THE MARITIME LAW ASSOCIATION OF AUSTRALIA

THE HAGUE RULES AND ASSOCIATED PROBLEMS

This is the topic chosen for the 1976 Annual Meeting final sessions to be held on the afternoon of May 29, 1976.

The subject is a vast one with many aspects and it would be fruitless to seek to canvass them all in one afternoon.

For this reason and also as an experimental variant to the format of the preceding sessions, the session will take the form of a "workshop discussion" lead by a panel, of matters concerning the Hague Rules ans associated problems which are of current interest.

The Victorian sub-committee charged with organising the session has prepared the attached papers in order to raise, and furnish background to, some matters which members at the meeting may find it of interest to discuss with the panel during the session.

The panel members will be Messrs. Salter, Birrell and Morgan, and Mr. O'Hare who has kindly consented to take the place of Mr. Walsh who regrets that he will be overseas.

It is intended that the panel members should address themselves to their respective papers only very shortly at the beginning of the session and that the balance of the afternoon should be directed to the workshop discussion.

Therefore, it would contribute significantly to the success of the session of members could read the papers prior to the meeting.

THE UNCITRAL REVISION OF THE HAGUE RULES

1. BACKGROUND

The UNCITRAL draft Convention on the Carriage of Goods by Sea was discussed at some length at the 1975 Annual Meeting.

UNCITRAL is the United Nations Commission on International Trade Law, an organ of the United Nations.

Although the draft Convention was prepared within UNCITRAL it was originated in UNCTAD.

UNCTAD is the United Nations Conference on Trade and Development. The underdeveloped and developing third world countries were chiefly responsible for the establishment of UNCTAD and they continue very much to dominate it.

In 1968, an UNCTAD Working Group on International Shipping was set up and undertook a revision of commercial and economic aspects of international legislation and practices relating to bills of lading "from the standpoint of their conformity with the needs of economic development in particular of the developing countries".

Following that review, UNCTAD, in 1971, called for a revision of the existing rules and practices concerning bills of lading, including the Hague Rules, and the task of preparing a new international convention for adoption under the auspices of the United Nations was referred, at UNCTAD's instance, to UNCITRAL with a rider from UNCTAD that the work undertaken by UNCITRAL should take account of the criticisms of the existing situation which were contained in the reports which had been prepared by UNCTAD and be aimed at establishing a more balanced allocation of risk between cargo owners and carriers.

Those criticisms related mainly to matters that the third world countries, which rely on other nations' shipping, regarded as prejudicial to their interests.

The preparation of the draft new Convention was carried out by an UNCITRAL Working Group, of which Australia was a member.

2. LATEST DEVELOPMENTS

Before considering whether to recommend adoption of the draft Convention prepared by its Working Group, UNCITRAL referred it back to UNCTAD and it was considered by the UNCTAD Working Group on International Shipping in January 1976.

The UNCTAD Working Group endorsed the draft Convention as being generally acceptable and noted only a few minor points which it suggested UNCITRAL should consider.

UNCITRAL also invited comments from member governments and international organisations, including CMI, and right at present is considering the draft Convention to finalise the text which it will recommend to the United Nations for adoption.

It appears likely that the draft prepared by the UNCITRAL Working Group will be recommended to the United Nations for adoption as a Convention, with few, if any, material changes to the existing text.

3. ARTICLES 5 AND 6 OF THE DRAFT CONVENTION

Under the draft Convention the basic rules governing liability of the carrier are contained in Articles 5 and 6. These are of fundamental concern in determining an overall attitude to the draft Convention. Article 5, in conjunction with the monetary unit of liability set under Article 6, will have significant economic consequences for shippers, carriers and insurance interests.

Attachment A is an extract from the report of the UNCITRAL draft Convention which the UNCTAD Secretariat submitted to the January 1976 meeting of the UNCTAD Working Group. This extract sets out the nature of the changes to the rules of carriers' liability which Article 5 involves and the case made for those changes.

At the UNCTAD Working Group meeting, the observer from CMI was specifically invited to make a statement. In line with the recommendations adopted by CMI at the XXXth International Conference in 1974, he argued that the carrier should be liable for errors by his servants in the management of the ship, but that the exemption of errors in navigation should be preserved. He noted that, for cargo insurers, losses due to free-of-particular average risks such as collision, stranding, fire and the resulting general average amounted to about 20% of all payments for losses, that therefore Article 5 would produce a considerable shift of risk, and that questions as to the reasonableness, according to abstract notions of equity, of the excuse of nautical error are irrelevant because any increased liability will be transformed directly into an additional cost factor to be borne by the shipper.

He contended that the proper principle was that risks for loss or damage should primarily be borne by cargo insurers and that the effect of raising the level of carriers' liability in the way being suggested would make the carrier very largely an insurer of the goods carried, with the ensuing effect that the shipper would lose control of the "risk costs" which would be included in the freight.

These views did not find favour with UNCTAD which endorsed Article 5 without material alteration and it appears that UNCITRAL will do the same thing.

However, a number of nations are known to support retention of the defence of navigational error and this issue will probably be the subject of further contention at any Diplomatic Conference which may be called for the purpose of adopting a Convention based on the UNCITRAL draft.

Putting aside the specific case of the defence of navigational error, the UNCITRAL Working Group which prepared the draft Convention reached the conclusions that -

(1) A rule of strict liability would be inappropriate and the Hague Rules principle of carriers' responsibility based on fault should be retained;

(2) Responsibility should, however, extend generally to the fault of the carrier's servants and agents as well as the carrier himself.

However, while Article 5 is said to give effect to these conclusions, it is suggested that in most instances its practical effect may approach that of a rule of absolute liability.

As stated in Attachment A, paragraph 51, the language of Article 5 is patterned on, though not quite the same as,

the corresponding provision of the Warsaw Convention (as amended).

The burden imposed upon the carrier under the Warsaw Convention provision has been judicially interpreted as follows :

1. In England: "(the carrier) is not to be liable if he proves that by his agents or servants he exercised all reasonable skill and care in taking all necessary measures to avoid causing damage by accident to the passenger or proves that it was impossible to take such measures. This seems to me to amount to a promise not to injure the passenger by avoidable accident, the onus being on the carrier to prove that the accident could not have been avoided by exercise of reasonable care." 1/

2. In U.S.A.: "(to prove) that it and its servants were free from all fault." 2/

The following comment has been made, by Ramberg, upon the difference between strict liability, with permitted exceptions, and fault liability, with no exceptions -

> "... When those favouring the principle of strict liability interpret the permitted exceptions generously in the carrier's favour and those favouring the principle of negligence demand the foresight and caution of 'supermen' before accepting the exculpation of the carrier and his servants, the practical difference between the two principles may be made to fade away." 3/

The writer believes that generally the experience of air carriers under the Warsaw Convention provision has tended to be the second kind described by Ramberg, and that the experience of sea carriers under Article 5 of the draft U.N. Convention would be likely to be similar.

If these suspicious should be well founded that result in itself might not be such a bad thing. 4/ However, the selection of the limit of liability to apply under Article 6 would become even more critical. For if the level of liability is fixed too high and carriers become effectively insurers of most goods for their full value the balanced allocation of risk which the Convention is supposed to produce may be found to be a very expensive unbalanced allocation of risk to the carrier.

4. DOCUMENTATION

The draft Convention provides thatin every case the shipper shall have the right to demand a bill of lading: Articles 14.1 and 15.2

1/ Grein v. Imperial Airways Ltd (1937) 1 KB 50 at 69 per Greer LJ

2/ Pierre v. Eastern Airlines (1957) U.S.C. Ar R 431.

3/ The Law of Carriage of Goods - Attempts of Harmonisation (1973) at 217.

4/ The number of disputed claims (and the delays and litigation costs attendant upon settlement of such claims) could be significantly reduced.

If a bill of lading is not required by the shipper, a non-negotiable receipt or other document which is not a bill of lading may be used: Article 18.

However, the provisions of the Convention governing the liability of the carrier will apply irrespective of the documentation used and, in particular, regardless of whether or not the carriage is covered by a bill of lading.

A question which the Australian Government will have to consider, in the event of the Convention being adopted in relation to international carriage is whether the mandatory liability regime which it imposes is also appropriate for application to the Australian coastal trade bearing in mind the great differences between the practical, legal and commercial circumstances and desiderata which operate in relation to trade in and movement of goods within Australia and those which operate in relation to international trade.

It is to be noted also that the draft Convention does not require the contracting carrier to be identified in the bill of lading.

All it requires is that the bill set forth "the signature of the carrier or a person acting on his behalf": Article 15.1(j).

Consequently, it appears that the Convention will not solve the problem, which cargo interests frequently encounter, of identifying the carrier to be sued, where a bill contains a demise clause, or the only identification of the carrier appearing on the bill is the appellation under which a service is operated by a group or collection of shipowners and/or charterers. Frequently, in such cases, the correct corporate name in which to sue the carrier is difficult to ascertain, especially where one is required to institute proceedings at short notice in order to prevent the claim from becoming time barred.

Unfortunately, the draft Convention will be likely to compound these difficulties because whereas at present the general rule, except in the case of a demise charter, is that the signature of the master binds the owner of the vessel, Article 14.2 provides that a bill of lading signed by the master of the carrying vessel will be deemed to have been signed on behalf of the contracting carrier.

THE PROPOSED UNITED NATIONS DRAFT CONVENTION ON INTERNATIONAL MULTIMODAL TRANSPORT

In 1973 UNCTAD established an International Preparatory Group to elaborate a preliminary draft of a Convention on International Multimodal Transport.

To date the Group has commissioned and received several studies upon relevant aspects of the subject, and has itself held three working sessions, the most recent one, in February of this year, unfortunately having been prematurely ended by a strike in the Secretariat.

It is understood, however, that the indications at the February session, before it had to be discontinued, were that agreement will be reached upon basic principles and guidelines for a Convention, and that a draft Convention in accordance with these principles and guidelines will then be produced, though obviously this work will take several years to complete.

1. THE NEED FOR A MULTIMODAL CONVENTION

There is nothing new about multimodal transport per se. Traditionally, however, the contractual arrangements under which such transport was effected generally were fragmented, and consisted of a series of separate contracts between the shipper and each modal carrier.

Perhaps most commonly the arrangements took the form of a through bill of lading whereby the first carrier contracted to perform the first stage of the carriage and then acted as the shipper's forwarding agent for the purpose of arranging a contract between the shipper and an on-carrier for the second stage.

What is relatively new is the emergence, as possibly the predominant method of effecting multimodal transport, of the combined transport service performed under one contract between the shipper and the service operator, who accepts responsibility for the complete transit.

The desirability of more uniform treatment of the problems associated with combined multimodal transport than presently results under national laws and the existing unimodal conventions, and of simplifying and clarifying the rules which are to apply, has been recognised for some time.

Thus, the Baltic and International Maritime Conference (BIMCO) has produced the Combiconbill combined transport bill of lading, which is a standardised document intended by BIMCO to serve "as the basic document to be used by, or at least as a guide to, shipping companies, as well as others, interested in acting as combined transport operators".

The International Federation of Forwarding Agents Associations (FIATA) has attempted to unify the various forwarders house bills of lading by the creation of a uniform FIATA Combined Transport Bill of Lading, for the use of its members.

As one of the subsequent papers indicates, the International Chamber of Commerce has drafted uniform rules for a combined transport document ("the ICC Rules").

The CMI itself sponsored with Unidroit a draft Convention ("the TCM Convention") on international combined transport which was adopted in 1971 by a joint meeting of the Inter-

Governmental Maritime Consultative Organisation (IMCO) and the United Nations Economic Commission for Europe (ECE).

It is probable that a diplomatic conference would have been convened to consider adoption of the TCM Convention if UNCTAD Had not stepped in and decided to produce a draft Convention of its own.

While the need for greater uniformity and certainty is generally recognised, opinions differ as to whether a Convention is appropriate.

One of the reports received by UNCTAD states :

> "An important question which for the present must remain unanswered is whether wide scale adoption of the ICC rules would obviate the need for a Convention. Commercial judgment suggests that for the foreseeable future the answer is in the affirmative. Only the prospects of a simple uniform liability system which is commercially viable would justify a major revision of existing laws and conventions applying to unimodal transport to provide an overriding convention for multimodal transport". 1/

The Preparatory Group set up by UNCTAD sees its function in preparing a draft Convention as being to aim at -

> "Evolving a suitable system for liability and cargo insurance covers under international multimodal transport operations based on a single contract which will not contribute to pushing up the cost to shippers/users and which at the same time will provide the requisite degree of safety and not adversely affect the insurance industry in developing countries". 2/

Australia has so far supported the work by UNCTAD towards a United Nations Convention.

Its position in this regard has been stated to be "based on the underlying assumption that uniformity serves efficiency and that there should be increased certainty and predictability of liability, uniform documentation with acceptable rules regarding negotiability, and adequate protection to the cargo interest at the least cost, combined with expedited settlements and recovery/" 3/

2. BASIC PRINCIPLES AND GUIDELINES FOR THE UN DRAFT CONVENTION

As already stated, the Preparatory Group is still working out the basic principles and guidelines on which it should attempt to draft a Convention.

However, it seems clear that it will be accepted that the draft Convention should be confined to multimodal operations where the operator accepts responsibility as principal (and

---

1/ Liability Aspects of International Multimodal Transport, a Providore's Viewpoint, by K.W. Moore: see Annex to UNCTAD Secretariat Study on Insurance and Liability Problems in International Multimodal Transport (TD/B/AC.15/7/add 3).

2/ IPG request to UNCTAD Secretariat for additional studies: see Annex 1 to the IPG Report on its Second Session (TD/B/533 -TD/B/AC.15/11).

3/ Annex B to letter of 25.8.75, Attorney-General's Department to Maritime Law Association of Australia.

not as an agent) to deliver the goods to the consignee and he bears primary responsibility for the full transit and for compensating the shipper, in accordance with the terms of the contract, in the event of loss, damage or delay, whether arising while the goods are in his charge or while they are in the custody of any of the unimodal carriers or other relevant parties by whom any stage or service involved in the transit is actually performed.

Where there is no multimodal operator interposed between the shipper, on the one hand, and the various unimodal carriers each contract for each stage of the through transit the Convention will not apply and will still be governed by the applicable unimodal Convention or national laws.

It appears also that there will be agreement that the Convention should deal only with areas of private law, particularly liability and documentation, and will not seek to enter public law areas such as the control of multimodal transport operators, or conditions for participation in multimodal transport activities.

There also appears to be little doubt that the system of liability adopted will be one of limited liability of the multimodal transport operator.

What is more uncertain is whether a network system or a uniform system will be used.

Essentially, a uniform system is one under which the risks for which the multimodal transport operator is liable, and the level of his liability, to the shipper/consignee for loss is the same regardless of the point at which the loss occurs.

In contrast, a network system is one under which the risks for which the multimodal operator is liable, and the level of his liability in relation to each stage of the transit, correspond to the liability of the unimodal operator of that stage.

The problem which arises under a network system where it cannot be proved where or how the loss or damage occurred, can be overcome by providing a minimum level of uniform liability which is to apply in those circumstances.

Most of the documentation presently in use in relation to multimodal transport operations involves a network system of liability of one or other of the following kinds :

1. The multimodal operator accepts a low uniform level of liability in all cases, but where the circumstances of the loss can be proved the shipper/consignee is entitled to have liability determined instead in accordance with the Convention or international rules of law governing unimodal transport of the kind during which the loss arose;

2. The multimodal operator accepts liability in relation to each stage of the transit, in accordance with the relevant Convention or international rules of law governing unimodal transport of that kind, but also accepts a low uniform level of liability where it cannot be proved when or how the loss occurred.

It seems more likely than not that the system of liability chosen from the draft Convention will be one or other of these forms of modified network liability.

If this proves to be correct, it will be necessary then to determine the level of liability to apply where the circumstances of the loss cannot be proven.

Many multimodal bills of lading in use at the present time provide that in those circumstances the level of liability will be determined under the Hague Rules as if the loss had occurred at sea.

It seems probable though that under any draft Convention the level of liability fixed in such circumstances would be at least that stipulated in the HAGUE-Visby Rules (£840 per ton).

Chapter III

PART II: LIABILITY OF THE CARRIER

Article 5: General rules on liability

37. This article, containing the basic general rules on liability, being the "heart" of any convention on the liability of carriers for loss or damage to goods, is more directly related to questions of underlying policy and cost factors than the other articles. As such it calls for more detailed comment.[25]

38. The Hague Rules contain no positive rule of liability for loss or damage to cargo. Liability is instead treated negatively. If through the fault or negligence of the carrier, or that of any of his employees,[26] cargo is lost or damaged, the carrier is liable, subject to certain exceptions.[27] Seventeen causes and events which would exculpate the carrier from liability are enumerated as exceptions. Further, the only positive obligations placed upon the carrier are that: he is bound 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; make the holds ... fit and safe for [the] reception, carriage and preservation [of the goods], and (c) [subject to the exceptions] to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

25/ Particularly since the structure and approach of the article is completely different from comparable provisions in the Hague Rules, which are backed up by half a century of doctrine, jurisprudence, case-law and application of international scope and interest.

26/ See "Responsibility of ocean carriers for cargo: Bills of lading; Report by the Secretary-General of the United Nations" (A/CN.9/63 Add.1), para. 157 (also contained in United Nations Commission on International Trade Yearbook, Volume III (1972) United Nations publication, Sales No. E.73.V.6, page 263 et seq.). In some situations, as for example, in the case of "Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or the management of the ship" the carrier has no liability, even when its fault causes loss or damage to cargo (article 42 (a)). In the case of fire, the carrier is not responsible for loss or damage resulting from fire, unless caused by his actual fault.

27/ See article 4(2) of the Hague Rules.

39. The Hague Rules also do not provide any specific liability for delay in the carriage and delivery of the goods, as do the other unimodal transport conventions. Liability for delay is, however, implied in some jurisdictions. The burden of proof is also not very clear, and many legitimate claims are dissipated in consequence.[28/]

40. The nature of the provisions on liability, including burden of proof, in the Hague Rules, was heavily criticized by most members of the UNCTAD and UNCITRAL Working Groups and has increasingly borne the brunt of severe attack in much subsequent public commentary. The principal grounds of complaint against the Rules have centred upon the greater relative prominence they give to the exceptions from liability accorded to the carrier, and their patent lack of emphasis on, and the qualified nature of, his more positive duties in the care and security of the goods entrusted to his care. Ambiguities connected with burden of proof and the restricted nature of the carrier's duty to provide a seaworthy ship, and in particular the exceptions in respect of (a) errors or faults in the navigation and management of the ship, (b) perils of the sea, (c) fire, (d) latent defects not discoverable by due diligence, (e) "any reasonable deviation", topped off by (f) the final "catch-all" exception,[29/] have been singled out for specific attack particularly since comparable exceptions do not exist in international conventions covering other modes of transport.

41. The policy considerations considered relevant by the Secretary-General of the United Nations in his report to the UNCITRAL Working Group on the re-examination of the Hague Rules, with particular reference to the basic rules on liability, were as follows:

(a) Promoting a desirable standard of care;

(b) The relationship between allocation of risks and the cost of insurance;

(c) The cost of administering claims: "Friction";

(d) Effects of increased carrier liability.

28/ "In countries using the Hague Rules, the burden of proof in some situations is placed on the carrier and sometimes on the shipper. Exactly how the burden is allocated is often a matter of some uncertainty and may vary among countries," ibid. para. 167. 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 are often decisive in the implementation of rules on liability and warrant special attention.

29/ Exception (q) in article 4(2) of the Hague Rules.

42. The report further stated that in considering the appropriate approach to risk allocation between carrier and cargo interests, attention might be given to the following alternative approaches:[30]

(a) Strict liability on the carrier;

(b) Simplified standards for liability and burden of proof based on other international conventions governing carriage of cargo;

(c) Modification of specific substantive provisions of the Hague Rules;

(d) Modification and simplification of the rules on burden of proof.

43. The Working Group considered these alternative approaches and most of its members at its third session took the following view:[31]

(a) "The principle of the Hague Rules that the responsibility of the carrier should be based on fault was to be retained;[32]

(b) The above principle should be simplified and strengthened by, for example, the removal or modification of the exceptions from liability of the carrier, or fault of his employees or servants;

(c) Simplification and unification of the rules on burden of proof."

44. A Drafting Party constituted by the Working Group then elaborated a basic text on liability which was supported "in substance" by the Working Group at its fourth (special) session.[33]

45. The Group in its redraft dropped the entire "catalogue" of exceptions as such, and made the carrier liable "for loss, damage or expense resulting from loss of, or damage to, the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences". In the "case of fire" the carrier is made "liable, provided the claimant proves that the fire arose due to fault or negligence" on his part or that

---

30/ Ibid. paras. 231-269.

31/ See report of the UNCITRAL Working Group on the work of its third session, (A/CN.9/63), para. 70. Many representatives had reservations or doubts concerning some of these principles; others felt further information was needed pending a final decision; ibid. para. 71.

32/ The rule has also been described as being based on "presumption of fault"; see the report of the UNCITRAL Working Group on the work of its fourth (Special) Session (A/CN.9/74), para. 30.

33/ Ibid., para. 36.

of his servants or agents. A reservation is also made with "respect to live animals", the carrier being relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage." Further, while the exceptions in the Hague Rules of "any reasonable deviation" no longer applies, the carrier will still not be liable for loss, damage or delay in delivery "resulting from measures to save life and from reasonable measures to save property at sea".

46. The basic rule of liability thus arrived at in article 5 represents a very delicate balance of compromise between two opposing views. On the one hand is the view that ocean carriers deserve special consideration in view of the high risks involved in ocean carriage. On the other hand is the view that such carriers should not continue to enjoy their historical privileges, particularly in the light of present-day improvements in ocean technology and communications.

47. The compromise in essence entails the removal of the more notorious "exceptions" from liability, in "exchange" for a rule of general liability subject to a standard of reasonable care; the excision of the positive duties placed on the carrier: (a) to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods ...", and (b) to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage.

48. Further, the burden of proof has been placed unequivocally upon the carrier except in the case of fire, where it rests upon the claimant. Arguments which were raised on behalf of cargo interests in the Working Group that the carrier's positive duties as set out under (a) and (b) in the previous paragraph should be restated and that his duty to provide a seaworthy ship was not to be restricted to doing so only at the beginning of the voyage but should continue throughout the voyage, were met, however, by counter arguments that these two separate sets of duties would be subsumed under the general liability rule and would not, for this reason, require restatement.34/

49. The compromise must also be looked at in the context of the amalgam of "economics and morality" which goes into the construction of rules on carrier liability. It needs to be noted with particular reference to the excision of the exceptions in respect of "fault in navigation" and "fire" that the Working Group

---

34/ See ibid. para. 30, where the views of the Drafting Party are endorsed that the general rule on liability in the draft Convention "based on presumption of fault" made it unnecessary to list the most important obligations of the carrier in article 3(1) and (2) of the Hague Rules since the carrier, under the general rule drafted by the Drafting Party would have to perform all his obligations under the contract of carriage with care." In this connexion see para. 66 below.

reached its decision after hearing the views of the International Union of Marine Insurers (IUMI) and the Comité Maritime International (CMI), which stressed that the two exceptions should be retained on economic grounds as otherwise insurance charges would escalate[35] with consequential freight rate increases.

50. As was to be expected in the face of lack of conclusive quantitative data, the question cannot be conclusively resolved ex ante as to whether and to what extent increased carrier liability would increase the over-all costs of liability, which some representatives in the UNCITRAL Working Group anticipated and others denied. The Report of the Working Group states in that connexion: "It was recalled that similar fears had been expressed in connexion with increased responsibility of air carriers, but that these fears did not materialize ... techniques of distributing risks through insurance has been thoroughly developed and that the insurance industry was competitive. Consequently, the ocean carriers and the insurers of the carriers and cargo would be able to cope with changes in the rules governing carrier liability."[36]

51. Article 5 is patterned broadly, but not exactly, on the comparable basic rule on the liability of the air carrier in the Convention for the Unification of Certain Rules relating to International Carriage by Air of 1929, as amended by the Hague Protocol 1955 (Warsaw Convention),[37] (article 18(1)), which states that the carrier is liable if the occurrence which caused damage took place during the transportation by air, and then goes on to state that he shall not be liable if he proved that he or his agents have taken all necessary measures to avoid the damage or (and this additional rule does not appear in the draft Convention) that it was impossible for him or them to take such measures (article 20(1)).

35/ The representative of a major maritime power informed the UNCITRAL Working Group that according to a "careful" study carried out on the ocean trades of his country it was estimated that the net effect (i.e. taking into consideration both freight and insurance aspects) would mean an increase of some 0.5 to 1 per cent in freight rates; see report of the UNCITRAL Working Group on the work of its fourth (special) session, (A/CN.9/74), para. 20, foot-note 14.

36/ Report of the UNCITRAL Working Group on the work of its fourth (special) session, (A/CN.9/74), para. 22.

37/ The Protocol done at Guatemala City in 1971 alters the language of articles 18 and 20 somewhat, but not their substance.