights and brings an action to assert such rights. His interests are similar to those of the party to whose rights he was subrogated, except that in some instances the insurer will have branches in the fora selected by the carrier, and may have more experience than the cargo owner with foreign rules and procedures. However, the insurer would have problems comparable to the cargo owner in transporting witnesses and other evidence to a tribunal remote from the point of delivery or other place where the damage was discovered. It may be assumed that the expenses borne by the insurer in the prosecution of a claim before courts in a distant or inconvenient place will eventually be passed on to the insured in the form of higher insurance premiums. See Gilmore and Black, op. cit., at 85-86.

82/ Reese, "The Contractual Forum: Situation in the United States", 13 Am. J. Comp. L. 187 (1964).

83/ In some situations choice of forum clauses have run afoul of Article III(8) of the Hague Rules, on the ground that such clauses (in effect) relieved or lessened the carrier's liability as established in the Convention. These cases will be discussed at para. 92, infra.

to this decisive question: Will the national courts stay or dismiss an action arising out of a contract of carriage on the ground that the contract of carriage states that the claim may only be presented to some other tribunal? Attention will first be given to jurisdictions that deny effect to choice of forum followed by jurisdictions that, in varying degrees, give effect to such clauses.

88. In a few countries statutory rules deny effect to choice of forum clauses. For example, the Australian Sea-Carriage of Goods Act, 1924, provides in Article 9:

> "(1) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.
>
> "(2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect." 84/

89. The maritime codes of Lebanon and Syria contain similar restrictions.85/

90. A somewhat less sweeping prohibition, not limited to maritime cases, may be found in the Code of Civil Procedure of Italy. Article 2 provides that the

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84/ The refusal of a stay pursuant to the statute was affirmed by the High Court of Australia in Companie des Messageries Maritimes v. Wilson, 94 C.2.R.577 (Austl 1954). Dixon, C. J. stated: "It can hardly be doubted that its object was to insure that Australian consignees of goods imported might enforce in Australian courts the contracts of sea-carriage evidenced by the bills of lading which they held" (at p. 583). The Merchant Shipping Act No. 57 of 1951 of the Republic of South Africa contains a provision similar to Article 9 of the Australian Sea-Carriage of Goods Act.

85/ Article 212 of the Lebanese Code de Commerce Maritime 1947 and Article 212 of the Syrian Code de Commerce Maritime 1950 are identical and include a provision nullifying clauses in bills of lading which would derogate from the competence of the court.

jurisdiction of the Italian courts may not be ousted in favour of foreign courts unless the parties to the contract are foreigners or one of the parties is foreign and the other party, although Italian, is not domiciled or resident in Italy. This general provision has been applied to maritime cases.[86/]

91. In other countries courts have denied effect to choice of forum clauses, in bills of lading, forbidding suit in the national courts; these include Spain,[87/] Argentina,[88/] and Pakistan.[89/]

92. In one jurisdiction, choice of forum clauses have been held inconsistent with Article III(8) of the Brussels Convention, which provides:

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention shall be null and void and of no effect...."

It has been concluded that requiring a claimant to sue in a foreign court, in effect, relieves the carrier of responsibility which is established by the Convention and which is protected from contractual derogation by Article III(8) above. The United States Court of Appeals for the Second Circuit in Indussa Corporation v. S.S. Ranborg,[90/] stated its view of the effect of Article III(8):

86/ For examples of the application of the Code to maritime cases see Siesby, "On Jurisdiction and Arbitration Clauses in Maritime Contracts" 4 Arkiv for Sjorett 388 (1960). A similar provision is Article 99 of the Portuguese Code of Civil Procedure of 1939.

87/ Revista de derecho privado 1956, p. 374

88/ See reply of Government of Argentina to the questionnaire. See also Schwind, "Derogation Clauses in Latin America," 13 Am. J. Comp. L. 167, 171 (1964).

89/ Chowdhury v. Mitsui D.S.K. Lines, Ltd. (Pakistan Supreme Court) [1970] 2 LLR 272.

90/ 377 F. 2d 200, 203, 204 (2d Cir. 1967).

> "A clause making a claim triable only in a foreign court would almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these regimes, requiring trial abroad might lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal...and /Article III(8)/ can well be read as covering a potential and not simply a demonstrable lessening of liability....We think Congress meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed."

93. The Belgian courts have also reacted to the possibility that choice of a foreign forum would impair the protection intended by the Brussels Convention. Although there is a general rule that choice of forum clauses are to be given effect, it appears that this rule will not be followed if the chosen forum is not required to apply the rules of the Brussels Convention as interpreted by the Belgian courts or if it is unknown whether those rules will be applied.[91]

94. In English law, the effectiveness of choice of law clauses depends on the examination and balancing of a number of considerations.[92] Brandon, J. in The Eleftheria[93] provided the following description of English law on the subject:

> "The principles established by the authorities can, I think, be summarized as follows: (1) Where the plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the

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91/ Rodière, Traité Général de Droit Maritime, Tome II, p. 450-452.

92/ See The Fehmarn (1957) 1WLR 815; (1957) 2 All England Law Reports 707 where the rule was applied and the choice of forum clause was not given effect.

93/ (1969) 2 All England Law Reports 641, 645. The cargo was loaded on a Greek ship in Romania and was consigned to a port in England; the carrier unloaded in Holland on the ground that strikes in England justified this deviation. The plaintiffs were residents of England; it was assumed that Greek law was applicable. A choice of forum clause, requiring suit in Greece, was given effect; an action in England was consequently subject to a stay.

defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion, the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would--(i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

94. The Canadian Courts appear to have developed a similar attitude. The reply of the Government of Canada to the questionnaire included the following summary:

"The Courts in Canada have held on various occasions that they have discretion to decide whether or not they should honour jurisdiction clauses incorporated into bills of lading. This discretion will be exercised upon proof of facts concerning the country of the ship's flag, the domiciles of the shipowner, the shipper and the consignee, the countries from where and to where the shipment was being carried, the place and circumstances under which the shipment was damaged and from where the witnesses will have to be brought to trial; in other words, in what jurisdiction, be it in the country where the action was instituted or the country mentioned in the jurisdiction clause, would it be most convenient and inexpensive to the parties to have the case heard. 94/

94/ The following cases were listed as authority in the Canadian Government's reply: Birks Crawford Limited v. the ship "STROMBOLI" 1955 Ex C.R.1; R. J. Polito v. Gestioni Esercizio Navi Sicilia Gens 1960 Ex C.R. 233; A. S. May & Co. Ltd. v. Robert Reford Co. Ltd. et al (1966) 6 D.L.R. (3d 288).

With respect to the Province of Quebec, the reply of the Canadian Government states: "In the Province of Quebec, Civil Law courts which have concurrent jurisdiction with the admiralty courts in marine and admiralty matters will only honour a jurisdiction clause if the facts do no indicate that the case falls into the areas of competency mentioned in Article 68 C.C.P."

95. The reply of the Government of India to the Questionnaire on Bills of Lading states that "there is no hard and fast rule in India for honouring 'jurisdiction clauses' in Bills of Lading....Although the prima facie leaning of the court is that a contract should be enforced and the parties should be kept to their bargain, if the court finds that the point about foreign jurisdiction is being raised so as to defeat the claim, our courts may not force the parties to foreign jurisdiction. The Indian courts exercise their discretion guided by considerations of justice and take into account the balance of convenience, the nature of the claim and of the defence, the history of the case, the proper law that governs the contract, the connexion of the dispute with the several countries concerned and the facilities for obtaining evenhanded justice from foreign tribunals."

96. It has been reported that, in a number of states, general principles support the effectiveness of choice of forum clauses in bills of lading.[95/] However, doubt has been expressed as to whether the general principles would be applied in some of these States if the effect of the clause would be to deny effect to the mandatory provisions of the Hague Rules.[96/]

95/ Replies to the questionnaire state such rules for Denmark, Federal Republic of Germany, France, Greece, Netherlands, Norway, Poland and Sweden.

96/ Replies to the questionnaire by Netherlands, Norway and Sweden. The reply to the questionnaire by Norway states: "A jurisdiction clause not affecting the choice of law would consequently be enforced in most cases. The possibility cannot be entirely excluded, however, that such a jurisdiction clause could be held invalid for the reason that it makes it so difficult or expensive for the cargo owner to maintain his rights if he has to bring suit to the foreign court upon which jurisdiction is conferred, that for all practical purposes the carrier is exempted from liability as effectively as by virtue of express exemption clauses of a type ordinarily invalid under the Hague Rules." Cf. Federal Republic of Germany. Giles, Uniform Commercial Law (1970), p. 106.

C. Possible Alternatives

97. Alternative approaches to dealing with choice of forum clauses are set out below. These alternatives will be measured against two basic policy objectives which emerge from the foregoing discussion. These objectives are:

(1) Minimizing those inconveniences that are related to the place where the dispute will be adjudicated.

(2) Minimizing the opportunity to escape the protective provisions set forth in the Convention.

98. The following alternatives are concerned with the question whether provisions should be added to the Hague Rules to deal with choice of forum clauses.[97] It should be noted that a suggestion for including a provision on choice of forum was advanced prior to the diplomatic conference which resulted in the 1924 Brussels Convention; the suggestion was not adopted.[98]

1. No new provision in the Convention

99. The analysis of existing rules and the replies to the questionnaire supports the decision of the UNCTAD and UNCITRAL working groups to examine the existing rules on choice of forum clauses in bills of lading. The Brussels Convention of 1924 (the "Hague Rules") does not deal directly with this question, and national rules vary from complete outlawry of choice of forum clauses to enforcement of such clauses without regard to whether the forum selected in the bill of lading is reasonable in relation to the needs of the claimant.

97/ Neither the discussion nor the proposals will be concerned with national rules regarding venue, the subject-matter competence of specific courts and the acquisition of jurisdiction (personal, in rem) over the defendant.

98/ During the discussion in the International Law Association prior to the diplomatic conference which resulted in the 1924 Brussels Convention a proposal was made to include the following:

> "Actions arising from the contract of affreightment shall be brought in the Courts of the place of delivery of the cargo. Clauses establishing the contrary shall be null and void and of no effect."

(ILA Report of the 31st Conference--Proceedings of the Maritime Committee, Vol. 2, pp. 79-80 (1923)). For a later proposal, see: International Maritime Committee, XXVIth Conference, Stockholm, 1963, pp. 101-102.

100. When the bill of lading designates a forum to which a claim can be presented only with substantial difficulty and expense, the cargo owner may be forced to choose among the following unsatisfactory alternatives: (a) bringing an action in an inconvenient forum; (b) settling on poor terms; (c) dropping the action; and (d) violating the choice of forum clause and facing delay and expense while the issue on the effectiveness of the choice of forum clause is litigated.

101. The situation appears to be inconsistent with the two objectives set out above. Most of the replies to the questionnaire support international unification to deal with the problems.[99/] It therefore is appropriate to explore alternative approaches to the framing of an international rule governing choice of forum clauses.

2. Provision declaring all choice of forum clauses to be invalid.

102. If regulation is considered, the most sweeping approach would be to deny any effect to choice of forum clauses.[100/] This is the approach of the Convention on

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99/ See, inter alia, replies from Argentina, Australia, France, India, Iraq, Japan, Norway and Poland. (Proposals made in various replies will be set out later in this report.) Contra, see Reply of the Government of Greece: "The existing rules on Jurisdiction Clauses, as far as Greece is concerned appear to be satisfactory". The reply of the United Kingdom on the question reads as follows: "The Government of the United Kingdom consider that the practice of giving effect to the wishes of the parties is desirable. It is recognized that this will normally mean that jurisdiction will be that of the country where the carrier has his principal place of business (such a provision reflects the logic of taking proceedings where assets are available). It is arguable that any hardship caused, e.g., by an importer being in theory forced to sue abroad, is already sufficiently mitigated by the laws in most countries, who either by legislation or as a matter of public policy make such clauses either voidable or to be over-ruled by the courts." (This reply also sets forth a suggestion for a rule dealing with choice of forum clauses for consideration in the event that legislative regulation is to be instituted. See infra, footnote 115.) Cf. Replies of Canada, Hungary, Sweden, Madagascar.

100/ This approach is supported in the Reply of the Government of Argentina to the Questionnaire, p. 19). Argentina also favours a separate protocol on the subject, deeming the subject very delicate, in order not to endanger the success of the items relating to the substantive law.

the Carriage of Passengers by Sea (1961). Article 9 of that Convention reads as follows:

> "Any contractual provision, concluded before the occurrence which caused the damage, purporting to relieve the carrier of his liability towards the passenger or his personal representatives, heirs or dependants or to prescribe a lower limit than that fixed in this Convention, as well as any such provision purporting to shift the burden of proof which rests on the carrier, or to require disputes to be submitted to any particular jurisdiction or to arbitration, shall be null and void, but the nullity of that provision shall not render void the contract which shall remain subject to the provisions of this Convention." 101/

103. Under such a provision, the claimant would be able to bring his claim in any country where he can get jurisdiction.

104. This approach would completely satisfy the interests of cargo owners. However, it would hardly reflect a balanced approach to the problem, for it would open up opportunities for obtaining jurisdiction at places unrelated to either the transaction or the business operations of the carrier. This approach thus would fail to implement the first basic policy objective set out above, namely, minimizing the inconveniences to be faced by both parties in the adjudication of disputes.

3. Provision setting out general criteria for effectiveness of choice of forum clause

105. Consideration might be given to rules framed in terms of general criteria for deciding on the effectiveness of a choice of forum clause. An example of this approach is found in the Convention on the Choice of Court (1965).102/ Article 6 provides:

> "Every court other than the chosen court or courts shall decline jurisdiction except--
> (1) where the choice of court made by the parties is not exclusive,
> (2) where under the internal law of the State of the excluded court,

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101/ (Emphasis is added.) British Shipping Laws, Vol. 8, Singh ed., pp. 1067, 1069.

102/ Recueil des Conventions de la Haye, Conférence de la Haye de Droit International Privé 97, 99 (1966).

the parties were unable, because of the subject matter, to agree to exclude the jurisdiction of the courts of that State,
(3) where the agreement on the choice of court is void or voidable in the sense of article 4,
(4) for the purpose of provisional or protective measures."

106. Article 6(3), above, referred to Article 4, which reads as follows:

"For the purpose of this Convention the agreement on the choice of court shall have been validly made if it is the result of the acceptance by one party of a written proposal by the other party expressly designating the chosen court or courts.

"The existence of such an agreement shall not be presumed from the mere failure of a party to appear in an action against him in the chosen court.

"The agreement on the choice of court shall be void or voidable if it has been obtained by an abuse of economic power or other unfair means." (Emphasis added.) 103/

107. It should be borne in mind that these provisions had to be drafted in general terms since the Choice of Court Convention was meant to apply to all types of choice

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103/ Another example of this approach is to be found in the Model Choice of Forum Act, which was approved at the 1968 annual meeting of the National Conference of Commissioners on Uniform State Laws (United States). Section 3 /Action in Another Place by Agreement/ states:

"If the parties have agreed in writing that an action shall on a controversy be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless
(1) the court is required by statute to entertain the action;
(2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
(3) the other state would be a substantially less convenient place for the trial of the action than this state;
(4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or
(5) it would for some other reason be unfair or unreasonably to enforce the agreement."

"The Model Choice of Forum Act", 17 American Journal of Comparative Law 292, 294-295 (1969) (Emphasis added).

of forum clauses. Consequently, this Convention could not be cast in terms of specific situations arising in ocean transport, nor could the Convention deal concretely with choice of forum clauses that might derogate from the mandatory rules of the 1924 Brussels Convention.[104/] Moreover it would appear that litigation to determine questions on whether the particular agreement was obtained by "abuse of economic power" would involve substantial costs, and the outcome would be too uncertain to make this alternative effective. As we shall see, it may be possible in the specific setting of bills of lading to draft rules that will provide greater predictability, certainty, and uniformity of result.

4. Provision specifying several alternative places before which a claim may be brought

108. One approach to the problem is a Convention provision which prescribes alternative places for suit.

109. Such a provision may give no effect to an agreement by the parties designating the place for suit. An example of this approach is Article XXVIII of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 1929 (the Warsaw Convention):

"ARTICLE XXVII"[105/]

> "(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the high contracting parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.
>
> "(2) Questions of procedure shall be governed by the law of the court to which the case is submitted."

104/ It would be possible to set out general criteria which are more closely relevant to these problems. These criteria might be along the lines of those listed by the English court in the Eleftheria, supra paragraph 94. However, each one of these criteria, as set out in V of the portion of the judgment quoted, involve questions of degree which would open the way for dispute and divergent interpretations by the various national courts.

105/ League of Nations, Treaty Series, vol. CXXXVII, p. 13. For discussion of the manner in which article XXVIII has been construed see Villanueve, "'Le Forum Shopping' dans la Convention de Varsovie," 30 Revue Générale de l'Air et l'Espace 221 (1967). See also, McKenry, "Judicial Jurisdiction under the Warsaw Convention," 29 Journal of Air Law & Commerce 205 (1963).

110. An approach that designates alternative places for suit and, in addition, gives limited effect to an agreement by the parties, is illustrated by Article 31 of the Convention on the Contract for the International Carriage of Goods by Road (CMR):[106]

> "1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory;
>
> (a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or
>
> (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated,
>
> and in no other courts or tribunals."

A feature of this provision, which is not to be found in Article XXVIII of the Warsaw Convention, is that under the first sentence of paragraph 1 effect is given an agreement designating an additional place for suit. However, the plaintiff is not restricted to the place specified in the agreement; the effect of the agreement is to afford the plaintiff a forum which, at his option, he may select in preference to the fora designated in paragraphs (a) and (b).

106/ United Nations, Treaty Series, vol. 399, pp. 189, 216. An early version of the draft convention on the Combined Transport Contract (TCM Convention) contained the provision in article 14. At the third session of the Joint IMCO/ECE Meeting to study the draft convention the following action was taken as stated in the report:

> "Article 14
>
> 104. Many representatives felt that the retention of this provision was superfluous as a body of law existed to determine the appropriate jurisdiction. Some representatives were of the opinion that its retention might lead to conflict with other international conventions. The meeting decided to delete Article 14."
> TRANS/370/III/I, p. 20.

111. Under these Conventions the plaintiff is guaranteed the right to bring his claim in a place which is related to the transaction, and which is likely to be convenient for him.[107] This, of course, neutralizes the advantage which the carrier usually has in drafting the bill of lading.

112. These Conventions also provide protection to the carrier. The Warsaw Convention and the Carriage of Goods by Road Convention (CMR) confine actions by the claimant to a specific number of places related to the transaction or the location of the defendant.[107a]

113. The provisions of the foregoing conventions with respect to the designation of alternative states for legal action are employed in the following draft proposal:

/Draft Proposal A/

A. In a legal proceeding arising out of the contract of carriage the plaintiff, at its option, may bring an action.

1. In a state within whose territory is situated:

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

/(b) the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that State; or/

(c) the place where the goods were delivered to the carrier; or

(d) the place designated for delivery to the consignee; or

2. In a /contracting state/ /place/ designated in the contract of carriage.

B. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph A above.

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

107/ These types of provisions are primarily concerned with assuring that the convenience of the parties is served. It is assumed that since the claimant has a choice of places he would choose one whose courts would apply the rules of the 1924 Brussels Convention, if it were appropriate to do so.

107a/ As was noted in para. 110, supra, under the CMR Convention the parties by agreement may extend the choice.

114. Each item in the above draft will be discussed separately

The specified places for suit - Paragraph A 1.

115. Sub-paragraph 1(a). The choices provided under this sub-paragraph are given under the Warsaw Convention and the Carriage of Goods by Road Convention (CMR). The carrier's principal place of business is often the place designated in the bill of lading.[108] It is assumed that the carrier would not object to this place for suit although under the above draft the claimant would not be restricted to this forum. For the claimant, it may be important to be able to sue in the carrier's courts if that is the only place (of the permissible places under the Convention provision where suit may be brought) where the carrier has assets.

116. Sub-paragraph 1(b). This sub-paragraph, referring to the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that state, is based on one of the choices given under Article 13 of the International Convention for the Unification of Certain Rules Relating to the Carriage of Passenger Luggage by Sea (1967). Article 13(1)(c) provides that one of the choices of a forum the plaintiff may make is "(c) the Court of the State of the domicile or permanent place of residence of the claimant if the defendant has a place of business and is subject to jurisdiction in that State."[109] The claimant's state of domicile or permanent residence is obviously convenient for him. On the other hand, the claimant's state of domicile or habitual residence might have no reasonable relation to the shipment and therefore may be inconvenient from the standpoint of the carrier. For this reason, this sub-paragraph adds a further requirement---that the defendant have a place of business in the State. Serious difficulties of interpretation may be presented by the term "a place of business"; for this reason, sub-paragraph (b) is presented in brackets. Wording such as "a permanent place of business" appears

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108/ The bill of lading may refer in general terms to the carrier's principal place of business or may designate the courts of a specified country—in which the carrier maintains his principal place of business. A widely used example of the first method is the choice of forum clause in the CONLINE bill of lading, set out above. Attention is also directed to the alternative choice in paragraph (a) of the state in which is situated the branch or agency through which the contract was made.

109/ Conventions on Maritime Law (Brussels Conventions) Ministère des Affaires Etrangères et du Commerce Extérieur de Belgique 1.V.1968, p. 97. For the full text of Article 13 and further discussion of the Convention see infra paragraphs 123-124.

somewhat less ambiguous, and therefore may be considered if an alternative along the lines of sub-paragraph 1(b) is desired.[110]

117. Sub-paragraphs 1(c) and 1(d). These sub-paragraphs, referring to the place of delivery to the carrier (1(c)) and the consignee (1(d)), are based on choices given under the Carriage of Goods by Road Convention (CMR) and the Carriage of Passenger Luggage Convention. Sub-paragraph (d) is also based on one of the choices given in the Warsaw Convention. The place of shipment will be a choice which the shipper and in some cases the cargo owner's insurer would wish to have. The place of delivery will be the most convenient for the consignee in most circumstances. Since, as has been explained earlier, the consignee is likely to be the claimant it would appear that the courts most convenient to him should be made available to him. In many cases the carrier will have a branch or office in the port of shipment or port of delivery; in these instances, it seems likely that the carrier could have little objection to the alternative. However, in some instances, there will be no branch office. In this case, the provision must be justified on the basis of convenience to the claimant, and the relationship of the ports of shipment and delivery to the transaction of carriage.[111]

Contractual alternative for suit

118. Sub-paragraph 2. This sub-paragraph states one of the choices given under the Carriage of Goods by Road Convention (CMR) and would give the parties to the contract of transport the power to add to the list of places for the adjudication of disputes. As a result of this paragraph, when a dispute arose and the claimant appeared before the courts of the place selected in the choice of forum clause, those courts could hear the suit even if they were not located in any of the places set out in

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110/ The phrase "principal place of business", which he used in sub-paragraph 1(a), seems less ambiguous than "a place" or "a permanent place" of business. However, the use of that test in paragraph 1(b) would make this choice narrower than that of paragraph 1(a), and consequently would make 1(b) redundant.

111/ The Report of the UNCTAD Secretariat on Bills of Lading states, at paragraph 303 that "if jurisdiction were required to be either in the country of shipment or in that of delivery, at the option of the plaintiff there might be certainty as well as fairness to cargo owners. This would also be fair to carriers as it is arguable that, by agreeing to trade between the two ports, they impliedly consented to the probability of submitting to the jurisdiction of either port."

the first four items above. If the carrier inserts or agrees to such a choice in the bill of lading the place selected should not be objectionable to him. It will be noted that the claimant would not be obliged to bring his action in the forum selected in the bill of lading, and would retain the choice of alternative places set out in sub-paragraph 1 of the draft provision. Sub-paragraph 2, following the pattern of the CMR Convention, limits the choice of forum to a "contracting State", in the first bracketed language.[112/]

Limits to choices

119. Paragraph B. This paragraph is based on provisions in the Warsaw Convention, the Carriage of Goods by Road Convention (CMR) and the Carriage of Passenger Luggage Convention. It confirms the limits within which the claimant may choose his forum.

Contractual alternative once dispute has arisen

120. Paragraph C. Paragraph C states: "Notwithstanding the provisions of paragraphs A and B above, an agreement, made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective".[112a/]

121. Paragraph C would give the parties involved in a dispute the opportunity to agree to a mutually convenient place for litigation. After a claim has arisen, each side would have the opportunity to weigh the advantages and disadvantages of litigating in a particular forum. The claimant would presumably agree to litigate in a particular forum, other than the ones before which he would otherwise have the right to appear, only because it was more convenient for him to do so. The agreement on a choice of forum made under these circumstances would be unlikely to contain the essential elements of an adhesion contract.

122. A number of States have, in their replies to the questionnaires, made suggestions and proposals that indicate support for the approaches envisaged in the

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112/ The alternative bracketed language "[place]" gives wider effect to the agreement of the parties. This may be appropriate since this additional alternative need not be employed unless the claimant finds it desirable at the time of suit; the other party (normally the carrier) will have agreed to this choice in drafting the bill of lading.

112a/ This paragraph is based on paragraph 3 of Article 13 of the Carriage of Passenger Luggage Convention. See infra, paragraph 123 for the text of Article 13.

draft proposal.[113/]

113/ In its reply to the question, the Government of France suggests a formulation of the provision which would consist of items like 1(a) and 1(c), 1(d) of Draft Proposal A. The specific formulation proposed reads as follows:

> "Pour tous litiges auxquels donnent lieu les transports soumis a la présente convention, le demandeur peut saisir les jurisdiction de l'Etat (contractant) sur le territoire duquel:
>
> a) le défendeur a sa résidence habituelle, son siêge principal ou la succursale ou l'agence par l'intermédiaire de laquelle le contrat de transport a été conclu, ou
>
> b) le lieu de la prise en charge de la marchandise ou celui prévu pour la livraison est situé,
>
> et ne peut saisir que ces juridictions".

In its reply the Government of Japan suggests a possible provision which would consist of items like 1(a), 1(c), 1(d) and 2 of the Draft Proposal A.

In its reply the Government of Norway suggested a provision which would consist of items like 1(a), 1(c), 1(d) and 2 of Draft Proposal A. The provision formulated would read as follows:

> "No provision in the bill of lading shall deprive the claimant of the right, at his choice, to bring proceedings relating to disputes arising out of the bill of lading:
>
> (a) in any court or tribunal of a Contracting State designated by agreement between the parties as indicated in the bill of lading; or
>
> (b) in the courts or tribunal of a country within whose territory is situated the place where the defendant has his habitual residence or his principal place of business through which the contract of carriage was made; or
>
> (c) in the courts or tribunals of a country within whose territory is situated the place where the goods were taken in charge by the owner or the place designated for delivery."

In its reply the Government of India suggested a provision which would consist of items like 1(c) and 1(d) which would provide "for instance, that jurisdiction would lie either in the country of shipment or that of destination, at the option of the party claiming the loss, regardless of what the Bill of Lading may provide." A similar proposal is made in the Reply of the Government of Iraq.

5. Requirement that specified limitations on choices, to be effective, must be set forth in the contract of carriage.

123. The International Convention for the Unification of Certain Rules Relating to the Carriage of Passenger Luggage by Sea (1967)[114] offers an approach to the relationship between an agreement by the parties and a statutory list of optional fora which differs from that of the Warsaw Convention and the Carriage of Goods by Road Convention (CMR).

Article 13 of the Carriage of Passenger Luggage reads as follows:

"1. Prior to the occurrence of the incident which causes the loss or damage, the parties to the contract of carriage may agree that the claimant shall have the right to maintain an action for damages, according to his preference, only before:

a) the Court of the permanent residence or principal place of business of the defendant, or

b) the Court of the place of departure or that of destination according to the contract of carriage, or

c) the Court of the State of the domicile or permanent place of residence of the claimant if the defendant has a place of business and is subject to jurisdiction in that State.

2. Any contractual provision which restricts the claimant's choice of jurisdiction beyond that permitted under paragraph (1) shall be null and void, but the nullity of such provision shall not render void the contract which shall remain subject to the provisions of this Convention.

3. After the occurrence of the incident which caused the loss or damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration."

124. The distinctive feature of this approach is found in the language of paragraph 1 that "the parties to the contract of carriage may agree that the claimant shall have the right to maintain an action for damages, according to his preference only before..." [the Courts listed in sub-paragraphs (a), (b) and (c)]. Thus the claimant's choice of places is limited only if he and the other party to the contract of carriage have agreed to the limitation of fora as prescribed in the Convention. It would appear that in the absence of such an agreement the claimant is not barred from bringing his action in any forum where he can obtain jurisdiction over the defendant. This approach has the merit of requiring the carrier to inform

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114/ See paragraph 123 supra.

the cargo owner in the contract of carriage itself that the plaintiff in an action has a choice of fora and what the choice are.

125. Following is a draft provision reflecting this distinctive feature of the Carriage of Passenger Luggage Convention.[115] (The choices of alternative places for suit are the same as those set forth in Draft Proposal A.)[115a]

/Draft Proposal B/

A. The parties to a contract of carriage may agree to limit the plaintiff's choices of places where a legal proceeding arising out of the contract of carriage may be brought to the following:

(1) the principal place of business of the carrier or the carrier's branch or agency through which the contract was made; or

/(2) the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that State; or/

(3) the place where the goods were delivered to the carrier; or

(4) the place designated for delivery to the consignee.

B. Any contractual provision that restricts the plaintiff's choice of places for legal proceeding more narrowly than as set forth in paragraph A shall be null and void, but the nullity of such provision shall not render void the contract which shall remain subject to the provisions of this Convention. The agreement may, however, add to the plaintiff's choices of places for legal proceedings.

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

126. Under this provision the carrier would have the choice of inserting a provision in the bill of lading limiting the fora available to the plaintiff to those set out in the Convention provision, or of being ready to face suit in any forum the plaintiff may choose. Since it is normally the carrier that drafts the bill of lading and since limiting the claimant's choice is to the carrier's advantage, as a practical matter, it is expected that the carrier would insert the appropriate provision on the subject in the bill of lading.

115/ In its reply, the United Kingdom doubted the need for a Convention provision on the subject but stated that there is diversity of law on the subject and "An alternative solution might be along the lines of" Article 13 of the "Carriage of Passenger Luggage Convention".

115a/ The provision in paragraph A2 of Draft Proposal A appears as the last sentence in Paragraph B of Draft Proposal B. In addition, this sentence makes use of the second alternative "/place/" set forth in sub-paragraph A2 of Draft Proposal A. See supra footnote 112.

D. Arbitration Clauses

127. At present few bills of lading contain arbitration clauses. However, if provisions are adopted restricting the choice of the judicial forum greater use may be made of arbitration in bills of lading.[116] Therefore it seems appropriate at this time that consideration be directed to the use of arbitration clauses to control the place for presentation of the claim.[117]

1. Present legal rules with respect to the choice of the place for arbitration in the contract of carriage

128. In discussing the aspect of the arbitration clause dealing with the place where arbitration will be held, one must distinguish between: (a) arbitration clauses that specify the place of arbitration and (b) clauses that delegate the setting of the place of arbitration to the arbitrator, arbitral organization or other body.

129. The first type is like the choice of judicial forum clause described and

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116/ The arbitration clause may well be more effective than a choice of judicial forum. E.g., in Indussa Corporation v. S. S. Ranborg. 377 F.2d 200, 204 (2d Cir. 1967) the U.S. Court of Appeals rejected both a choice of law and choice of forum clause under which the 1924 Brussels Convention as enacted in Norway would have been applied, but stated in a footnote: "Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained."

The Reply of the Government of Japan to the Questionnaire states that if legislation should be enacted which does not allow the parties to make agreements regarding jurisdiction, "the result would be that the arbitration clause which makes the award final and binding will be frequently used in the bills of lading". (p. 8)

117/ After consideration of the place for arbitration, consideration will be given to the possible effect of the arbitration clause in avoiding the protective provisions of the 1924 Brussels Convention (infra, paragraphs 142-148).

discussed above.[118] The second type would, in most cases, permit the designated person or body to consider the appropriateness of the place after a dispute has arisen. In such cases, the contract of transport could not be considered to be a contract of adhesion as to the designation of the arbitral forum. Barriers to effective recovery resulting from an inconvenient place would arise only if the designating body or the arbitrator makes an unfair selection of a place.

2. Possible alternatives

(a) No change in the existing legal rules

130. It will be recalled that the 1924 Brussels Convention contains no provision concerning clauses choosing a judicial forum or arbitration. It might be suggested that since arbitration clauses are not often used in bills of lading, nothing need be done until it is shown that the use of such clauses is widespread and generates substantial difficulties. On the other hand, it might be suggested that a review of the basic rules governing bills of lading occurs infrequently, and consequently the problems that may reasonably be anticipated should be dealt with at this time.

(b) Provision declaring arbitration clauses to be ineffective

131. The International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea (April 1961)[119] provides in Article 9 that any contractual provision requiring disputes to be submitted to arbitration "shall be null and void."

118/ Selection in the contract of carriage of certain courts of arbitration, or organizations which administer arbitrations would be tantamount to the choice of a specific place for arbitration since according to the rules (and in some cases legislation) under which these bodies operate the place of arbitration is fixed at a particular place or within a particular country. E.g., USSR Maritime Arbitration Commission of USSR Chamber of Commerce, Handbook of National and International Institutions Active in the Field of International Commercial Arbitration (hereinafter called Handbook) TRADE/WP.1/15/Rev.1, Vol. II, pp. 416, 419. Maritime Arbitration Chamber (France) (Handbook pp. 335, 338), Arbitration Court of the Bremen Chamber of Commerce (Handbook Vol. II, pp. 101, 104). Foreign Trade Arbitration Commission of the Romanian Chamber of Commerce (Handbook, Vol. II, pp. 180, 182). Cf. Arbitration Court of the Chamber of Commerce of Czechoslovakia according to whose rules the normal seat of the arbitral tribunal is Prague, but the arbitrators may sit in a foreign country upon request of the parties. (Handbook, Vol. II, pp. 93, 95).

119/ This Convention is discussed in paragraphs 102-104, supra.

132. In considering whether such a provision should be applied to bills of lading attention should be given to the fact that arbitration enjoys widespread favour as an efficient and inexpensive process for the settlement of disputes. This is particularly true in the adjustment of commercial disputes. In view of this generally favourable attitude toward arbitration, less drastic measures may be envisaged for dealing with the problems relating to the choice of the place for arbitration.

(c) Provision specifying alternative places where arbitration may be brought

133. Consideration might be given to a provision restricting the places for arbitration that may be chosen in the contract of carriage or by a body or procedure designated in the contract.

134. In this regard consideration might be given to Article 32 of the Warsaw Convention which reads as follows:

> "Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28." (Emphasis added.)

135. The first paragraph of Article 28, to which the above provision refers, has been quoted in para. 109, supra.

136. To achieve the objectives described above, consideration might be given to the following draft:

/Draft Proposal C/

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

/(a) the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that state; or/120/

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

(c) the place designated for delivery to the consignee.

120/ See discussion in paragraph 116 supra, on possible ambiguities with regard to the term "a place of business". Any decision with respect to the use of this phrase in Draft Proposal A presumably would be followed here.

2. After a dispute has arisen the parties may enter into an agreement selecting the territory of any state as the place of arbitration.

137. Paragraph 1 of the draft would permit a binding choice in the bill of lading of one of three places for arbitration listed in sub-paragraphs (a), (b) and (c). It may be recalled that Draft Proposal A on the choice of judicial forum, in addition, included the principal place of business of the carrier; this alternative seemed appropriate in that setting since the claimant remained free to select among the various alternatives at the time of suit. However, Draft Proposal C dealing with arbitration clauses presents a different problem since a binding choice as to the place of arbitration can be made in the contract of carriage. Earlier in this report, it was noted that shippers seldom can negotiate effectively concerning specific terms in bills of lading. Attention was also directed to the tendency of the carrier to specify in standard bills of lading that all claims must be brought for adjudication to the carrier's place of business. Hence, if a binding choice for arbitration at the carrier's place of business could be made in the contract of carriage, some of the present problems with respect to choice of forum clauses might reappear. It is thought that this restriction on a binding choice in the contract of carriage does not produce excessive rigidity with respect to the place for arbitration in view of the flexibility afforded by paragraph 2 of the draft, which will be discussed below.

138. Paragraph 1 of Draft Proposal C would also limit the places for arbitration that may be designated by a body or person specified in the contract of carriage. Considerations supporting such a restriction are related to the abuses that may develop from contracts of adhesion. It may be assumed that most arbitral bodies would select a place for arbitration that would take into account the needs of both parties. On the other hand, it may be considered hazardous to assume that this will always be the case.[121/] Flexibility in this regard is also provided by paragraph 2 of the draft, to which attention may now be directed.

139. Paragraph 2 of the draft proposal provides that once a dispute arises the parties may agree to another place for arbitration. As in the case of choice of

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121/ A delicate choice of policy is involved at this point. A draft reflecting a choice different from that outlined here appears infra as Draft Proposal D.

judicial fora, such an agreement is not subject to the abuses of contracts of adhesion, since the claimant has the opportunity to negotiate concerning the place for arbitration. As has been noted above,[122] this policy has been reflected in provisions of the Carriage of Passenger Luggage Convention and seems useful to provide the maximum flexibility consistent with a degree of restraint on the abuses of contracts of adhesion.

(d) Provision imposing no restriction on the power of a body or person designated in the arbitration clause to select the place for arbitration

140. Often one of the functions of the arbitration body or the arbitrator designated in the arbitration clause is to choose the place where arbitration will be held. It will be recalled that under Draft Proposal C the designating body or person is restricted to the choice of a specified number of places. Such restrictions may not be deemed to be desirable on the ground that the designating body or person will normally take into account the needs of both parties.

141. A provision reflecting this approach follows. (The provision that differs from the preceding draft is sub-paragraph (d).)

/Draft Proposal D/

1. An arbitration proceeding initiated pursuant to an arbitration clause in a contract of carriage must be held:

/(a) within the state of the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that State; or/[123]

(b) within the state of the place where the goods were delivered to the carrier; or

(c) within the state of the place designated for delivery to the consignee; or

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

122/ See supra paragraph 120-121.

123/ See discussion in paragraph 116, supra on possible ambiguities with regard to the term "a place of business". Any decision with respect to the use of this phrase in Draft Proposal A presumably would be followed here.

2. After a dispute has arisen the parties may enter into an agreement selecting the territory of any state as the place of arbitration.

(e) Provision requiring application of the rules of the Convention

142. It will be recalled that the 1924 Brussels Convention laid down mandatory minimum standards of carrier responsibility; the Convention precludes reducing those standards by contract. In certain circumstances the choice of a judicial forum in a bill of lading may be rejected on the ground that this choice indirectly nullifies the mandatory rules of the Convention. Does a similar problem arise when the parties choose an arbitral forum?

143. In some countries arbitration proceedings are similar to judicial proceedings. The appropriate rules of law must be used in reaching a decision; the arbitrator's reasons for his decision must be written out. In other countries, however, the arbitrator may not be obliged to follow the applicable rules of law, and even if such an obligation exists the arbitrator may not be required to give the reasons for his award.[124/] In still other countries the parties may choose in their arbitration clause between the two types of arbitration.[125/] Furthermore, the courts of many states will enforce an award made on the basis of a valid arbitration clause without reviewing the decision of the arbitrator on the merits of the dispute. This approach is reflected in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[126/] Article V sets out the grounds upon which the recognition and enforcement of an award may be refused:

"Article V

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party

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124/ However, almost all legal systems will honour the specific instruction in the arbitration clause that the parties wish the appropriate rules of law to be applied, and the arbitrator's reasons for his decision stated in the award.

125/ In France, for example, the parties may choose between arbitration according to strict legal rules or amiable composition. Robert on "Arbitration in France" in International Commercial Arbitration 240, 255 (Sanders Rap. Gen. 1956).

126/ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). U.N.T.S., Vol. 330, pp. 38, 40 and 52.

furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that;

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

144. It will be observed that under the above convention there are only limited grounds for refusing recognition and enforcement of an award; more particularly this means that the court is now obligated to review whether the arbitrator applied the legal rules applicable to the dispute and if he did so whether they were applied correctly.

145. In States where the courts will not inquire as to whether the appropriate substantive rules were applied by the arbitrator, is there reason to fear that the arbitrator will fail to implement policies for the protection of cargo owners established by the Convention? The question is not whether this might occur in isolated cases; courts also on occasion may fail to give full effect to provisions of a statute or a convention. The relevant question is whether arbitrators in general would give less effect than courts to the protective provisions of the Convention.

146. The Convention on the Carriage of Goods by Road (CMR) contains a provision dealing with this question. Article 33 reads as follows: "the contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply this Convention."

147. The following draft provision, drawing on Article 33 of the CMR Convention but adapted to fit the requirements of the 1924 Brussels Convention, might read as follows:

/Draft Proposal E/

> The contract of carriage may contain a provision for arbitration only if that provision states that this Convention shall be applied in the arbitration proceedings.

148. Such a provision would at least serve to encourage the arbitrator to use the rules of the Convention.[127/]

149. Draft Proposal E, it will be observed, does not deal with the appropriateness of the place for arbitration. (See paragraphs 130-141, supra.) If the Working Group decides to recommend both a provision concerning the place for arbitration and a provision concerning application of the Convention by the arbitrator (as in Draft Proposal E), it would be feasible to combine both provisions into one consolidated draft.[128/]

127/ A possible provision based on Art. 33 of the CMR Convention is supported in the Replies of the Governments of Denmark and France. The Reply of the Government of France further states that in order to facilitate the application of Art. 33 and in the interest of all the parties concerned in the contract of maritime carriage, the following alternatives could be studied: (a) the application, in a manner appropriately adapted to maritime transport, of the 1961 Geneva Convention in International Commercial Arbitration; (b) the creation and organization of an International Maritime Chamber of Commerce within which the interests of both carriers and cargo owners would be represented, whether they be from market economy countries or developing countries.

128/ To facilitate analysis and decision by the Working Group, the various alternatives with respect to choice of forum and choice of arbitration have been presented separately, without an attempt to present a single consolidated draft. It is possible that the Working Group may recommend proposals on these issues that would contain identical provisions--as in the listing of the places for recourse to a judicial forum and to arbitration. In this event, the consolidation of these provisions could produce a more concise total draft than would appear if the provisions are considered separately.

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RESPONSIBILITY OF OCEAN CARRIERS FOR CARGO: BILLS OF LADING

Report by the Secretary-General

CONTENTS*

* For introduction and parts one and two, see vol.I; for part three, see vol.II.

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CONTENTS (continued)

PART FOUR. APPROACHES TO BASIC POLICY DECISIONS CONCERNING ALLOCATION OF RISKS BETWEEN THE CARGO OWNER AND THE CARRIER*

A. Introduction

150. The scheme of carrier liability in the carriage of goods by sea is the mechanism for allocating the risk of cargo loss and damage between cargo owner and carrier. For much of the world the Brussels Convention of 1924,[128a/] incorporating the Hague Rules, provides the scheme and sets the allocation.[129/]

151. This Part of the report responds to the request that the Secretary-General prepare a report "analysing alternative approaches to the basic policy decisions that must be taken in order to implement the objectives, set forth in paragraph 2 of the UNCTAD resolution and quoted in paragraph 1 of the Commission's resolution,[129a/] with special reference to establishing a balanced allocation of risks between the cargo owner and the carrier". Section B summarizes the law on the bases of liability and the present burden of proof scheme under the Hague Rules. Section C describes and analyzes certain major factors, or policy considerations, that should be weighed in formulating the rules as to carrier liability for cargo loss or damage. Section D compares the rules on liability and burden of proof established by international conventions on carriage of cargo by air, by rail and by truck. The final part, Section E, considers the pertinent

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*This Part of the Report is based on the research and analysis in a study prepared by Robert Hellawell, Professor of Law, Columbia University, as consultant to the Secretariat.

128a/ International Convention for the Unification of Certain Rules Relating to Bills of Lading, League of Nations Treaty Series Vol. CXX, p. 156, No. 2764 (1931-1932).

129/ It was estimated in 1955 that about four-fifths of world tonnage was under flags which adhere to the Convention on Rules or which, without adhering thereto, have enacted national legislation incorporating the Rules. UNCTAD Secretariat Report on Bills of Lading TD/B/C.4/ISL/6 page 68 dated 14 Dec. 1970 (hereinafter cited as UNCTAD Report) citing Stoldter, Zur Statuten-Kollinsion im Seefrachtuertrag, in Liber Amicorum of Congratulations to Algot Bagge, 220, 225 (1955).

129a/ Report of the United Nations Commission on International Trade Law on the work of its fourth session, 1971 Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), para. 19.

provisions of the Hague Rules against the policy considerations--particularly considering the exceptions of Article IV--and considers possible amendments to the Rules that would implement the relevant policy considerations analyzed in the earlier parts of the report.

B. Varying Approaches to Carrier Responsibility Employed in the Hague Rules

152. Three different approaches to liability are found in the present Hague Rules. These are: (1) The carrier is not liable even when the carrier's employees are at fault; (2) Liability is based on fault; and (3) Liability is based on the fault of only certain employees. This section will discuss the provisions of the Hague Rules that implement each of the above approaches, and then will turn to rules on burden of proof under the Rules.

1. Carrier Not Liable Even If At Fault

153. One provision in the Hague Rules exempts the carrier from any liability even when its fault causes loss or damage to cargo. This is found in Article IV(2)(a) which covers the "act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship ".

154. The reasons for the provisions are to be found in the early background of maritime law. Historically, the carrier was liable for loss or damage to cargo whether or not the carrier was negligent and regardless of the cause of the loss. The only exceptions were loss or damage caused by Act of God, the public enemy, the inherent vice of the goods, the fault of the shipper or a voluntary sacrifice for the common safety. And even these exceptions

would not obtain if the carrier were negligent.[130/] These rules were, however, modified by provisions inserted by shipowners in the bills of lading which have served as contracts of carriage. The bargaining position of the shipowners, often organized into conferences, was far stronger than that of the cargo interests; shippers had little choice but to accept the bills of lading prepared by the carrier. By 1890 bills of lading commonly contained exceptions covering almost every cause or type of cargo damage, including loss or damage caused by negligence of the carrier. British courts upheld such provisions[131/] while the United States Supreme Court struck them down on the ground that it was against public policy for a carrier to exonerate itself for its own negligence.[132/]

155. In response to this conflict of outlook, the United States Congress enacted the Harter Act in 1893[133/] to effect what was then considered a compromise. The act invalidated bill of lading provisions which attempted to exculpate the carrier for negligence in making the ship seaworthy or in

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130/ See 2 Carver, British/Laws 11-20 (11th ed. Colinvaux 1963). The common law exceptions are stated somewhat differently by different authors. E.g., Robinson, Admiralty Law 493 (1939); Gilmore and Black, The Law of Admiralty 119 (1957). (These treatises will be cited herein by the name of the author.)

131/ In re Missouri S.S. Co., 42 Ch.D. 321 (1889).

132/ Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U.S. 397 (1889). Some state courts, however, followed the British rule. See Rubens v. Ludgate Hill S.S. Co., 65 Hun 625, 20 N.Y.S. 481 (Sup. Ct. 1st Dep't 1892), aff'd without opinion, 143 N.Y. 629, 37 N.E. 825 (1894); Robertson v. National S.S. Co., 139 N.Y. 416, 34 N.E. 1053 (1893); Gleadell v. Thomson, 56 N.Y. 194 (1874).

133/ Harter Act of 1893, ch. 105, 27 Stat. 445 (now 46 U.S.C. §§190-96 (1964)).

the care of cargo. But it then provided that, upon fulfillment of certain conditions, the carrier would not be liable for faults or errors in the navigation or management of the ship.[134/] The factors that supported this departure from the principle of respondeat superior included the following: the lack of contact during the voyage (under early conditions) between the owners of the ship and the master; the delicacy of the judgment and the gravity of the perils presented by problems of navigation; the concept that the owner of the ship, the owner of the cargo and the master and crew shared the perils of a hazardous venture.

156. It was this compromise, in somewhat different form, which was ultimately included in the Hague Rules. At a later point (Sec. E) attention will be given to the question whether this aspect of the compromise is consistent with current conditions of shipping.

2. Carrier Liable If At Fault

157. In most situations, the carrier is liable if cargo is lost or damaged by reason of the fault or negligence of carrier or any of its employees. The two basic duties of the carrier are set out in Article III. Article III(1) requires, essentially, that the carrier exercise due diligence to provide a

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134/ Harter Act of 1893, ch. 105, §3, 27 Stat. 445 (now 46 U.S.C. §192 (1964)).

seaworthy ship, fit for the intended voyage. Article III(2) provides that:

> "Subject to the provisions of Article IV the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

158. Taken in conjunction with paragraph (2)(q) of ArticleIV--which exempts carrier from liability for loss except that caused by negligence--these provisions establish the general rule that carrier will be liable for the results of negligence (and only for the results of negligence).

159. Attention must, however, be given to certain provisions of the Hague Rules that might appear to free the carrier from liability in spite of negligence. One of these is paragraph (a) of Article IV(2) which exempt carrier from liability for loss or damage resulting from perils, dangers and accidents of the sea. In application, this exception does not apply if carrier's negligence contributed to the loss.[135/] Only if the situation is such that the loss would occur despite all reasonable precautions can it be said that the loss results from a peril of the sea. Paragraph (a), exempting carrier from loss caused by an act of God is similarly interpreted.[136/] The exemption of paragraph (p) covering "Latent defects not discoverable by due diligence", by express provision, does not exempt a negligent carrier.

135/ Carver, op. cit. supra, at pp. 138-41.

136/ Id., at 11-14, 148.

160. Exemption of the carrier only when he is free of negligence also appears to be the result under the balance of the exemptions, although this conclusion is less clear. The exemptions in several paragraphs of Article IV(2) might be classified as superhuman force exemptions: These exculpate the carrier from liability for loss to cargo caused by an act of war (e); an act of public enemies (f); an arrest or restraint of princes, rulers or people, or seizure under legal process (g); quarantine restrictions (h); strikes or lockouts or stoppage or restraint of labor (j); and riots and civil commotions (k).137/ Four other paragraphs exempt carrier for damage caused by a matter in the control of the shipper: act or omission of the shipper (i); inherent defect, quality or vice of the goods (m); insufficiency of packing (n); and insufficiency or inadequacy of marks (o). And one final paragraph excuses carrier for loss to cargo resulting from saving or attempting to save life or property at sea (l).

161. Where one of the above exemptions applies, the Rules do not clearly indicate what the effect will be of carrier's negligence, either as a concurring cause of the loss or as a cause of the particular exempted peril. This problem is presented, for example, by a case where there is a riot and,

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137/ Tetley, Marine Cargo Claims 128 (1965) considers these six exceptions (as well as (l)) in essentially the same category as (c), (d) and (p). Gilmore and Black, however, distinguish them on this question, although concluding that the better view is that they will not exculpate carrier for the consequences of its negligence. See pages 147-52 of Gilmore and Black, op. cit. supra.

because of carrier's negligence, rioters manage to get on the vessel and destroy a portion of the cargo, or a case where a fault of carrier touched off the riot. Despite the paragraph (j) exception for riots, the dominant view seems to be that carrier would be liable in such cases.[138/] In short, these various exemptions (unlike that of Art. IV(2)(a), discussed supra) do not appear to cut into the general rule that carrier is liable for the consequences of its negligence and also for the negligence of its employees.

162. Such is the legal rule, but the practical operation of the rule may be quite different. It is frequently very difficult, if not impossible, for the shipper to prove carrier negligence. And, as will be discussed below, (Sec.B 4) shipper may bear the burden of proof once carrier has brought itself within certain exceptions. Accordingly, although carrier may legally be liable for the consequences of its negligence, once carrier fits within an exception the shipper may be unable to win the case as a practical matter.[139/]

3. Carrier Liability for Fault of Certain Employees Only: Fire

163. Generally under the Hague Rules, apart from the practical considerations just noted, a carrier is legally responsible for the fault or negligence of

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138/ This assumes that the carrier's negligence was not in management of the ship.

139/ This important practical consideration is well brought out in the UNCTAD Secretariat Report at paras. 39-41.

any of its employees including the master and crew. ArticleIV(2)(b), the fire provision, stands as an exception to this, providing that the carrier shall not be responsible for loss or damage resulting from:

"Fire, unless caused by the actual fault or privity of the carrier".

164. The striking feature of the fire exception is that it is necessary to distinguish between the negligence of the shipowner and that of its employees. The negligence of carrier's employees will not necessarily result in carrier liability; the fault must be that of carrier itself. In the case of corporate shipowners some decisions have held that only the negligence of a senior employee or officer will result in carrier liability, not that of a "mere employee or agent".140/

140/ M. Tetley, op cit. supra, at p. 112. Earle & Stoddart, 287 U.S. 420, 425 (1932); Gilmore and Black, op. cit. supra, at p. 698.

165. In Great Britain, the question of corporate privity has been likened to "something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity...as of his servants or agents."[141] The normal liability in law for one's servants to exercise reasonable care does not apply.[142] However, liability has been imposed upon the carrier where the negligent employee was the "person with whom the chief management of the company's business resides".[143] On this theory, the negligence of an expeditor, a contractor for repair work, and that of the Master was imputed to the corporate shipowner.[144] On the other hand, the negligence of a shore-side superintendent and an outside advisor (chemist) was not so imputed.[145]

166. In Italy, the shipowner will be exonerated from liability if he shows damage by fire. Again, the shipowner must not have "provoked (the fire) by his actual fault or privity."[146]

141/ Buckley, L. J., Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co. Ltd. (1914) 1 K.B. 419, 432.

142/ Beauchamp v. Turrel, (1952) 2 Q.B. 207.

143/ Hamilton, L. J. in Lennard's Carrying Co. Ltd. v. Asiatic Co. Ltd., (1914) 1 K.B. 419, 437.

144/ The Edmund Fanning, 201 F.2d 281 (2d Cir. 1953); Riverstone Meat Co., Pty. Ltd. v. Lancashire Shipping Co. (1961) 1 Lloyd's List L.R. 57; Maxine Footwear Co. Ltd. v. Canadian Merchant Marine, Ltd., (1959) 2 Lloyd's List L.R. 105 (The negligence of the master occurred prior to breaking ground for the voyage; the court indicated that had the incident occurred during the voyage a different result might have been reached.).

145/ The Warkworth (1884) 9 P.D. 145; Dominion Glass Co. v. The Anglo-Indian, (1944) Can. S. Ct./SCR/409.

146/ 2 Manca, International Maritime Law, 494 (1970).
In France, it must be shown that the fire resulted from an outside force; this is the force majeure exception of Article IV(3) of the Law of April 2, 1936. The convention's liability exclusion will prevail as long as the shipowner is not responsible for causing the fire. See Tetley, op. cit. supra, at p. 108.

4. Burden of proof

167. The foregoing analysis of the bases of liability under the Hague Rules helps to illustrate the following fact basic to the practical application of the Rules: The events relevant to the liability of the carrier for the most part occur out of the presence of the shipper and under circumstances making it exceedingly difficult for the shipper to ascertain (or prove) the cause of damage or loss. Because of this, rules on burden of proof assume decisive importance.147/

168. In countries using the Hague Rules the burden of proof in some situations is placed on the carrier and sometimes on the shipper.147a/ Exactly how the burden is allocated is often a matter of some uncertainty and may vary among countries.

169. The shipper must make out a prima facie case of damage by proving delivery of the goods to the carrier in good order and receipt in bad order, or non-receipt. This done, the burden of proof passes to carrier and the carrier must then show that it falls within an Article IV exception. If it manages to do so the burden may shift back again to shipper; as will be discussed, this depends on which exception is relied on.

170. The Article IV(2) exceptions in paragraphs (e) through (o) involve the overwhelming force of a third party, fault of the shipper or the goods or an attempt to save life or property at sea. A common rule with regard to all of these is that once carrier has brought itself within the exception the burden passes back to shipper to prove that the carrier's fault or negligence caused the

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147/ Under the UNCITRAL resolution, quoted in the Introduction to this report, sub-paragraph 2(c) called attention to "burden of proof" as one of the areas calling for particular attention. The implications of practical problems on burden of proof are further explored in Section E-4, infra.

147a/ In its reply the Government of France explains that under the Hague Rules carrier's responsibility is based on a relatively complex system of proof. It concludes that the system of the Hague Rules is such that the burden of proof falls on both the carrier and the cargo owner.

excepted act or concurred with the excepted act in producing the loss or damage.[148] For example, a delay causes loss or damage to cargo and the carrier proves that the delay was the result of the ship being quarantined at a port en route. This proof would bring carrier within the Article IV(2)(h) exception; the burden would then shift to shipper to prove, for example, that the carrier's own fault or negligence caused the quarantine.

171. While the shift in burden described above is a common rule for the (e) through (o) exceptions, some cases and jurisdictions take a different approach. Tetley asserts the rule to be that the carrier must not only prove an excepted cause, but also he must prove due diligence to make the vessel seaworthy at the beginning of the voyage in respect of the loss before the burden will shift back to shipper.[149] Carver and Astle note that English cases have held that once the shipper has shown damage the carrier must affirmatively show reasonable care in addition to

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148/ Gilmore & Black, op. cit. supra, at 163. Cf. Brunetti Manuale del diritto della navigazione maritima e interna. §§ 308-309, pp. 214-215 (1947) Righetti "La responsabilita del vettore marittimo per i danni da causa ignota o non provata." 25 (1959) Riv. dir. nav., I, 48. Some examples of cases are: The Southern Cross, 1940 A.M.C. 59 (S.D.N.Y.) (If carrier shows damage from an excepted cause [insufficient packing], shipper must show negligence. Where there are concurrent causes, carrier must distinguish damage due to excepted cause, to escape liability for that portion); Shaw, Savill v. Powley [1949] N.Z.L.R. 668 (Carrier showed prima facie damage from inherent vice, so onus shifted to shipper to show carrier negligence). Quaere the very broad holding in George F. Pettinos, Inc. v. American Export Lines, 68 F.Supp. 759 (D.C.Pa. 1946), affd 159 F.2d 247 (under all exceptions (a) through (p), burden of proof of carrier negligence is on shipper).

149/ Tetley, op. cit. supra, at pp. 35, 93-95.

bringing itself within an excepted cause.[150] Payne finds the matter unsettled in English Law. [151]

150/ Astle, Shipowners' Cargo Liabilities and Immunities 13, 134-166 (1967); Carver, op. cit. supra at p. 226. Carver feels, however, that on this construction (b) to (p) would have little purpose, for if a carrier must always disprove negligence under (b) through (p), he would be protected by (q) at any rate, if he succeeded. Carver would prefer that the common-law rule of The Glendarroch [1894] P. 226, were still good law in England, so that when the carrier proved prima facie an excepted cause, the shipper would have to prove negligence or unseaworthiness. Cf. Scrutton on Charterparties 424 (17th ed. 1964) (Would retain the apparently abandoned common-law rule of The Glendarroch, that aside from exemptions dealing expressly with negligence or privity, carrier protected on his proving that cause within the exemption, unless shipper proves negligence).

151/ Payne's Carriage of Goods by Sea 124 (8th ed. 1968). See e.g. Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton) Ltd. [1953] 2 All E.R. 570, [1953] 2 Q.B. 295; and J. Kaufman, Ltd. v. Cunard S.S. Co., Ltd. [1965] 2 Lloyd's Rep. 564 (Exchequer Court, Quebec Admiralty District). Both hold that the carrier is liable even if damage was shown due to excepted perils, unless the carrier can prove he has taken proper care in fulfilling his article 3 duties. But see Albacora S.R. L. v. Westcott & Laurance Line, Ltd. [1966] 2 Lloyd's Rep. 53 at 64 H.L., (no express provision and no implied provision in the Hague Rules that carrier must prove absence of negligence. But in a particular case proof of an excepted cause might require that carrier disprove negligence. Did not discuss specific exceptions in this regard). Accord, Jahn v. Turnbull Scott Shipping Co., Ltd., [1967] 1 Lloyd's L. Rep. 1 Q.B.D. (Commercial Court) (Roskill, J. follows Lord Pearson's view in Albacora).

172. Paragraph (b), the fire exception, (subject to the fact that carrier will only be liable for the negligence of certain of its employees) follows a burden of proof scheme similar to that of (e) through (o). Once carrier has shown that the loss or damage was caused by fire the burden is on shipper to show that the cause of the fire was due to the fault or neglect of persons for whom carrier would bear liability.[152/]

173. Under the perils of the sea exception (c) and the Act of God exception (d), the carrier must prove its lack of negligence before it will be considered to fit within the exception.[153/] Cases hold that the carrier is exempt only from perils

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152/ 2 Manca, International Maritime Law 205 (1970), citing Corte di Cassazione 13 aprile 1957, in 23 Riv. dir. nav. 1957, II, 217. The Shell Bar, 1955 A.M.C. 1429 (shipper failed to sustain burden of proving fire resulted from owner design or neglect); The Rio Gualeguay, 1953 A.M.C. 1348 (shipper has burden of proving cause of fire was fault or neglect of vessel owner). Accord, Cour d'Appel d'Aix (Marvia, June 21, 1960), [1961] D.M.F. 340.

153/ Lady Drake, 1937 A.M.C. 290 (where carrier alleges peril of the sea, carrier must show that weather was cause of damage; that damage from weather was not forseeable or preventable as probable incident of voyage; and that fault or neglect of carrier was not a contributory cause); Blackwood Hodge (India) Private Ltd. v. Ellerman Lines Ltd. [1963]1 Ll. L. Rep. 454 (Damage from exceptionally severe weather not under perils of the sea exception, because carrier failed to sustain burden of showing the loss was directly caused by weather and was not contributed to by his unsatisfactory stowage). See also Gilmore & Black, op. cit. supra, at p. 140, 147. But see Corte di Cassazione 4 aprile 1957, in Dir. mar. 1958, p. 67 (shipper has burden of proving carrier negligence under perils of the sea exception).

against which all reasonable precautions of a prudent carrier proved to be unavailing. Under these exceptions, therefore, the burden falls on and stays with carrier once the shipper has carried its initial burden of showing the loss. The latent defect exception, (p) may also fall in this category.[154] Article IV(1) relating to unseaworthiness has an explicit burden of proff provision:

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

Thus, after shipper has proven the loss, if carrier's explanation shows the cause to have been unseaworthiness the burden remains with carrier to prove its freedom from fault.[155]

174. Like IV(1), the catchall exception (q) has specific burden of proof language. It provides that carrier will not be liable for damage arising from any cause without the fault or neglect of carrier,

> " . . . but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." [156]

154/ The Tulsa, 63 F. Supp. 895 (S.D.Ga. 1941) (Carrier must show there was latent defect, that it was cause of damage, and that there was no fault or neglect by carrier. Unclear whether requirement of proving absence of fault is based on (p) or (q)). Compare Corporacion Argentina v. Royal Mail [1939] 64 Ll. L. Rep. 188 (if carrier gives certain evidence that damage caused only by latent defect, no burden of proof on carrier to prove also exercise of due diligence). See Manca, op. cit. supra, at pp. 213-214; Tetley, op. cit. supra, at 151; Waterman S.S. Co. v. U.S.S.R. & M. Co., infra; Astle, op. cit. supra, at p. 160 (purpose of (p) has not yet been established, since Article IV(1) seems to cover the same ground).

155/ Gilmore & Black supra, at p. 163; Tetley, op. cit. supra, at p. 94-95; Astle, op. cit. supra, at 13; The Cypria, 46 F. Supp. 816 (D.C.N.Y. 1942), affd 137 F.2d 326 (carrier must show due diligence to make ship seaworthy, where damage due to unseaworthiness); Petition of Reliance Marine Transport and Construction Corp., 206 F.2d 240 (C.A.Conn. 1953) (carrier has burden of proving due diligence to determine seaworthiness of vessel).

156/ Potts v. Union S.S. Co. of New Zealand [1946] N.Z.L.R. 276 (under (q), carrier may avoid liability for loss by pillage if he shows absence of fault); see also Brunetti. Manuale del diritto della navigazione marittima e interna. §§ 308-309, pp. 214-215; Astle, op. cit. supra, at p. 166.

It is not necessary, under the (q) exception, for the carrier to show the exact cause of the loss if it shows that damage was not due to negligence.[157] But it is not enough to state that the loss is unexplained; the burden of proof is still on the carrier to show absence of fault or neglect.[158] United States cases have held that the burden of proof under (q) of showing freedom from contributory fault is not merely the burden of going forward with the evidence, but also the burden of persuasion, coupled with the risk of non-persuasion.[159]

157/ See City of Baroda v. Hall Line (1926) 42 T.L.R. 717, 719, (carrier failed to discharge burden of proving theft occurred without fault of his servants, but dictum stated that carrier need not prove all circumstances which would explain an obscure situation).

158/ Heyn v. Ocean S.S. Co. (1927) 43 T.L.R. 358 (because carrier failed to establish that independently contracting stevedores had not stolen the missing cargo, carrier was liable. Stevedores were treated as agents or servants within the meaning of (c)); Pendle & Rivet v. Ellerman Lines (1928) 33 Com Cas. 70 (carrier had burden of proof to explain when case of piece goods became empty, and to show absence of fault or neglect); Herald Weekly Times v. New Zealand Shipping Co. [1947] 80 Ll. L.Rep.596 (carrier had burden of proof under (a) that water damage was due to act of servant in navigation or management of the ship; or under (q) that there was no carrier neglect or fault). See also Manca, op. cit. supra, at 201, citing Brunetti, Manuale di diritto della navigazione, § 308, p. 215 (under (q), carrier must show due diligence to make ship seaworthy).

159/ The Vizcaya, 63 F. Supp. 898, 902,/(E.D.Pa. 1945), affd sub nom Bech v. The Vizcaya, 182 F.2d 942 (3d Cir. 1950), cert. den. 340 U.S. 877 (1950) See also Waterman S.S.Co. v. U.S. S.R. & M. Co., 155 F.2d 687 (5th Cir. 1946), cert. den. 329 U.S. 761 (1946) (carrier has burden of going forward to show peril of sea or latent defect not discoverable by due diligence, and also has the risk of nonpersuasion).

175. Article IV(2)(a), which exempts carrier even if there is negligence in the navigation or management of the ship, is in a class by itself. Once carrier proves that the cause of the loss lies with the navigation or management of the ship, presumably the shipper would have to carry the burden of showing that some other fault of carrier, such as improper stowage of cargo, was a concurrent cause of the loss. But there is little authority on the point.

176. Where there are concurrent causes of damage, one of which is excepted and the other of which is not, courts are not in agreement on the burden of proof. However, the general rule seems to be that in order to qualify for any exception, carrier has the burden or proving the extent of the damage attributable to an excepted cause. If it cannot do so, it is liable for all damages.[160/]

177. In summary, the rules on burden of proof are quite uncertain and appear to vary among countries in several respects.

160/ Tetley, op. cit. supra. at pp. 104-105; Astle, op. cit. supra, at p. 166; Tri-Valley Packing Assn. v. States Marine Corp. of Delaware, 310 F.2d 89 (C.A.Cal. 1962) (carrier remains liable for all damages where unable to show portion of loss due to act of God or sea peril); The General Artigas, 1955 A.M.C. 725 (damage to cargo due to both negligence in care of cargo and to fault in management of the ship; carrier had burden of proving what damage was attributable to excepted cause; if he cannot distinguish, is liable for all damage); The Southern Cross, op. cit. supra. note 148. There seem to be few cases on burden of proof where shipper negligence is an alleged concurrent cause. But see American Tobacco Co. v. The Katingo Hadjipatera. 81F. Supp. 438, 445 (S.D.N.Y. 1948) affd 194F.2d 449(2d C.Cir. 1951), cert den 343 U.S. 978 (1952). (suggests that whenever damage could have been caused by internal defects shipper must disprove such defects, even if carrier's failure to exercise due diligence in stowing or car caring for cargo may have caused or contributed to damage); Contra: The Nichiyo Maru, 89 F.2d 539 (4th Cir. 1937). See Tetley, op. cit. supra, at p. 142: "Where there is insufficiency of packing and any other cause of loss, the burden is, of course, on the carrier to show what percentage was due to insufficient packing and what was due to the other cause. The carrier will be responsible for the whole loss if he is unable to separate the two causes."

See Kawsay 1944 A.M.C. 133 at 138; Cour d'Appel d'Aix (Djoliba, October 11, 1960), [1962] D.M.F. 276.

C. Policy Considerations Relevant in a Reexamination of the Rules

178. The present section is concerned with an analysis of the more important policy considerations that should be borne in mind in a reexamination of the allocation of risks and responsibility under the Hague Rules. These policy considerations will be discussed under the following headings: 1. Promoting a desirable standard of care; 2. The relationship between the allocation of risks and the cost of insurance; 3. The cost of administering claims: "friction"; and 4. Effects of increased carrier liability: The rate structure. 161/

1. Promoting a desirable standard of care

179. It would be generally agreed that the rules of carrier liability to cargo--the allocation of risks--should be arranged so as to encourage the carrier to set and maintain an optimum standard of care. 162/ However, the proper content of the term "optimum standard of care" and the rules of carrier liability that will promote it may not be immediately apparent. 163/

180. The basic question is whether a more desirable standard of care can be induced by an increase in legal liability for loss or damage to cargo. Consideration of this requires a closer look at what the optimum standard of care is.

161/ In its reply the United Kingdom Government states that while it is difficult to define objective criteria for the establishment of a balanced allocation of risks, it should be noted that maritime transport is the servant of trade and therefore "any legal framework established must therefore not only be clear and balanced but must also not increase unduly the overall cost of world trade." This reply also observes that the revised Rules would have to have world wide applicability; it is "therefore important to recognize the diversity of situations that must be covered, in particular the varied trades and different interests of large and small shippers." See also replies of the International Chamber of Shipping, the Baltic and International Maritime Conference (BIMCO) and the International Chamber of Commerce.

162/ The Canadian Government's reply states that "a fundamental policy aim should be the reduction in the incidence of loss of or damage to cargo. Any significant reduction in the extent or magnitude of losses or damage would be reflected in a reduction in the cost of insurance which in the case of the carrier's risks, should, in turn, result in a reduction in freight rates."

163/ There are inducements to careful carrier operation apart from any legal liability to cargo. One of these is the carrier's natural desire to keep its customers. However, the present report is concerned only with carrier's liability, and the comparative effect of alternative rules of liability on various aspects of commercial practices.

181. Roughly, at least, a higher standard of care may be equated to a greater expenditure of funds. The more carriers spend for the purpose of preventing loss or damage to the ship and the cargo on safety devices, maintenance, better equipment, more expensive ship construction and other such things--the less loss and damage to ship and cargo there will be.

182. It seems a reasonable assumption that each higher level of care will cost more and save less damage than the preceding one. This is likely since presumably carriers will employ the less expensive and more productive measures first. Accordingly, the optimum level of care will be that where the costs of attaining the last level of care are just exceeded by the savings. Or to put it another way, to achieve the optimum level carriers would stop raising their standard of care just before their marginal costs exceed the savings that will occur as a result of those costs. (For reasons that will be explained more fully later, such is the standard that carriers will set for themselves even if they are absolutely liable for loss of cargo.) Such a standard of conduct would minimize world shipping costs, resulting in a saving of resources compared to any lesser or higher standard of care and consequently is the optimum standard.

183. What rule of liability would promote such a standard? This question can not be answered with certainty on the evidence now available, but the following considerations appear relevant.

184. **Liability for fault**[164/] **Liability for fault or negligence--the more widely** used standard of liability under the Hague Rules--may tend to promote a standard of care near the optimum. With the carrier financially responsible for the consequences of its error, it should logically be prepared to spend 99 cents to avoid an error causing $1.00 of cargo damage. There are some problems with this standard of liability, however. With certain types of errors or certain kinds of damage claims, carriers may be able, on the average, to settle the claims for less than the full amount of the loss. If, with certain kinds of errors or types of claims, carriers could reasonably expect to settle for 75 cents for each $1.00 of loss then logically

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164/ For theoretical completeness, the analysis might include the possibility of complete exemption of the carrier for liability even when loss or damage resulted from the carrier's fault. This alternative, however, presents such serious problems both as to policy and acceptability that extensive discussion seems unnecessary.

they should be willing to spend 75 cents or less to raise their standard of care enough to save $1.00 of loss. A lower than optimum standard of care will result.

185. Perhaps a greater defect in the liability for fault standard is that fault, error, negligence, or due diligence (however it is described) does not exist as a constant and does not have an objective content. This calls for some explanation. The content of "fault" changes over time. The navigational equipment which would have satisfied the requirement of due diligence to make the ship seaworthy in 1910 would obviously not suffice today. The content of "fault" depends, to some extent, on the normal practice of the industry. A carrier that follows normal industry practice will, in many cases, not be considered to be at fault. In a time of technological change the result may be that the "fault" liability basis fails to induce the carriers to keep their standard of care at the optimum level--since industry practice is to some extent determinative of fault they are likely to lag behind the technology. This would be particularly likely with regard to matters that concern care of cargo and do not concern the safety of the ship. Thus the carrier may hesitate to spend money on a recent innovation to save some damage to cargo when it is not yet the practice of the industry and when the carrier will therefore not incur any liability for a failure to make the innovation.

186. The above comments are directed to a fault standard involving carrier responsibility for the negligence of all of its employees. Analysis for a liability basis limited to the negligence of certain employees only, as under Article IV(2)(b), the fire exemption, would be very similar. Such a liability basis, however, would obviously tend to induce a somewhat lower, and less desirable, standard of care than one involving liability for the negligence of all employees.

187. Strict liability Strict liability of the carrier for all loss or damage to cargo regardless of fault (assuming no fault of shipper) would tend to promote an optimum standard of care. Carriers would spend up to $100,000 to prevent loss or damage of $100,000, regardless of whether the damage was their fault or not. This is an economically desirable result. Carriers would not adopt an uneconomically high standard of care because they would prefer to pay claims of $100,000 rather than take preventive measures costing more than $100,000.[165/]

165/ Anticipating the following section, some mention should be made here of insurance. Carriers generally insure against their liability for loss or damage to cargo. Accordingly, even if liable they will not be out-of-pocket the amount of the loss. At first glance one might think this cuts against the earlier reasoning but consideration of the nature of insurance will show that it does not. In short, as described in the next section, carrier's insurance premiums will reflect it losses.

188. Of course, carriers will not be able to determine with precision what measures to adopt to balance their marginal expenditures with damage prevention, as required for an optimum standard of care. While unfortunate, this is not significant in assessing different bases of liability. The basis of liability should ideally point the carrier in the right direction. The fact that the carrier will have to estimate some matters rather than determine them with precision is irrelevant. An estimate of the right factors is better than not taking them into account at all.

189. Shipper fault Much of the reasoning just applied to promoting an optimum standard of care on the part of the carrier also applies to the shipper. The liability arrangements should be so made that shipper is induced to pack and mark the cargo properly and otherwise exercise due care. Accordingly, shipper should bear the loss caused by improper packing or marking of cargo or by any other of shipper's acts or omissions.166/

2. The relationship between allocation of risks and the cost of insurance

190. Insurance considerations run throughout the problem of dividing risks between carrier and cargo interests. Most losses are covered by insurance held by the carrier as well as by insurance held by the shipper, so that some insurance company normally makes good the loss whether legal liability falls on carrier or cargo interests. However, since insurance rates are based on experience--that is, the number and amount of claims paid--the ultimate burden of loss falls either on carrier or cargo interests through the mechanism of insurance rates. If losses increase, the insurance companies will raise their rates to cover them.

166/ It should be noted that insurers now play a constructive role in advising shippers of measures designed to prevent loss; it might be suggested that a change in the present rules would remove some of the incentive for this activity. P & I insurers cover whatever cargo may be received by the ocean carrier; these insurers consequently are not in a good position to advise shippers concerning shipping practices. On the other hand, there is reason to believe that shippers will continue to carry insurance, and cargo insurers have to face the likelihood that subrogation to the shipper's claim would not be fully effective because of the defense of improper packing and because of limits on unit liability. On these assumptions the loss prevention activities of cargo insurers could be expected to continue even if carrier liability were substantially strengthened.

191. Similarly if there is a shift in the legal rules as to whether the burden of some category of loss falls on carrier or cargo interests this will ultimately be reflected in the respective insurance premiums of carriers and cargo. Suppose, for example, that the Hague Rules were changed to make the carrier liable for damage or loss of cargo caused by negligent navigation or management of the ship. This would result (assuming other influences on insurance rates do not change) in a rise in the cost of the carriers' Protection and Indemnity (P and I) insurance, which covers the liability of the carrier for loss or damage to cargo. The rise might take place along with the change in the law in anticipation of a rise in claims against the carriers--or it might wait until experience verified the anticipated rise in claims. Conversely cargo insurance rates would fall as the experience of cargo insurers improved.

192. It should be noted that cargo insurance policies ordinarily cover a loss even though the carrier is liable. And in such a case the cargo owner almost always will collect from his insurer, simply because that is usually easier than collecting from the carrier. When that happens the cargo insurer is subrogated to the claim of the cargo interest against the carrier--that is, the insurer steps into the shoes of the cargo owner and itself presses the cargo owner's claim against the carrier. Accordingly, even if cargo owners continued collecting from their insurers after a change in law making carrier liable for negligent management of the ship, cargo insurance rates would fall. They would fall because insurers' experience would improve--not because of fewer claims against them but because they could reimburse themselves for more losses through subrogation.

193. The question of this section is, which of the various bases of liability is preferable from the standpoint of insurance?

194. Is there a basis of liability that would eliminate or reduce the duplication of insurance costs? It has already been noted that under present practice the carrier's P and I insurance policy and the shipper's cargo insurance policy will cover some of the same losses--essentially the losses for which carrier is liable. This does not necessarily mean that there is a duplication of cost, however. As described above insurance rates are based upon experience, or the record of claims paid. Although there may be two insurance policies covering

the same loss there will be only one payment. If the cargo owner initially collects from his insurer, his insurer may be reimbursed by the carrier and the carrier in turn reimbursed by its insurer. Or alternatively the cargo owner may initially collect from the carrier and the carrier be reimbursed by its insurer. In no event will both insurance companies be out-of-pocket the amount of the claim: the cargo owner, for example, may not collect from both the carrier and his own insurer. Since only one insurance company will be out-of-pocket, the amount of the loss will go in the experience record of only one insurer and will contribute to only one set of insurance rates.

195. There is, however, a way in which duplication can occur. Premiums must cover not only the claims against an insurer but all of the insurer's sales, management and administrative costs. The percentage of the premium which is allocated to these costs varies from insurer to insurer and from one type of policy to another. But there will be more of such costs when both carrier and shipper insure than if only one were to do so. Where both insure there are two policies and two customers to be sold and serviced instead of one.

196. A system of liability, therefore, that would facilitate having all insurance taken out by one party--herein called a single insurance arrangement--would tend to avoid duplication and lower total insurance costs. A system based on fault or negligence does not facilitate this. Carriers buy P and I insurance to cover claims agains them when they are negligent and shippers buy cargo insurance to cover losses, inter alia, when carriers are not negligent. It may be possible to devise an arrangement that would avoid duplication of insurance costs even under a liability system based on negligence but it would be cumbersome and difficult.

197. Single insurance arrangements would be facilitated by a system where carrier would not be liable for loss or damage to cargo under any circumstances, regardless of fault. Under such a system of no-liability the carrier would have no need to insure against loss or damage to cargo. Such a system is undesirable for other reasons, however, and many would find it repugnant to exonerate the carrier even from intentional damage to cargo.

198. Theoretically, a single insurance arrangement could be facilitated by a system of strict liability, that is, carrier to be liable for all damage to cargo, regardless of fault. The idea, of course, would be that carrier would then buy a policy covering all loss or damage to cargo and the shipper would have no need to take out insurance. The carrier's insurance rates would go up, of course, and carrier might raise its freight rates appropriately so that the shipper would indirectly pay for the insurance. But if the idea worked out there would be a saving of administrative costs because of the elimination of one insurance policy.

199. There is great practical difficulty with this approach, however. First, unless coupled with other major changes, a switch to strict carrier liability would almost certainly not lead to elimination of double policies. Cargo interests would still find it advantageous to insure for several reasons. One is to cover the possibility that the carrier would be financially irresponsible, and would not carry insurance to benefit the shippers.

200. A second reason is that the carrier's liability may be limited by provisions of law quite apart from those discussed here. The package limitation of the Hague Rules, for example, limits a carrier's liability to 100 pounds sterling per package or unit.[167/]

201. A third reason arises from the availability to shipowners of a distinct type of limitation on their liability--an overall limit on their liability, to all persons, resulting from a single accident or occurrence.[168/] The overall limita-

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167/Art IV(5). The 1968 Protocol done at Brussels 23 Feb. 1968 amends this to raise the limit to "the equivalent of Frcs. 10,000 per package or Frcs. 30 per Kilo of gross weight of the goods lost or damaged, whichever is higher." The Protocol has not yet come into force. The package limitation is inapplicable if "the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." Shippers rarely make such a declaration, however, because carriers impose a very substantial extra charge if they do so. See Hellawell, "Less-Developed Countries and Developed Country Law: Problems from the Law of Admiralty," 7 Colum. J. Transnat'l L. 203, 208-09 (1968).

168/ The prime condition of limitation is that the owner not be at fault. See, e.g., International Convention Relating to the Limitation of the Liability of Owners of Sea Going Ships, Art. I(1) Oct. 10 (1957). In the words of the Convention "actual fault or privity" of the owner precludes limitation. The Convention entered into force on May 31, 1968. The comparable phrase in the United States Limitation of Liability Act is "privity or knowledge," 46 U.S.C.§183(a) (1964).

tion fund, in which all parties may share and to which they are limited, has been fixed in a variety of ways. Great Britain has long fixed the amount of the limitation fund for both personal and property claims at a specified amount per ship ton.[169/] Civil law countries have tended to fix the limitation amount as the value of the ship and freight at the conclusion of the voyage.[170/] In the United States, for claims relating to property loss, that amount is the value of the ship and freight pending at the conclusion of the voyage during which the loss occurs. This may, of course, be only the value of a few bits of flotsam from the wreck.[171/] The Brussels Convention of 1957 on limitation of liability provides for a limitation fund which amounts to $140 per ton for personal injury and death recoveries and an additional $67 per ton to be shared ratably by property loss claims and personal claims not satisfied upon exhaustion of the $140 per ton fund.[172/] More than thirty nations have adopted the Brussels Convention, including many developing countries.[173/] In addition many other countries

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169/ Merchant Shipping Act of 1854, 17 & 18 Vict., c. 104, §§ 504-05, as amended, 6 & 7 Eliz. 2, c. 62 (1958), as further amended, Public General Acts and Measures 1970, Eliz. 2, c. 36.

170/ 4 R. Marsden, British Shipping Laws (The Law of Collisions at Sea) 1969 (11th ed. K. McGuffie 1961).

171/ 46 U.S.C. § 183 (a) (1964). Claims for bodily injury and death are guaranteed a certain limitation fund, 46 U.S.C. § 183 (b) (1964).

172/ International Convention Relating to the Limitation of Liability of Owners of Sea Going Ships, Oct. 10, 1957. The Convention entered into force on May 31, 1968.

173/ Among these nations are Algeria, Denmark, Egypt, Figi, Finland, France, Federal Republic of Germany, Ghana, Greece, Guyana, Iceland, India, Indonesia, Iran, Israel, Madagascar, Mauritius, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom and Republic of Zaire. See Astle, Shipowner's Cargo Liabilities and Immunities, pp. 470-71 (1967); 4 Marsden, British Shipping Laws, § 1291 (1961 and 1970 Supp.); Knauth, ed., Benedict on Admiralty, pp. 635-36 (7th ed. 1969).

have shipowner's limitation legislation.[174/]

202. To summarize, even if the Hague Rules were changed to impose liability on carriers without regard to fault, shippers would still find it advantageous to purchase cargo insurance. They would do so to protect against the case of an uninsured bankrupt and to cover losses beyond limits imposed by the package limitation and the shipowners liability limitation. Some other considerations also point in this direction. If the carrier's strict liability covered only the period from tackle to tackle--that is from the time of loading onto the ship until the time of unloading--the shipper might well require cargo insurance for the period of time after the goods left its possession and before loading on the ship as well as for the period after unloading and before delivery to the consignee. While this consideration might be eliminated by extending the time period of the carrier's liability, such action has not yet been taken. (See Part One of this Report in Vol. I.)

203. Next, with regard to elimination of the cargo insurance policy, one must consider exactly what is meant by strict liability of the carrier. Would the carrier be liable for loss or damage to cargo occurring while in possession of the carrier but caused solely by the fault or negligence of the shipper--for example, damage caused by negligent crating or packing of the goods? To hold carrier liable to shipper in that case would be going a step further than imposing liability where there was no fault (or when a third party was at fault) and

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174/ See, e.g., Philippine Commercial Laws Annotated arts. 809-10, 837-38 (promulgated on Aug. 6, 1888, by Queen Maria Cristina of Spain, extended to the Philippines by Royal Decree of Aug. 8, 1888, and made effective on Dec. 1, 1888) (J. Espiritu & C. Alvendia ed. 1947) and (Phillipine Code of Commerce, ed. 1969); Law of June 4, 1963, The Merchant Shipping Act of 1963, [1963] Acts of Ghana (No. 183) §§ 274-85, at 117-23; Proclamation of Sept. 25, 1953, Maritime Proclamation No. 137 of 1953, [1953] Negarit Gazeta No. 1, pt. B(VII) §§ 16-17, at 26-27 (Ethiopia); Law No. 66-007 of July 5, 1966, Amending the Maritime Code, [1966] Journal Officiel of July 16, 1966, Annex II, art. 8.5.03, at 1486 (Malagasy); Law No. 1000 of Jan. 20, 1962, Commercial Code (bk. V, Maritime Commerce) arts. 746-52, in Laws of Rep. of Korea 984-88 (Korean Legal Center transl. 1969). For a collection of the domestic legislation on this subject in Germany, England, France, Italy, Netherlands, Switzerland, and the United States, see Sotiropoulos, Die Beschränkung der Reederhaftung, in 30 Ubersee Studien Zum Handels-, Schiffharts-, Und Versicherungsrecht 406-22 (1962).

many would object to it. But if carrier were not liable in that case many shippers would find it expedient to take out insurance to protect themselves.

204. For all of the above reasons it will be difficult to eliminate the shipper's motivation to insure even with a system imposing strict liability on the carrier. And unless the cargo insurance policy is eliminated for a particular shipper (not just reduced in price) there can be little saving in administrative cost.

3. The costs of administering claims: "Friction"

205. By friction is meant the negotiation of claims, the arbitration of claims, the litigation of claims, the consideration of claims, the investigation of claims, legal work in connection with claims, arranging the subrogation of claims and all such matters. It is immediately apparent that friction is uneconomic, wasteful and altogether undesirable. In setting the bases of carriers' liability to cargo one aim should be the reduction of friction.

206. Friction cannot be eliminated entirely except by preventing all loss and damage to cargo--and even in that unlikely event some claims would undoubtedly be filed. But, other things being equal, anything that reduces loss and damage will reduce friction. Accordingly the considerations of the section on the promotion of an optimum standard of care are also relevant here.

207. Apart from reducing loss and damage the most hopeful means of reducing friction is to make the rules of liability simple and clear. The simpler and the clearer they are the less likely it is that in any given case there will be room for argument about whether the carrier is liable or not. Hence, less friction.[175/]

208. Theoretically, the simplest and clearest rules would be one of these: (1) That the carrier would not be liable for loss or damage to cargo whatever the circumstances and regardless of fault, or, (2) That the carrier would be liable for all loss and damage to cargo whatever the circumstances and regardless of fault.[176/] The first of these alternatives is, of course, unacceptable on grounds

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175/ See the UNCTAD Secretariat Report on Bills of Lading.

176/ Comment, Cargo Damage at Sea: The Ship's Liability, 27 Texas L. Rev. 525, 536 (1949).

of policy that have been developed above. The second (a rule that carrier was liable regardless of fault) would still leave room for some friction. For one thing, there would be the question whether the loss or damage occurred while the cargo was in carrier's possession, or during whatever period of time carrier was responsible. In the second place, presumably the rule would not charge the carrier with responsibility for normal evaporation or wastage of the cargo or for normal, unavoidable, decay or other such loss occurring through a natural tendency, defect or vice of the cargo itself--issues that provide ground for debate and disagreement. Finally, a strict carrier liability rule presumably would not allow shipper to collect from carrier for loss or damage caused solely by a fault of the shipper, as for example, faulty packing; this issue could provide some scope for argument.

209. Thus, a rule of strict carrier liability will not eliminate friction. However, a fault or negligence standard of liability, as is mostly the case under the Hague Rules, is worse from the standpoint of friction. Negligence is a difficult factual question which invites contention.

4. Effects of increased carrier liability

210. As described earlier, the present system of carrier liability is a mixture, with carriers exempt from liability for negligence in one major area--navigation and management of the ship--and otherwise, with limitations, liable for the consequences of their negligence. At first glance it might seem that a change in the system imposing greater liability on the carrier would inevitably be of economic advantage to cargo interests to the disadvantage of the carriers. Lest unwarranted expectations (and fears) be aroused, this issue needs to be examined.

211. As with so many other maritime matters, the examination starts with insurance. As noted in a previous section, both the cargo and the shipowner are insured in most cases. Accordingly, if a change of the rules on carrier liability is to benefit cargo interests in the normal case, the benefit will come by a lowering of cargo insurance rates.[177/] On the assumption that there is competition among cargo in-

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177/ In the case where cargo is uninsured the benefit will come, of course, from being able to recover from carrier for losses that would not otherwise be recoverable. But apart from this the analysis of this section is substantially the same whether cargo is insured or not.

surers, there is reason to suppose that a change of the rules which substantially increased the cargo owners' right to recover against carriers would improve the experience of cargo insurers and would result in lower rates.

212. There is, however, another side to the matter. As the carrier pays off more claims it will in turn collect more from its P and I insurer. Consequently, the experience of the P and I insurer will worsen and sooner or later it will raise the rates. This raises the key question in the analysis: When the carriers' P and I rates go up will they raise freight rates to recover the higher insurance costs? If so, cargo interests may be left about where they were before the increase in carrier liability, paying lower insurance rates but higher freight rates. If not, cargo interests would benefit from the increase in carrier liability. The answer to the key question is by no means certain, and leads into the difficult area of conference ratemaking.

213. With more than one hundred conferences throughout the world, policies, considerations and methods in ratemaking presumably vary a good deal. The pressures of competition from non-conference liners, charters, other forms of transportation, and perhaps from other conferences will also vary widely. So it is doubtful that any valid generalization can be made about the effect of a rise in P and I rates or freight rates. It will depend on the policies, practices and situation of the conference as well as the bargaining position and other circumstances of the particular cargo in question.[178/]

178/See: UNCTAD Secretariat Reports, "The Liner Conference System" (TD/B/C.4/62/Rev.1) and "The Regulation of Liner Conferences" (TD/104); Federal Maritime Commission Fact-Finding Investigation No. 6, The Effect of Steamship Conference Organization, Procedure, Rules, Regulations and Practices upon the Foreign Commerce of the United States, ordered Oct. 22, 1963, 28 Fed. Reg. 12066 (1963). Report submitted August 16, 1967. 9 Pike and Fischer Shipping Regulation Reports 547-636 (1967); Note, Ratemaking Procedure of International Shipping Conferences, 4 Stanford Journal of International Studies 84 (1969); W. Grossman, Ocean Freight Rates 60 (1954); A. Svendsen, Liner Conferences and the Determination of Freight Rates (1957); Sturmey, "Economics and International Liner Services," 1 Journal of Transport Economics and Policy 190 (1967); Abrahamsson, "A Model of Liner Price Setting," 2 Journal of Transport Economics and Policy 321 (1948); Hyde, Shipping Enterprise and Management 1830-1839 pages 63-68 (1967).

214. There is one type of improvement in the Hague Rules where the benefits are less speculative: the removal of ambiguities and bases for responsibility that turn on propositions that are difficult to establish and hence are productive of expensive litigation and resistance to just claims. The cost of administering claims (or "friction") is aggravated, with respect to ocean carriage, by the requirement that a party prove facts that are difficult or impossible to ascertain, and by legal ambiguities that are productive of litigation; reduction of such costs would constitute a net gain to shippers and carriers. Consequently, in considering possible changes in the Hague Rules (Section E infra) close attention will be given to ways of reducing such unproductive costs.

D. Bases of Liability and Burden of Proof under International Conventions on Carriage of Cargo by Air, by Rail and by Road

215. This section describes briefly the bases of liability and the burden of proof systems of the major conventions dealing with international carriage of cargo by rail, road and air. These bodies of law may provide two sources of experience and consensus to the extent that these other systems of transportation present problems comparable to those of carriage by sea. In addition, the present variations in the scope of liability of different types of carriers has proved to be troublesome in connexion with work towards a single set of rules governing combined transport operation; for this reason, reducing these variations could have significant practical consequences.

1. International Air Transport of Cargo (The Warsaw Convention)

216. The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw October 12, 1929 and called the Warsaw Convention has been widely adopted and provides rules on air carrier liability when international air cargo is lost or damaged.

217. Article 18(1) appears to lay down a rule of strict liability stating:

> "The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air." 179/

179/ League of Nations Treaty Series, Vol. 137, pp. 11, 23.

Article 20(1), however, provides a broad exception to the seemingly strict rule of Article 18 stating that:

> "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." 180/

The key words to be interpreted in this provision are "necessary" and "impossible". Literally they could be read to exempt the carrier only for events completely out of its control--vis major or act of God. However, despite the literal wording of the provision the prevalent view is that Article 20(1) requires a standard of reasonable care only.181/

218. Michael Milde describes this in his monograph, The Problems of Liabilities in International Carriage by Air.182/

> "...The authors of the Warsaw Convention evidently had not in mind a requirement of all the *necessary* measures, but the requirement of *reasonable* and *normal* measures, taken with such a care *"qualem quisque diligentissimus pater familias suis rebus adhibet."*
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> They proceeded from the concept that the carrier cannot be held liable for all — even accidental — risks of air traffic. At the time of the signature of the Warsaw Convention, and naturally even at present, carriage by air has not yet reached such a level of security as, for instance, railway traffic after almost 150 years of experience. In carriage by sea [the Hague Rules of 1924, art. 4 [1]] the carrier is also made liable only if he did not act with due diligence; and this provision served as an example for the authors of the Warsaw Convention ."

180/ The Protocol done at Guatemala City on 8 March 1971 alters the language of Articles 18 and 20 somewhat but not the substance.

181/ See Bin Cheng, "The Rules of 'International' and 'Non-International' Carriage by Air," 61 Law Society's Gazette 37 (1964); Hardman, "International Air Cargo Shipments under the Warsaw Convention," 29 Insurance Counsel Journal 120, 123 (1962); Hjalsted, "The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Law," 27 J. Air L. & Com. 1, 6-11 (1960); Grein v. Imperial Airways [1937] 1 K.B. 50; City of Montreal v. Watt & Scott [1922] 2 A.C. 1955; Chisholme v. British European Airways [1963] 1 Lloyd's Rep 626. But see American Smelting & Refining Co. v. Philippine Air Lines, Inc. U.S. & C. Av. R. 221 (1954) (N.Y. Sup. Ct.)

182/ Published by The Charles University, Prague, Czechoslovakia in 1963. Pages 66-67.

219. The Warsaw Convention, as originally adopted, included a provision analogous to Article IV(2)(a) of the Hague Rules. Article 20(2) provided:

> "In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation and that, in all respects, he and his agents have taken all necessary measures to avoid the damage."

The 1955 Hague Protocol, which came into force in 1963, deleted Article 20(2) so that it is now applicable only in cases governed by the original Warsaw Convention.

220. Article 20 (quoted above) places the burden of proof on the carrier. To escape liability it must show the cause of the loss or damage. Consequently, carrier will be liable for an unexplained accident or loss.[183/]

221. The Warsaw Convention, like the Hague Rules, allocated responsibility on the basis of fault rather than on a basis of strict (or absolute) liability. It has been stated that "the protection of a foundling airline industry was a primary objective of the /Warsaw/ Convention"[184/] and that "the reason the Convention adopted the 'fault' doctrine instead of the more stringent one of 'risk' was for the purpose of aiding the development of this new and growing branch of transportation."[185/]

183/ Hjalsted, "The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Law", 27 J. Air L. & Com. 1, 119 (1960) with reservations and some contrary cases as noted therein.

184/ Levine, "Warsaw Convention: Treaty under Pressure", 16 Cleveland-Marshall L. Rev. 327 (1967).

185/ Note, The Liability of Domestic and International Air Carriers for Loss or Damage to Cargo, 20 Temple L. Q. 118 (1946).

2. International Rail Carriage of Cargo (The CIM Convention)

222. The International Convention Concerning the Carriage of Goods by Rail (hereafter called CIM) was done at Berne on 25 October 1952 and came into force for most European states, including the United Kingdom, on 1 March 1956. A new CIM was concluded in 1961 and came into force 1 January 1965. In addition to many other things CIM provides the rules on carrier liability to shippers. The key provisions are in Article 27 which states:

> 1. The railway shall be liable for exceeding the transit period, for total or partial loss of the goods, and for damage thereto occasioned between the time of acceptance for carriage and the time of delivery.
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> 2. The railway shall, however, be relieved of liability if the exceeding of the transit period or the loss or damage was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as a result of the wrongful act or neglect on the part of the railway, by inherent vice of the goods (decay, wastage, etc.) or through circumstances which the railway could not avoid and the consequences of which it was unable to prevent.

Article 27(3) lists cases involving special risks where carrier is to be re-

lieved of liability and is set out in the margin.186/

186/ 3. "Subject to Article 28(2) of this Convention, the railway shall be relieved of liability when the loss or damage arises out of the special risks inherent in one or more of the following circumstances:

(a) carriage in open wagons under the conditions applicable thereto or by an agreement made with the sender and referred to in the consignment note;

(b) the absence or inadequacy of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;

(c) loading operations carried out by the sender or unloading operations carried out by the consignee under the conditions applicable thereto, or by agreement made with the sender and referred to in the consignment note, or by agreement with the consignee;

faulty or improper loading when performed by the sender under the conditions applicable thereto or by agreement made with the sender and referred to in the consignment note;

(d) the carrying out by the sender, the consignee or the agent of either, of the formalities required by the Customs or other administrative authorities;

(e) the nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, desiccation or leakage;

(f) the forwarding under irregular, incorrect or incomplete description of articles which are not to be accepted for carriage; the forwarding under irregular, incorrect or incomplete description of articles accepted only subject to certain conditions, or the failure on the part of the sender to observe the prescribed precautions in respect of such articles;

(g) the carriage of livestock;

(h) the carriage of consignments which, under this Convention, or under the conditions applicable or by special agreement made with the sender and referred to in the consignment note, must be accompanied by an attendant, in so far as the risks are those which it is the purpose of the attendant to avert."

223. Article 27 appears to follow, in form at least, the common law rule of strict liability on the carrier for all loss or damage to goods, with exceptions. Paragraph one provides the strict liability and paragraph two the exceptions. Moreover, two of the exceptions are familiar: wrongful act of the shipper or claimant and inherent vice of the goods. But the last of the exceptions in paragraph two -- "circumstances which the carrier railway could not avoid and the consequences of which it was unable to prevent" -- is clearly broader. As Otto Kahn-Freund says of this exception:[187/]

> "[It includes] a great deal more than what at common law is comprised by the terms 'act of God' and 'act of the Queen's Enemies' and even by the term 'Casualty (including fire and explosion)' used in the Railways Board's General Conditions. If it had been the intention to restrict the carriers' defence to events of this kind, the words 'force majeure' would have been used. In the Convention of 1924 'force majeure' was a defence against a claim for loss or damage, and 'circumstances which the railway could not avoid and the consequences of which it was not able to prevent' could only be pleaded against a claim based on 'delay.' The present Convention has made the wider defence available in all cases and thus considerably modified the standard of liability in favour of the carriers. Much the most important consequence of this is that the defence now covers acts of strangers. Theft, arson and sabotage, not to mention negligence on the part of strangers, are not 'force majeure,' but they may come within the excepted peril as now formulated. This, however, presupposes that the carrier can prove that his servants had done all in their power to avoid the loss, damage or delay, e.g., by protecting the consignment against theft, and that all was done in order to minimize the loss.

224. While there are not yet enough cases and comments on Article 27(2) to state its meaning with certainty it may well amount to a rule of liability only for fault or negligence. Of course, this leaves open

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187/ The Law of Carriage by Inland Transport 433 (4th ed. 1965).

the question of how rigorous a standard of care is required. Whether rail carriers under CIM will be held to a higher standard of care than they would be under an express negligence standard or to a higher or lower standard than air carriers under the Warsaw Convention cannot be stated with certainty.

225. Article 28 of CIM sets out the rules on burden of proof. Paragraph one states:

> The burden of proving that loss, damage or exceeding of the transit period was due to one of the causes specified in Article 27(2) of this Convention shall rest upon the railway.[188/]

226. In speaking of the burden of proof provisions Otto Kahn-Freund states:[189/]

188/ Paragraph 2 relates to burden of proof with respect to the particular cases of Article 27(3), which is quoted in part in note 186, supra. Paragraph 2 provides:

> When the railway establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of the special risks referred to in Article 27(3) of this Convention, it shall be presumed that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, attributable either wholly or partly to one of these risks.
>
> This presumption shall not apply in the circumstances envisaged in Article 27(3)(a) of this Convention if there has been an abnormal shortage, or a loss of any package.

189/ The Law of Carriage by Inland Transport 437 (4th ed. 1965).

As in English law, it is for the carrier to prove any excepted peril on which he relies. He must also prove those special circumstances which protect him against liability arising from the carriage of certain types of goods, such as livestock, or from certain contingencies such as improper packing. In these special circumstances he is not, however, as we have seen, relieved of all liability, but only of liability for loss or damage arising from the special risks inherent in those circumstances. To claim this relief all he has to do is to prove that the loss or damage could have so arisen, and if the possibility of the causal connection between the special risk and the loss or damage has thus been established,

it is for the claimant to prove that the loss or damage was not in fact attributable wholly or partly to the risk which might have caused it, e.g., that an injury suffered by a living animal in transit was not due to the inherent propensity of animals to be so injured. If, however, the carrier relies on the special risk of carriage in open wagons and the claim is not for damage to the goods but for the loss of an entire package or for abnormal short delivery, it is not presumed in his favour that the particular method of carriage was the cause of the loss.

3. International Motor Carriage of Cargo (The CMR Convention)

227. The Convention on the Contract for the International Carriage of Goods by Road (hereafter called CMR) was done at Geneva on 19 May 1956 and came into force on 2 July 1961 with the ratification or accession of Austria, France, Italy, Netherlands and Yugoslavia.

228. The general provisions on carrier liability are contained in paragraphs 1 and 2 of Article 17 and read as follows:

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

2. The carrier shall however be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

229. The language is essentially the same as the provisions of Article 27(1) and (2) of CIM and presumably will be interpreted in like manner. The remaining provisions of Article 17 deal with particular situations and again are similar to provisions of CIM. They are set out in the margin. 190/

190/ 3. The Carrier shall not be relieved of liability by reason of the defective condition of the vehicle used by him in order to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle or of the agents or servants of the latter.

4. Subject to article 18, paragraphs 2 to 5, the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:

(a) Use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note;

(b) The lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;

(c) Handling, loading, stowage or unloading of the goods by the sender, the consignee or persons acting on behalf of the sender or the consignee;

(d) The nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin;

(e) Insufficiency or inadequacy of marks or numbers on the packages;

(f) The carriage of livestock.

5. Where under this article the carrier is not under any liability in respect of some of the factors causing the loss, damage or delay, he shall only be liable to the extent that those factors for which he is liable under this article have contributed to the loss, damage or delay.

230. The burden of proof provisions of Article 18, set out below, are also essentially the same as those provisions in CIM except for paragraphs 4 and 5 which have no CIM counterparts.

> 1. The burden of proving that loss, damage or delay was due to one of the causes specified in article 17, paragraph 2, shall rest upon the carrier.
>
> 2. When the carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the special risks referred to in article 17, paragraph 4, it shall be presumed that it was so caused. The claimant shall however be entitled to prove that the loss or damage was not, in fact, attributable either wholly or partly to one of these risks.
>
> 3. This presumption shall not apply in the circumstances set out in article 17, paragraph 4(a), if there has been an abnormal shortage, or a loss of any package.
>
> 4. If the carriage is performed in vehicles specially equipped to protect the goods from the effects of heat, cold, variations in temperature of the humidity of the air, the carrier shall not be entitled to claim the benefit of article 17, paragraph 4(d), unless he proves that all steps incumbent on him in the circumstances with respect to the choice, maintenance and use of such equipment were taken and that he complied with any special instructions issued to him.
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> 5. The carrier shall not be entitled to claim the benefit of article 17, paragraph 4(f), unless he proves that all steps normally incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him.

E. Alternative approaches to Implement the Relevant Policy Considerations

231. In considering the appropriate approach to risk allocation between carrier and cargo interests, attention may be given to the three alternative approaches that follow:

1. Strict liability

232. Although rendered illusory by bill of lading exceptions in the 19th Century the general law of maritime carriage imposed a standard of strict liability on the carrier for all loss or damage to cargo with only a few exceptions. Strict liability has also been imposed on other types of carriers, with various exceptions and modifications.191/

233. A system of strict liability--assuming always an exception for inherent vice of the cargo and where the shipper is at fault--has two major factors to recommend it. First, it would tend to induce carrier to adopt a somewhat closer to optimum standard of care than a system of liability for negligence. Second, a system of strict liability would result in lower costs of administering claims (i.e., "friction") than one based on negligence. Although it seems that these are factors of substantial importance there is at present no way to measure their economic significance accurately.

234. On the other hand, caution has been advised with respect to readjustment of the present commercial patterns reflected in insurance rates and practices, and in the structure of freight rates.192/

235. These various factors should be considered and balanced in deciding, as a matter of policy, whether existing law should be changed to impose a form of strict

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191/ Under some legal systems, rail carriers have virtually absolute liability subject to narrow exceptions such as force majeure and fault of the shipper. As to such liability in the USA under the standard bills of lading governing shipments by rail, truck and air see Honnold, Sales and Sales Financing (3d ed., 1968), 281-83. For liability in the United Kingdom under the standard contract forms published by the Railways Board see Kahn-Freund, The Law of Carriage by Inland Transport (4th ed., 1965).

192/ The Canadian Government's reply states that "any rearrangement in the allocation of risks which imputes greater responsibilities on the carrier can be had only at the price of the surrender by the shipper of: (a) his existing freedom of choice respecting whether to insure or not to insure against the related risk; and (b) his existing freedom of choice respecting the market in which insurance against the related risk will be placed." For a similar view see Poor, "A New Code for Carriage of Goods by Sea", 33 Yale C.J. 133, 135 (1923). For caution with respect to possible changes in carrier liability on freight rates see also the replies of Japan and the United Kingdom.

liability on carriers. If strict liability is not to be imposed then various lesser changes in the liability scheme should be considered as described below.

2. Simplified standards for liability and burden of proof based on other international conventions governing carriage of cargo

236. Section D, above, discussed the basic provisions on liability and burden of proof contained in international conventions for carriage of goods by air (the Warsaw Convention), by rail (the CIM Convention) and by road (the CMR Convention). Examination of these conventions shows that they are built on two short, basic provisions: (1) The carrier shall be liable for all damage or loss occurring while the goods are in the carrier's possession;[193] (2) However, the carrier shall not be liable if he proves that:

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

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

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

237. The fuller text of these conventions (see Section C, supra) shows that carrier may also avoid liability by proof that the loss resulted from the wrongful act of the claimant or from inherent vice of the goods or that the loss could have resulted from specified circumstances involving special risks (such as the absence of packing).[194] However, these exceptions do not cover the usual shipment and do not substantially modify the basic structure outlined above.

238. The structure of responsibility established under these conventions does not establish liability of the carrier regardless of the carrier's fault, and thus is

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193/ The varying ways of stating the period during which the carrier is responsible are discussed in Part One of this report.

194/ Similar exceptions, reflecting the circumstances of marine carriage, would be feasible if this approach should be adopted in connexion with reexamination of the Hague Rules.

less strict than the basic rules of maritime law (apart from exculpation by contract) and the rules of some national rules governing the responsibility of carriers.[195/] On the other hand, the burden of proof is placed on the carrier to show his lack of responsibility for the loss or damage. In considering whether the basic approach of these international conventions would be useful for present purposes, attention may be directed to: (1) the simplicity of their basic structure; and (2) the advantages of harmony among the rules of liability of various types of carriers in view of the increasing significance of combined transport operations.

239. This approach is developed in detail in the Reply to the Questionnaire by the Government of France and is supported in other replies.[196/]

195/ See Section D-1, supra, at note 1.

196/ It is not feasible to set out the entire proposal; the following is a summary. Under the scheme put forward in the French proposal the carrier is fully responsible if the goods do not arrive in a satisfactory state unless he proves that he was entitled to an exemption from responsibility.

The instances of exemption of the carrier would be simplified. There would be two guiding principles: (1) loss resulting solely from the fault of the cargo owner, i.e., a false declaration by the cargo owner, defective or insufficient packaging, or marking of goods, and inherent vice of the goods; (2) cases of force majeure, i.e., an event which is unforseeable, insurmountable, independent of the carrier. Examples of force majeure would be war, fire and strike. The carrier would have the burden of proving the fault of the cargo owner, or force majeure.

Under this proposal certain of the present exemptions in Article IV(2) would be set aside. The exemptions for fire (IV(2)(b)) and perils of the sea (IV(2)(c)) would be retained only insofar as they fit within the force majeure exemption. Since the exemption in Article IV (2)(a) (neglect, etc. in the navigation or management of the ship) does not have the characteristics of force majeure, this exemption would be set aside. The removal of this exemption would eliminate uncertainty which has given rise to much litigation.

The French reply noted that to conform with the objective set up by UNCTAD for a balanced allocation of risks, a ceiling for liability must be maintained. The limitation of liability should be set aside only in cases (already provided for in the 1968 Protocol) of international or inexcusable fault of the cargo owner or his servants. Such a system would eliminate existing uncertainties and ambiguities and, as a consequence, would reduce litigation while insuring the prompt and satisfactory compensation of the cargo owner. The reply added that the system proposed would bring the regulation of maritime transport closer to that of other modes of transportation. (The reply noted that before adopting new legal solutions, it would be desirable to undertake studies on the economic effects of modifications of the present system.)

In its reply the Government of Austria indicated that the grounds for exemption from liability should be "adjusted to the grounds provided by the international conventions on aviation (Warsaw Convention), railways (CIM) and road transport (CMR)." The Indian reply supports redrafting Article IV "somewhat along the lines of Article 20 of the Warsaw Convention."

3. Modification of specific substantive provisions of the Hague Rules

(a) Article IV(2)(a): Navigation or management of the ship

240. This provision exempts carrier from liability for loss to cargo caused by neglect in the management or navigation of the ship. It is the only provision of the Hague Rules which grants complete exemption from liability for the consequences of fault. Under the reasoning spelled out earlier, it appears that holding carrier liable for the consequences of its fault in the navigation or management of the ship would tend to promote a closer to optimum standard of care than the present rule. From this standpoint a change in the present rule appears to be desirable.

241. It was pointed out earlier that a fault standard of liability is high in friction, compared to a standard of strict liability or no liability, because fault or negligence is complicated to prove. While this is true as a general rule, the change to a fault standard for navigation and management, within the overall framework of the Hague Rules, would be likely to reduce friction rather than increase it. This calls for some explanation. Under the present rules three major categories into which the cause of loss may fall are -- failure to provide a seaworthy ship; failure to properly care for the cargo; and negligence in navigation or management of the ship. The lines between these categories are very unclear. Moreover, the carrier is liable to cargo for the consequences of its negligence as to two of the categories but not for negligence in navigation or management and as a result responsibility under the present system is subject to basic doubts and confusion -- in other words, friction. As Gilmore and Black point out, the question of what is navigation or management is rarely asked in isolation. Rather, given a particular set of facts, the question is this: Did the loss result from fault in the management or navigation of the ship (for which carrier is not liable) or, on the other hand, did the loss result from fault in caring for cargo or fault in not providing a seaworthy ship (for which faults carrier is liable)? Consequently, the parties must not only debate whether the carrier was negligent but must, in addition, debate the difficult question of the proper characterization of the event. Again as Gilmore and Black point out:

> "The difficulty in drawing the line arises from the fact that read naturally, the two clauses overlap, for many actions which might be spoken of as faults or errors in management or even in navigation might equally well be viewed as failures in the duty to use due care with respect to the cargo. Few clearcut concepts have appeared for dealing with the problem; the feel of it can only be acquired by reading cases." 197/

242. If carrier is made liable for the consequences of its negligence in the navigation and management of the ship the area of debate will be narrowed considerably. It will no longer be necessary to decide whether a particular set of facts involves, for example, fault in the care of cargo or fault in the management of the ship. If negligent, carrier will be liable in either event. Only the question whether carrier's fault caused the loss need be debated. Thus friction is likely to be reduced.

243. A change in the rule on navigation and management would have no major effects in the area of marine insurance but would tend slightly to lower cargo insurance rates and slightly to raise P and I rates. This could result in some minor economic benefit to shipping interests, depending upon the circumstances of carriers and their conferences. As to the matter of fairness, few would argue that it was unfair to charge carriers with damage to cargo caused by their negligence in the navigation or management of the ship. On balance, therefore, substantial reasons support a change in the Hague Rules to hold carrier liable for loss or damage to

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197/ Op. cit., supra at p. 135.

cargo caused by carrier's fault in the navigation or management of the ship.[198/] 244. As to effecting the change, the simple elimination of Article 4(2)(a) would in most (possible in all) cases have the effect of making carriers liable for loss to cargo caused by the negligent navigation or management of the ship. Presumably this result would come about as follows:

(1) The shipper would prove that the cargo had been delivered to the ship in good condition and returned at destination in damaged condition.

(2) Thereupon, carrier would be obliged to show that it came within some specific provision exempting it from liability, which we assume it could not do.

198/ The replies of Austria, Canada, France, Korea, Khmer, Madagascar, Saudi Arabia, Nigeria, India, Hungary, and Australia, indicate support for deletion of Article IV(2)(a). The reply of India, seems also to support this result. Cf. Reply of Ceylon which states that in fairness to the shipper/consignee, the carrier should be responsible for the default of his master or servants but cannot be held responsible for the defaults of mariners, pilots and others who are not his servants. On the other hand, the observations of Japan state that this exemption has traditionally been accepted, and that "although scientific techniques has been remarkably developed nowadays, modern types of danger have appeared and the danger involved in sea navigation has not yet diminished." If the carrier is made responsible in the context of the situations set out in Article IV(2)(a) the carrier will have to arrange for insurance with respect to that risk. The cost of the premium will be added to the freight; the amount of increase in freight would not be less than the decrease in premium for the insurance taken out by the cargo owner. A further reason set out in the Japanese reply for maintaining the exemption is that claims arising in cases of collision of vessels can be disposed of more simply and expeditiously in cases of collision of vessels if the carrier is relieved of his liability for fault in navigation. In its reply the Government of Greece indicates its opposition to the modification of the exemptions listed in Article IV (2) of the Hague Rules. The reply states the following: "The exemptions set out in Article 4(2) of the Hague Rules and in particular those under paragraphs (a), (b) and (c) constitute the well-known concession made by the International Convention of 1924 to the carrier against giving up his freedom to contract with the shipper. If those exemptions have to discontinue, the carrier should be allowed to recover his contractual freedom. Shipping enterprises are private business operations under international competition and they cannot be assimilated to carriers of other means of transportation enjoying monopoly or other privileged systems."

(3) Carrier would be obliged to show that it came within the catchall exemption (IV(2)(q)) which requires that carrier show that its fault or negligence did not contribute to the loss. This, by assumption, it could not do.

(4) Therefore, since carrier could not fit within a specific exemption provision it would, presumably, be liable.

245. However, this leaves much to inference. It would seem distinctly preferable - in addition to eliminating IV(2)(a) - to adopt language stating the carrier's duty to exercise due diligence in the navigation and management of the ship. The appropriate place for this would be in a new section 3 in Article 3 following statement of the carrier's duty to exercise due diligence to provide a seaworthy ship and the duty to properly care for cargo. The provision might read as follows:

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

(b) Article IV(2)(b): Fire

246. The fire provision is unusual in that, as described earlier, it exempts carrier from liability for the negligence of some employees but not others. The merits of carrier liability for negligence have been discussed earlier. As a general rule there seems little reason to adopt the approach of the fire provision. Carrier is in a better position than the shipper to eliminate, mitigate or guard against the negligence of even its minor employees. It appears, therefore, that holding carrier liable for the consequences of their negligence would tend to promote an optimum standard of care. There does not appear to be anything unique about loss or damage from fire to warrant a special rule. Considerations of insurance, economics, fairness and friction all seem to bear on liability for fire loss in the same manner as on liability for other types of losses. Accordingly, it appears that it would be desirable to treat fire loss in the same manner as other types of loss and, therefore, to eliminate Article IV(2)(b).[199/]

199/ The replies of Austria, France and Nigeria support deletion of Article IV(2)(b). The Australian reply states: "In the light of current technological advances it is doubtful whether retention of this exception is warranted. If it is retained, present uncertainty as to its application could be eliminated by placing the onus on the carrier to show that the fire was caused by fault or privity of the cargo owner." On the other hand, the Japanese Government notes, inter alia, that the exemption for fire has been approved for the reasons that the origin of a fire is unknown in many cases and that a fire frequently causes extensive damage; requiring the carrier to prove the cause of the fire would deny the exemption of its effect. Cf. Reply of Government of Greece.

(a) Article IV(2)(c): Perils of the sea

247. This clause provides that the carrier shall not be liable for loss or damage caused by perils, dangers and accidents of the sea. It is said that the clause "denotes accidents peculiarly incident to navigating the sea. . .arising from the peculiar physical conditions under which navigation upon the sea takes place."[200/] The test is stated as" ... whether the accident which occurred was or was not one which could have happened on land, so far as its general character was concerned."[201/]

248. Although not clear from the face of the provision, cases hold it will not apply where the loss would not have occurred but for lack of due diligence on the part of the carrier.[202/] The carrier is exempt only from sea perils against which all reasonable precautions by a prudent carrier proved to be unavailing. Only then can it be said that the loss was caused by a peril of the sea. The absence of negligence as a concurring cause is sometimes even said to enter into the very definition of sea peril.[203/] Cases also have held, although again the provision is not clear on its face, that carrier bears the burden of proof: carrier must show that it took all reasonable precautions, that it was not negligent.[204/]

249. The results of the peril of the sea exception, as outlined above, fit in with the general reasoning in favour of charging carriers with the results of their negligence. Moreover, since the facts relevant to determining whether its fault contributed to the loss are peculiarly within the control of the carrier, it also seems reasonable to give carrier the burden of proving that it took all reasonable precautions.

250. Even if one assumes that the results developed by the above case-law should be continued, Article IV(2)(c) appears to be unnecessary for these same

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200/ Carver, op. cit. supra at p. 134.

201/ Id. at 135.

202/ Id. at 141.2 Manca op. cit., supra at p. 206 UNCTAD Report pp. 88-89.

203/ Gilmore and Black op. cit. supra at p. 140. But see Blackburn v. Liverpool /1902/ 71. K.B. 177.

204/ Gilmore & Black, op. cit. supra at p. 163. But see Carver op. cit. supra at p. 131 (footnote 36).

results would be reached under the catchall provision of Article IV(2)(q).[205] Indeed Article IV(2)(q) is far clearer. It explicitly states that carrier will not be liable for loss from any cause "arising without . . . the fault or neglect . . . of the carrier. . ." It is also explicit that the burden of proof shall be on the carrier to show that its fault or neglect did not contribute to the loss.

251. Consideration should therefore be given to eliminating Article IV(2)(c). It is unnecessary and ambiguous. Although courts have interpreted it in a desirable way, there would be merit in doing away with the possibility of undesirable and unwanted results in the future.[206]

(d) Article IV(2)(d): Acts of God

252. This provision exempts carrier for loss resulting from acts of God, and is very similar in operation to the perils of the sea clause. That is, first, it does not apply where carrier's negligence is a concurring cause of the loss[207] and, second, carrier bears the burden of proof.[208] Accordingly, like the perils of the sea clause, it is redundant and could be eliminated, leaving carrier to rest on the more explicit language of Article IV(2)(q).[209]

205/ See para. 174, supra.

206/ In its reply the Australian Government states: "Judicial construction of this provision has varied from country to country between the lenient and the strict. This is, of course, confusing and does not make for certainty. It is suggested that amendment is needed so that the stricter judicial interpretations are adopted and it is made clear that the peril must have been one which the ordinary safeguards of skillful vigilant seamen could not have prevented." The Austrian, French and Indian replies indicate that under a scheme of liability which might be modelled on the conventions on other modes of carriage of goods this exemption would be deleted. See supra footnote 196. On the other hand, the reply of the Government of Madagascar indicates that a modification of the exemption on "perils, damages or accidents of the sea" does not seem called for since neither the carrier nor his servant have any influence over such perils, dangers or accidents.

207/ Gilmore & Black, op. cit. supra, at pp. 141, 147. 2 Manca op. cit. supra at p. 207.

208/ Gilmore & Black op. cit. supra, at pp. 146-147.

209/ The same reasoning may also apply to (p), the latent defect exception.

(e) Article III(1), Article IV(1): Seaworthiness

253. Article III(1) binds the carrier "before and at the beginning of the voyage" to exercise due diligence to "(a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation." Under Article IV(1) neither the carrier nor the ship is liable for damage or loss resulting from unseaworthiness unless such damage or loss is caused by "want of due diligence" on the part of the carrier to carry out the duties set out in Article III(1). When loss or damage due to unseaworthiness is shown, the burden of proof as to the exercise of due diligence is on the carrier or other person claiming exemption from liability.

254. Modifications of the present provisions on seaworthiness have been suggested in the replies of the Governments of Australia and of India. These include extension of the period during which the carrier is required to exercise due diligence to assure the seaworthiness of the ship, and simplification of the rules on burden of proof.[210/]

210/ The Indian reply suggests that Article III(1) should be revised to require the carrier to make the ship seaworthy "at all times and before leaving every port", and that corresponding changes should be made in Article IV(1) if that provision is maintained. Changes in Article IV(1) would include removing from the cargo owner the burden of proving that the loss or damage was due to unseaworthiness. The Indian reply concludes that it would be sufficient for the cargo owner to prove that the loss or damage occurred during the course of carriage.

The Australian reply points out that at the present time matters such as those set out in Article III(1) are already subject to rigorous standards prescribed in the 1960 Safety of Life at Sea Convention (SOLAS). In these circumstances, according to the reply, it seems reasonable that the cargo owner is entitled to assume "that a ship will be seaworthy and that it will be operated efficiently and safely." Consequently, the reply states, the following modifications of the Hague Rules would not impose hardship in the carrier: "(a) deleting the present Articles III(1) and IV(1), and (b) writing in a provision that the carrier should be responsible for loss or damage to the goods during such times as they were in his charge, except as otherwise provided." The Australian reply adds that these modifications would bring the rules on sea carriage into line with those relating to air carriage (1929 Warsaw Convention and 1944 Chicago Convention). See also discussion on the subject of seaworthiness in the UNCTAD Secretariat Report, paragraphs 203-206.

255. Comments with respect to other substantive provisions were made in a number of replies.[211/] Some of these do not relate directly to the structure of the present report but will be appropriate for consideration in connexion with those items reserved for later consideration under the resolution adopted by UNCITRAL at its fourth session. For the provisions of the resolution see para. 3 (Vol. I, supra).

4. Modification and simplification of the rules on burden of proof

256. The burden of proof is a device for determining the winner of a dispute when there is not sufficient evidence to know what occurred or when the evidence presented on either side is closely balanced. While a case decided on the basis of the burden of proof is decided in an essentially arbitrary manner, the shaping of the burden itself need not be arbitrary. In deciding which party should bear the burden of proof in the area under consideration two considerations seem to be of primary importance.

257. First, the burden should be placed on the party most likely to have knowledge of the facts. So placed the burden is more likely to promote the production of evidence; it is less likely to result in an arbitrary decision made on the basis of the burden of proof itself. In short, the party with greater knowledge of the facts is more likely to be able to prove what happened and less likely to suffer from bearing the burden of proof.

258. Second, the burden should be placed so that when invoked the loss will fall in a manner consistent with policy objectives discussed in prior sections.

259. Both these considerations suggest that carrier should bear the burden of proof (with exceptions to be noted later) as to matters occurring while the cargo is in its possession. Little needs to be said on the first consideration: carrier

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211/ Suggestions and proposals regarding the modification of other substantive provisions of the Hague Rules were made in a number of replies. The problem of delay in delivery is taken up in the Australian and Indian replies. The desirability of changes in Article IV(4) (deviation) is taken up in the Australian and Indian replies and in the Japanese observations. The Indian reply makes suggestions regarding Article III(3). This reply also proposes a provision on contributory negligence of the shipper along the lines of Article 21 of the Warsaw Convention. The Hungarian reply makes suggestions regarding Article III(4) and Article III(8) (benefit of insurance). The Austrian reply discusses needed changes in Article IV(5) of the Rules with respect to preventing the carrier from taking advantage of the limitation of liability when damage or loss is due to reckless or willful action on his part or that of his servants or agents. The Australian reply also comments, inter alia, on the need to require the issuance of a bill of lading.

is most likely to have knowledge of matters bearing on loss or damage which occur while cargo is in its possession.[212]

260. The second consideration requires more explanation. As noted above, a decision made on the basis of burden of proof is essentially an arbitrary one. The basis of liability may be negligence, but if carrier bears the burden, and if there is a failure of proof, carrier will be liable, regardless of whether it was actually negligent or not. Placing the burden on carrier then is a move in the direction of strict carrier liability. By the same reasoning, placing the burden on cargo interests is a move in the direction of exemption of the carrier from the consequences of its negligence. As a result, an important consideration in placing the burden of proof is the merit of strict liability of carriers as compared to the merit of exoneration of carriers for their own negligence. One or the other must be favoured.

261. On the basis of previous discussion it appears that the better choice would be to place the burden of proof on the carrier and thus take a step toward strict carrier liability. Applying the earlier analysis of policy considerations this would tend to promote an optimum standard of care on the part of the carrier -- while placement of the burden on shipper would not.

262. As to reduction of friction, the main consideration is clarity. The clearer the rule, the less the friction. A rule placing the burden squarely on carrier for all matters occurring while cargo is in its possession (with sharply delineated exceptions) would be clearer than the present set of rules and would therefore tend to reduce friction.

(a) Exceptions to Carrier Bearing the Burden of Proof

263. Although there appears to be good reason for generally placing the burden of proof upon carrier, five exceptions to such a general rule should be considered. These are essentially the five preliminary matters that shipper must prove under present law.[213]

212/ Justifying a rule of strict liability for carriers, see Lord Holt in Coggs v. Bernard (1703) 2 Ld. Raym. 909; 1 Smith's L.C., 13th ed., 175, 186. Tetley, op. cit. supra at p. 156: "... virtually all the information, if available at all, is available to the carrier alone. To exculpate a carrier when the cause of the loss is unknown is to make it beneficial for carriers not to discover the cause."

213/ They are taken from Tetley, op. cit., supra, at pp. 34-35.

(1) That the claimant is the owner of the goods and/or is the person entitled to make the claim.

(2) The contract.

(3) That the loss or damage took place during the period for which carrier is responsible. (See Part Two, Vol. I, paras. 7 - 41).

(4) The physical extent of the damage or loss.

(5) The monetary value of the loss or damage.

264. It seems reasonable to continue to place the burden of proof for these matters on shipper.

(b) Consequences in specific situations of a suggested burden of proof scheme

265. The following set of examples is designed to illustrate how the suggested burden of proof scheme would work -- that is, carrier bearing the burden on all issues except those specifically excepted. It should be noted that this scheme is very similar to the burden of proof arrangement used in the catchall exemption section of the Hague Rules (Article IV(2)(q)). Thus the suggested scheme might roughly be described as an extension of the Article IV(2)(q) arrangement.

Example: A case involving the detention of a vessel in a harbor by government authorities. Assume there is a shipment of cheese on board which spoils.

(1) Shipper would have the burden of proving that the cheese was delivered to the carrier in good condition and was received back in bad condition as under present law.214/ Also, as under present law, shipper would win if it bore its burden on this point and there were no other showings or allegations.

(2) Carrier would bear the burden of showing that the cause of the loss was the delay in a hot harbor occasioned by the restraint of princes. If carrier can bear its burden here it will win in the absence of any other showings or allegations.

214/ Shipper would also bear the burden on the various other preliminary matters noted above.

(3) If shipper alleges that carrier's improper stowage of the cargo in an inadequately ventilated part of the ship was a contributing cause of the damage, carrier will have the burden of proving that the stowage was not faulty or, alternatively, that it was not a contributing or concurring cause of the loss.

(4) If carrier fails to bear its burden under 3 above, carrier will then have the burden of showing how much of the loss is attributable to the restraint of princes and how much to the faulty stowage. If carrier fails to bear this burden it will be liable for the entire loss, in the absence of any further showings or allegations.

(5) As an alternative to shippers allegation in paragraph 3 above, if shipper alleges that the carrier's fault provoked or caused the restraint of princes (as by refusal to pay just taxes or fees, inciting riot and the like) the carrier will bear the burden of proving that it did not cause or provoke the restraint of princes.

(c) Amendments to the Hague Rules for Implementation of the Suggested Burden of Proof Scheme

266. Earlier parts of this report have suggested the elimination of some paragraphs of Article IV(2). Adoption of the suggested burden of proof scheme would eliminate or alter the rest of Article IV(2). This can be illustrated by taking Article IV(2)(g) as an example. Article IV(2)(g) exempts carrier from loss or damage caused by, inter alia, an arrest or restraint of princes. This provision, on analysis appears to only a specific and perhaps redundant illustration of the fault principle. Thus, if a restraint of princes causes the loss rather than any fault of carrier, the carrier will not be liable regardless of Article IV(2)(g). Carrier will be protected by the catchall provision, Article IV(2)(q) which relieves carrier of liability for any and all loss or damage except that caused by the fault of carrier. Paragraph (q), however, places the burden on the carrier to prove that its fault did not contribute to the loss or damage. Under paragraph (g), on the other hand, it has been held that once carrier proves that a restraint of princes occasioned the loss the burden shifts to shipper to prove that the carrier's fault caused or provoked the restraint of princes or concurred

with the restraint of princes to produce the loss.[215] The general rule placing the burden of proof on the carrier would be inconsistent with the shifting burden that now results from Article IV(2)(g); if the general rule is accepted, Article IV(2)(g) should be deleted.

267. It is possible, although not likely, that as the Hague Rules are presently written a court might hold that if a restraint of princes "causes" the loss or damage, carrier would not be liable even if its negligence caused the restraint of princes or concurred with the restraint of princes to produce the loss. Such an interpretation of Article IV(2)(g) cannot be completely ruled out on the face of the Hague Rules, and to the extent a court might adopt it, the elimination of Article IV(2)(g) will effect a substantive change, in addition to changing the burden of proof. If so, on the basis of prior reasoning, there would appear to be reasons to support the substantive change effect by eliminating Article IV(2)(g).

268. The various other paragraphs of Article IV(2) which have not been discussed previously are for purposes of analysis the same as Article IV(2)(g). These are paragraphs (e), (f), (h), (i), (j), (k), (l), (m), (n), and (o).[216] The reasons supporting clarification of the rules on burden of proof, mentioned above, would also support the elimination of these paragraphs.[217]

269. Article IV(1) could also be eliminated if the suggested burden of proof scheme is adopted.

215/ As noted earlier there may be jurisdictions where this shift does not occur and the burden remains with carrier as it does under Article IV(2)(q). In such jurisdictions elimination of Article IV(2)(g) will effect little change.

216/ See Gilmore and Black, op. cit., supra at p. 147-52.

217/ Paragraph (p) should also be eliminated, either on the above reasoning or because it is redundant as suggested in para. 252 supra. The Australian reply suggests that with respect to the exemptions in the Hague Rules for inherent vice (IV(2)(m)) and insufficiency of packing (IV(2)(n)) the carrier should have the burden of proof in attempting to avoid responsibility on these grounds. With regard to the exemption for latent defect (IV(2)(p)) "proof that a defect was latent and that it caused the damage will always involve extensive litigation. As the state of the vessel is the responsibility of the carrier anyway, it is suggested that this exception could also be deleted." It is also suggested that the catch-all exemption (IV(2)(q)) should be deleted.

The Australian reply also suggests that the carrier should be obliged to prove that he has fulfilled the obligations of Article III(2) before he may invoke the exceptions in Article IV. The Indian reply makes a similar point.

(d) Summation: Form of Article IV(1) and (2) as amended

Article IV(1)

Neither the carrier nor the ship shall be responsible for loss or damage from any cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier.

Article IV(2)

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

(1) That the claimant is the owner of the goods or is otherwise entitled to make the claim.

(2) The contract.

(3) That the loss or damage took place during the period for which carrier is responsible.

(4) The physical extent of the loss, or damage.

(5) The monetary value of the loss or damage.

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

ANNEX I

Questionnaire on Certain Matters regarding the Responsibility of Carriers for Loss or Damage to Cargo in the Context of Bills of Lading

Part I

1. Period during which the carrier is responsible for damage or loss of goods

Attention is directed to the provisions of the Brussels Convention of 1924 (the Hague Rules) which impose certain restrictions on clauses in bills of lading during "the period from the time when the goods are loaded on to the time they are discharged from the ship" (Art. 1(e)). The question has been raised as to the protection that should be afforded cargo owners with respect to loss or damage to the cargo during the two following periods: (i) the period after delivery by the shipper to the carrier (or to the carrier's agent or otherwise pursuant to the carrier's instructions) but before they have been "loaded on" the ship and (ii) the period after discharge of cargo from the ship but prior to delivery to the consignee.

a. In what circumstance under your country's legal rules is the carrier responsible for loss or damage before the goods have been "loaded on" the ship or after they have been "discharged from" the ship?

b. Are there any existing applicable legal rules in your country attributing responsibility to persons (such as port authorities) other than the carrier or his agent during the period after delivery by the shipper and before loading on ship, and during the period after discharge from ship and before delivery to the consignee? If so, please state provisions of such legislation and relevant case law.

c. If, according to existing applicable legislation, the carrier is responsible only for "the period from the time when the goods are loaded on to the time they are discharged from the ship" (Art. 1(e)), when according to such legislation and relevant case law are the goods considered to have been "loaded on" and when are the goods considered to have been "discharged"?

d. Do you consider the existing international legislation in this area satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for modification of such international legislation and the reasons therefor.

2. Jurisdiction clauses

a. Under legal rules (legislation and case law) applicable in your country, in what circumstances is effect given to "jurisdiction clauses", whereby jurisdiction over claims with respect to contracts of carriage of goods may only be brought before the courts of a particular country or before arbitration proceedings in a specific location, or whereby a specific system of law is chosen to govern the substantive aspects of the contract?

b. Do you consider the existing rules on "jurisdiction clauses" satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor.

3. Cargo carried on deck and related problems

Attention is directed to Art. 1(c) of the Hague Rules which provides as follows: "'Goods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried". Questions have been raised under this provision with respect to its applicability to containers and certain other types of cargo which are customarily carried on deck. Attention has also been directed to the above provision relating to "live animals".

a. Do existing legal rules in your country attributing responsibility to the carrier for loss or damage to the cargo contain special rules with respect to cargo which is stated as being carried on deck and which is so carried? If so, please indicate the nature of these rules. Do these rules apply to the carriage of containers on deck? Are live animals also the subject of special rules insofar as carrier's responsibility is concerned?

b. Do you consider the exclusion of deck cargo and live animals from the operation of the Hague Rules to be satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for modifications of such international legislation and the reasons therefor.

Part II

The Working Group on International Legislation on Shipping at its meeting during the fourth session requested the Secretary-General to prepare a report analyzing alternative approaches to the basic policy decisions that must be taken in order to implement the objectives set forth in para. 2 of the UNCTAD resolution and quoted in para. 2 of the Commission's resolution. Special reference was made to the objective of establishing a balanced allocation of risks between the cargo owner and the carrier.

To assist the Secretary-General in the preparation of the above report, it would be appreciated if you would suggest policy approaches implementing the objective mentioned above. It would be helpful if such suggestions could be illustrated by concrete proposals relevant, inter alia, to the exemptions set out in Article 4(2) of the Hague Rules providing that:

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

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

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

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

...".