THE CMI CONFERENCE IN SINGAPORE IN FEBRUARY 2001 – A GENERAL OVERVIEW

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1. Introduction

The Comité Maritime International (CMI) was formally established in 1897 in the Belgian port city of Antwerp, where the first International Conference of the national maritime law associations of Belgium, Denmark , France, Germany, Italy, Netherlands, Norway and the United Kingdom adopted a constitution which by Article 1 provided:

As its object the Comité Maritime International proposes:

(a) to promote the creation of national associations for the unification of maritime law;

(b) to maintain regular contact and co-ordinated action between the Associations.

In the 103 years which have passed since then, the power and influence of CMI has ebbed and flowed, but, is presently on the increase. Currently the membership of CMI comprises in excess of 50 national maritime law associations. The overriding objective of the organisation, however, remains much the same, with Article 1 of the 1992 constitution providing as follows:

The Comité International is a non-governmental international organisation, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects.

To this end it shall promote the establishment of national associations of maritime law and shall co-operate with other international organisations.

2. CMI Conferences

The CMI Conference, while certainly an occasion to enjoy serious social and business networking in an atmosphere of good fellowship, is not a conference such as the MLAANZ Conference, where papers are given and discussions take place without any necessary conclusions being reached. Rather, a CMI international conference resembles a parliament, where legislation is introduced and ultimately voted upon, after due process. In the context of CMI, we are of course not dealing with legislation, but rather with proposed international conventions, model laws, and the like.

International conferences of CMI are held only every 3 to 4 years, and the Singapore Conference, scheduled for 11-17 February 2001, will represent only the 27th such event.

3. The Road to Singapore

Having been privileged to have been a member of the Executive Council of CMI for some 9 years until my retirement earlier this year, I regard myself as having been extremely fortunate in having been privy to the development of the work programme of CMI. I have also been able, from close quarters, to observe the manner in which CMI, as an organisation, has been able to re-invent itself in the face of rapid change.

In many ways, the halcyon days of CMI are behind us. When one considers the central role played by CMI in the development of such features of maritime law as the Hague Rules, the Salvage Convention, and the Limitation of Liability Convention, one can observe that over the last years of the first century of its existence, CMI's power and influence appeared to be eroding. During the 90s, it became apparent that unless firm and positive action was taken, CMI might gradually fade out of existence.

At the Centenary Conference of CMI, held, appropriately in Antwerp in 1997, the opportunity was taken to consider the future of CMI. At the same time, Patrick Griggs, a highly respected former senior partner of a leading London legal firm, was elected President, with a clear mandate to move CMI forward, and to ensure that the organisation remained at the centre of international focus in terms of any maritime law reform.

One reason, in my view, for the apparent decline in influence of CMI during the last 20 years of the 20th Century has been the somewhat unproductive and inconclusive debate between supporters of the Hague/Hague Visby Rules on the one hand and the Hamburg Rules on the other. CMI, often seen as a conservative Euro-centric organisation dominated by shipowners, P&I Clubs, and their lawyers, has been unable to break the impasse. However, once the organisation collectively pressed the "refresh" button in 1997, a potential new way forward was observed and grasped with alacrity. It is this new way forward that forms the corner-stone of the programme for the CMI Conference. I quote from the draft conference programme:

There is wide spread demand in shipping circles for a new liability regime to reflect modern commercial practice and replace the Hague, Hague/Visby and Hamburg Rules. In a joint exercise with UNCITRAL, the CMI is working on a new instrument to cover numerous aspects of marine transportation, not previously covered by International Convention, to which would be added a new and appropriate set of rules governing liability and compensation for loss or damage to cargo. Delegates will be invited to consider the issues raised and the preliminary drafts of an instrument.

However, that will not be the only subject for discussion in Singapore. Other programme topics are issues of marine insurance, general average, a piracy model law, and the implementation and interpretation of International Conventions.

While, quite properly, MLAANZ members will be asked at this conference to consider what position MLAANZ should adopt in connection with the topics to be discussed in Singapore, it is appropriate that I draw to your attention a couple of events, one of which will have taken place by the time we meet and other which is scheduled for September.

On 6 July 2000, a transport law colloquium was held in New York under the auspices of UNCITRAL and CMI to debate issues of transport law in anticipation of the Singapore conference. More substantially, there is to be a colloquium held in Toledo, Spain in September organised by the Spanish Maritime Law Association in conjunction with CMI at which further discussion and debate will take place on each of the proposed Singapore topics except for the piracy model law.

Copies of the following documents are attached for consideration and discussion:

Issues of Transport Law

A1	Agenda paper for the second meeting of the International Sub-Committee
A2	Agenda paper for the third meeting of the International Sub-Committee

General Average

B1	International Union of Marine Insurance (IUMI) report on general average (1999)
B2	Questionnaire submitted to national maritime law associations

Marine Insurance

C	Questionnaire submitted to national maritime law associations

Piracy

D1	Draft report of the third session of the Joint International Working Group
D2	Revised table of responses of the CMI national member associations to the questionnaire concerning the law of piracy.

Comité Maritime International

International Sub-Committee on Issues of Transport law

Agenda Paper for the Second Meeting
on 6th and 7th April 2000

Introduction

As its first meeting on 27th/28th January 2000, the International Sub-Committee ("ISC") debated the six topics which the Working Group believed arose from the responses to the Questionnaire and which were set out in annex 2 to the Chairman's Introductory Paper dated 29th December 1999. The ISC is required by its terms of reference to prepare an outline of an instrument designed to bring about uniformity in transport law. The purpose of the debate at the first meeting was to attempt to identify issues arising out of the six topics which such an instrument could resolve. The issues were so identified and in some cases views emerged which appeared to have considerable support. At the conclusion of the first meeting it was agreed that the Working Group would prepare a paper in which such issues were set out and possible solutions put forward, in some cases on an alternative basis, for discussion at the ISC's second meeting.

This agenda paper attempts to do this. Each member of the Working Group who led a discussion on the respective topics at the first meeting prepared the first draft of the relevant section of this paper. It is proposed that he will lead the discussion at the second meeting. Topic 4 (obligations of the shipper, intermediate holder and consignee), which was debated at the first meeting, no longer appears as a separate section; the issues which arise under this topic have been included in the other sections. It is proposed that this paper forms the agenda for the second meeting.

At this stage the Working Group considers it premature to suggest the precise language that an instrument might adopt. The present paper either puts forward "propositions" that generally describe what the law might be, or proposes questions for resolution and suggests some solutions. Where provisions are set out at this stage they are purely for the purposes of illustration. Each proposition or question is designed to isolate a particular aspect of the law for discussion purposes. If the ISC is able to agree on solutions or propositions in general terms, it should then be possible to proceed to drafting an outline of an instrument to give effect to such solutions or propositions.

The Working Group proposes that the third meeting of the ISC takes place in New York on 7th and 8th July 2000, following the UNCITRAL/CMI Colloquium. In addition to considering an outline of such an instrument at this meeting (assuming that we can make the necessary progress in April), the Working Group hopes that it will be possible to move to the third limb of the ISC's terms of reference and to begin considering issues of liability. To this end the Working Group envisages preparing a further agenda paper dealing with the liability regime, which would be circulated towards the end of May.

As part of the preparation for the Singapore Conference "Issues of Transport Law" will be the subject of one of the sessions at the CMI/Spanish Maritime Law Association Colloquium on 18th September 2000. The Working Group nevertheless considers that it will probably be necessary to have a further (fourth) meeting of the ISC after this Colloquium and the dates of 16th and 17th October have been suggested.

1 DESCRIPTION OF THE GOODS IN THE TRANSPORT DOCUMENT

1.1 After the carrier receives the goods, the carrier must issue a transport document if the shipper requests one, but need not issue a transport document if the shipper does not request one.

This first principle corresponds to existing law and practice in most countries, and to the current international regimes (including the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules).

1.2 [Alternative A] The shipper is entitled to a negotiable transport document [*e.g.*, a negotiable bill of lading], but the carrier may instead issue a non-negotiable transport document if that is acceptable to the shipper.

[Alternative B] The shipper and the carrier may agree on the type of transport document (*e.g.*, negotiable or non-negotiable) that the carrier will issue. This agreement may be express (*e.g.* in the booking note) or implied (*e.g.* by the custom of the trade).

This second principle is given in two alternatives for the International Sub-Committee's consideration. Currently, a shipper is generally entitled to a negotiable bill of lading, but in some trades (*e.g.* short ferry voyages) shippers never ask for a negotiable bill of lading and a negotiable document would serve no purpose. Alternative A follows existing law. Alternative B would permit a carrier to offer a service in which negotiable documents were simply not available even if the shipper requested one.

In any event, it is important to recognise that electronic documents may some day supersede bills of lading entirely. Thus it seems preferable to confine the shipper's entitlement to a "negotiable transport document" such as a negotiable bill of lading. This leaves open the possibility that a negotiable transport document other than a bill of lading (*e.g.*, an electronic equivalent) may some day be as fully acceptable in commerce as the current negotiable bill of lading.

Although alternatives A and B are inconsistent, the International Sub-Committee may wish to combine them in some way. For example, alternative A may be accepted as the general rule but alternative B may be recognised as an exception in particular trades. Or alternative B may be accepted as the general rule but alternative

A may be recognised as the default rule in the absence of an express or implied agreement.

1.3 **If the carrier issues a transport document, it must describe the apparent order and condition of the goods at the time the carrier receives them from the shipper.**

This principle confirms the understanding that is clearly expressed in the travaux préparatoires of the Hague Rules and carried forward in subsequent international conventions. *See, e.g.*, Hamburg Rules arts. 15(1)(b), 16(1)-(2). The courts in some countries have departed from this principle.

1.4 **If the carrier issues a transport document, it must (subject to principles 1.6 and 1.8, *infra*) show the leading marks necessary for identification of the goods as furnished in writing by the shipper [before the carrier receives the goods]. The marks must be stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which the goods are contained, in a manner that would ordinarily remain legible until the end of the voyage.**

The requirement that the transport document must generally show the leading marks is widely recognized in most countries and in the current international regimes. The brackets do suggest one issue for discussion: Must the shipper furnish the information in writing before the carrier receives the goods, or is it sufficient to furnish the information before the carrier issues the transport document?

1.5 **If the carrier issues a transport document, it must (subject to principles 1.6 and 1.8, *infra*) show the number of packages, the number of pieces, the quantity, [and/or] the weight as furnished in writing by the shipper [before the carrier receives the goods].**

The requirement that the transport document must generally show the number of packages or pieces, and/or the quantity or weight, is widely recognized in most countries and in the current international regimes. Two issues, however, are indicated by the bracketed material: First, must the transport document include all of the information furnished by the shipper (*e.g.* the number of pieces and the weight), or is it sufficient to include at least one of the items on the list (*e.g.* the number of pieces or the weight)? Second, must the shipper furnish the information in writing before the carrier receives the goods, or is it sufficient to furnish the information before the carrier issues the transport document?

1.6 **Notwithstanding principles 1.4 and 1.5, *supra*, the carrier need not show the leading marks, or the number of packages or pieces, or the quantity or weight of the cargo, on the transport document if the carrier has no reasonable means of checking the information furnished by the shipper. A "reasonable means of checking" must be not only physically practical but also commercially reasonable. Opening a sealed container or unloading a container to inspect**

the contents, for example, would not be commercially reasonable, even if it might be physically practical in some circumstances.

The exception expressed in this principle carries forward the proviso to article 3(3) of the Hague Rules and article 16(1) of the Hamburg Rules, with some clarification as to the meaning of "reasonable means of checking."

As stated here, this principle eliminates the Hague Rules and Hamburg Rules language excusing the carrier from including the otherwise required information when there are reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods. The consensus of the International Sub-Committee at its first meeting appeared to be that when the carrier had reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods, the carrier was obligated to check the information if it had a reasonable means of doing so. Thus the carrier would be excused from including the otherwise required information only when there is no reasonable means of checking it. The reasonable suspicion exception is accordingly redundant.

1.7 **A transport document is prima facie evidence of the carrier's receipt of the goods as described in the transport document except as provided in principle 1.9, *infra*. A [negotiable] transport document is conclusive evidence of the carrier's receipt of the goods as described in the transport document, except as provided in principle 1.9, *infra*, when the transport document has been transferred to a third party acting in good faith [or when a third party acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the transport document].**

The first sentence of this principle simply confirms the widely recognized rule that, as a general matter, a transport document is prima facie evidence of the carrier's receipt of the goods as described in the transport document. The exception in principle 1.9, which is elaborated in the following principles, reduces the scope of the general rule.

The second sentence recognizes that, in order to protect innocent third parties who rely on the descriptions in transport documents, in some circumstances a transport document is not simply prima facie evidence but conclusive evidence. The bracketed material raises two issues: First, must a transport document be negotiable to constitute conclusive evidence, or may a non-negotiable transport document also constitute conclusive evidence in some cases? Second, to benefit from the conclusive evidence must the third party be in possession of the transport document (*e.g.*, as a holder of a bill of lading), or is it sufficient that the third party relied on the description of the goods in the transport document (*e.g.*, by releasing payment for the goods after seeing a faxed copy of the transport document)? The meaning of "third party" also raises important issues. For example, is the buyer under an FOB contract a "third party" who can treat the description of the goods in the transport document as conclusive evidence even though the FOB seller may be treated as the FOB buyer's agent when entering into the contract of carriage?

1.8 **If the carrier issues a transport document that includes information that the carrier can show that it could have omitted under principle 1.6, *supra* (because the carrier can show that it had no reasonable means of checking the information furnished by the shipper), then the carrier may — instead of omitting the information entirely — qualify the information with a clause such as "said to contain" or "shipper's weight and count," as appropriate.**

Although current law (restated in principle 1.6) generally permits the carrier to protect itself by omitting from the transport document a description of the goods that it is unable to verify, this protection is essentially meaningless in practice. Even if the carrier is unable to verify the description, the typical shipper still requires a transport document describing the goods in order to receive payment under the sales contract. Commercial pressures therefore deny the carrier the one form of protection that is clearly recognized under current law. Qualifying clauses represent the carrier's attempt to regain its protection. This principle and the ones that follow address the situations in which the carrier may succeed in this effort.

The qualifying clauses "said to contain" and "shipper's weight and count" are given as examples of the types of clauses that a carrier might wish to use. Other qualifying clauses may also be effective, depending on the particular needs of the case.

1.9 **If a qualifying clause described in principle 1.8, *supra*, is "effective," then the transport document will not constitute prima facie or conclusive evidence under principle 1.7, *supra*, except to the extent that the description of the goods is not limited by the clause.**

Principle 1.9 simply describes the effect of a qualifying clause when it is "effective." (Subsequent principles address when a qualifying clause is effective.) It is worth noting that a qualifying clause does not necessarily defeat the prima facie or conclusive evidence of the description of the goods in full. A qualifying clause such as "shipper's weight," for example, would not affect the evidentiary value of a description of the goods to the extent that it listed the number of packages in the shipment or described the leading marks.

1.10 **For non-containerized goods, a qualifying clause is effective according to its terms to the extent that the carrier is permitted to include the clause in the transport document under principle 1.8, *supra*.**

There are sharp distinctions between commercial expectations with respect to containerized and non-containerized goods. Principle 1.10 addresses only non-containerized goods. Whenever the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it is entitled to omit the leading marks, the number of packages or pieces, and the quantity or weight of the cargo, as appropriate. In the same circumstances, the carrier may instead include an appropriate qualifying clause and the clause will be "effective."

1.11 **For containerized goods, a qualifying clause is effective according to its terms (subject to principles 1.12 and 1.13, *infra*) to the extent that the carrier (a) is permitted to include the clause in the transport document under principle 1.8, *supra*, and (b) delivers the container intact and undamaged with the seal intact and undamaged.**

For containerized goods, the carrier will often not be in a position to verify any of the information furnished by the shipper, but this is not always the case. To take the most obvious example, the shipper may have delivered break-bulk cargo to the carrier and the carrier may have stuffed the container. Some containers are not fully enclosed (*e.g.*, "flat rack" and "rag top" containers), and the carrier has at least some ability to verify the contents of such containers. Indeed, sometimes the carrier will have a representative present when a container is stuffed, even though the shipper ultimately delivers a sealed container for shipment. Thus the carrier must show that it had no reasonable means of checking the information furnished by the shipper before it can rely on a qualifying clause — even for containerized goods. (It is important to keep in mind, however, that principle 1.6 clarifies the meaning of "reasonable means of checking.")

The carrier's classic rationale for relying on a qualifying clause and escaping liability in a containerized goods case is that the carrier delivered to the consignee exactly what it received from the shipper: a sealed container (the contents of which could not be verified). As soon as the carrier delivers something different (*e.g.*, a damaged container or a container that has been opened during the voyage), the equities shift. At this point it is clear that the carrier has done at least something wrong, and the consignee's entitlement to rely on the description of the goods in the transport document becomes much stronger. Requirement (b) of this principle recognizes this shift in the equities.

1.12 **Notwithstanding principle 1.11, *supra*, a qualifying clause with respect to the weight of goods shipped in a container, or the weight of a container and its contents, will not be effective unless it states explicitly that the carrier has not weighed the container. A qualifying clause that states explicitly that the carrier has not weighed the container will be effective (subject to principle 1.13, *infra*) to the extent that (a) the clause is accurate, and (b) the carrier delivers the container intact and undamaged with the seal intact and undamaged.**

Clauses regarding the weight of containerized goods create special problems. In some ports, facilities for weighing loaded containers simply do not exist. In such cases, it is an easy matter for the carrier to prove that it had no reasonable means of checking the weight information furnished by the shipper. But even in ports where weighing facilities exist, and could be used, it is often customary to load containers without weighing them. Sometimes this is because the time spent weighing containers would delay the ship's departure (particularly when the shipper delivers the container to the carrier shortly before sailing). Often it is because the weight is of no commercial importance, and the time and expense of weighing a container is

unjustified in the absence of any commercial benefit. In some cases, however, the weight is of commercial importance, and the consignee should be permitted to rely on the statement of weight in the transport document unless it is clear that the carrier has in fact not weighed the container.

In view of these special problems with clauses regarding the weight of containerized goods, principles 1.12 and 1.13 specifically address the issue in unique fashion. Principle 1.12 requires a clear statement that the carrier has in fact not weighed the container. The carrier can rely on this statement only if it is true (for obvious reasons) and if the container is delivered intact and undamaged with the seal intact and undamaged (for the same reason as was explained with respect to requirement (b) of principle 1.11).

1.13 **Notwithstanding principles 1.8 and 1.12, *supra*, the carrier may not include a qualifying clause stating that the carrier has not weighed the container if the shipper and the carrier agreed in writing prior to the shipment that the container would be weighed and the weight would be recorded on the transport document. In the absence of such a written agreement, the carrier may include such a qualifying clause without regard to whether the carrier had a reasonable means of weighing the container.**

Principle 1.13 recognizes that in some cases the container's weight is of commercial importance, and that in such cases the shipper may legitimately insist on having a weight listed in the transport document without a qualifying clause. Under principle 1.13, a shipper may protect this legitimate interest with an explicit agreement prior to shipment (*e.g.*, in the booking note). In the absence of such a prior agreement, however, the carrier may assume that the container's weight is of no commercial importance. The carrier may then load the container without weighing it, any weight listed on the transport document may be qualified, and the qualifying clause will be effective — without proof that the carrier had no reasonable means of checking the weight furnished by the shipper

1.14 **Notwithstanding principles 1.10, 1.11, 1.12, and 1.13, *supra*, no qualifying clause will be effective if a person relying on the description of the goods in the transport document can show that the carrier did not act in good faith when issuing the transport document (*e.g.*, including a qualifying phrase that is known to be inaccurate or including a qualifying phrase when the description of the goods is known to be inaccurate).**

This final principle simply recognizes the general maxim that no one should be allowed to profit from his or her own wrong-doing. For example, if the carrier knows that the containers do not in fact weigh anything near to the weight listed in the transport document, and the carrier chooses not to weigh the containers because it knows that it would discover this discrepancy and be required to correct the transport document, a consignee could well prove the carrier's failure to act in good faith when issuing the transport document.

2 TRANSPORT DOCUMENTS

2.1 Date on the bill of lading

2.1.1 The issue

The date of the transport documents involves issues of great importance, both in the contract of carriage and in the contract of sale and related financial relationships (letters of credit). However, the said element of the transport document is often not dealt with, neither in most domestic laws nor in many international conventions.

The main issues are:

- Should the transport documents necessarily be dated in any case?
- Which date (of taking in charge by the carrier, of loading on board, of issuing of document) should appear on the transport document?
- What are the consequences of the indication of a false date?

2.1.2 Possible Answers to the Issues

2.1.2.1 Should the transport document necessarily be dated in any case?

As is well known, the Hague Visby Rules do not contain a specific reference to the date of the bill of lading. Under Article III.3 of the Brussels Convention 1924 the bill of lading must include, *inter alia*, a number of particulars, among which date and signature are not mentioned.

Although undated bills of lading are very rare in practice, according with the position of most of the delegations during the meeting of the Sub-committee on January 20th, 2000, the date should not be considered an essential element of the bill of lading and an undated bill of lading should be considered valid.

The said issue deserves probably to be further examined, considering that the date appearing on the bill of lading (whatever its meaning - see 2.1.2.2) provides to the holder important information about some essential aspects of the right which is incorporated in the transport document (for example: the moment when the holder's rights will be time barred can be approximately inferred from the date appearing on the document).

It should be noted that also the regulation contained in article 15 of the Hamburg Rules seems to imply the inclusion of (at least) one date among the particulars which must be contained on the bill of lading. Article 15, which contains the express provision that "the bill of lading must include ...f) *...the date on which the goods were taken over by the carrier at the port of loading*" (paragraph 1) and that a 'shipped' bill of lading must also state "*the date or dates of loading*" (paragraph 2), establishes

furthermore that the absence in the bill of lading of one or more particulars referred to in the provision does not affect the legal character of the document as a bill of lading only "*provided that it nevertheless meets the requirements set out in paragraph 7 article 1*" (paragraph 3). Article 1 paragraph 7 reads as follows: "*Bill of lading means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by a carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking*". It can be inferred therefore that even if there is some inconsistency between article 1.7 and 15 and the list of fifteen items mentioned in article 15.1 which must be included in the bill of lading is, in fact, limited to nine mandatory items, at least one date must appear in the document.

2.1.2.2 Which date (of taking in charge by carrier, of loading on board, of issuing of the document) should appear on the transport document?

As was previously clarified, according to article 15 paragraph 1 letter (f), among the particulars to be included on the bill of lading is the "*date on which the goods were taken over by the carrier at port of loading*" while the provision contained in paragraph 2 provides that a 'shipped' bill of lading must also state "*the date or dates of loading*" (paragraph 2). Article 15 of the Hamburg Rules seems therefore to imply necessarily that the bill of lading bears the date on which the goods are taken over by the carrier, and not - as customarily happens - the date when loading is completed. However, in light of Article 1.7, the issuance of a bill of lading bearing the date of completion of loading seems admitted (the carrier being nonetheless liable from the time he has taken over the goods).

The date when loading is completed seems, in fact, more relevant for the purposes of the underlying contract of sale, if the latter is concluded on the traditional 'shipment terms' and for the purposes of the underlying documentary credit if a 'shipped' bill of lading is required. However, for goods to be carried in container, the sale contract will be often concluded on 'CPT' or 'FCA' terms, the underlying documentary credit will require a 'received for shipment' bill of lading and, therefore, the date on which the goods are taken over by the carrier will be more relevant.

In consideration of the above and of Article 23 a) (ii) of UCP 500, a general provision for the purpose of clarifying the significance of the date mentioned in the bill of lading should be of some use. A possible approach might be the following:

"Unless specified that the date mentioned in the bill of lading only refers to the date of issuing of the document or to the date on which the goods were taken over by the carrier, such a date will be deemed to be the date of completion of loading of the goods on board the vessel".

2.1.2.3 What are the consequences of the indication of a false date in the bill of lading?

The issuance of a bill of lading bearing an inaccurate or incorrect date is rather frequent. The position under many national laws is that the bill of lading can bear an inaccurate date without losing the nature of evidence of the contract of carriage and document of title to the cargo.

The presence of a false or inaccurate date might be of great relevance in respect of the contract of sale, being the bill of lading evidence of the receipt of the goods. The date of the bill of lading becomes therefore "*a statement to the effect that goods of the specified quantity as have been shipped by that date*"[1] The view expressed by civil law courts is that the tender of a bill of lading wrongly dated is relevant insofar as the time of shipment of the goods is a condition of the contract of sale, and that the breach of such condition entitles the buyer to reject the bill and treat the contract as repudiated. The position under English law is that the tender of a wrongly dated bill of lading qualifies as a breach of a condition, and entitles the buyer to reject the bill and treat the contract as repudiated, even if the goods are in fact shipped in contract time[2].

The issuance of a bill lading wrongly dated can furthermore result in an action in tort against the carrier, regardless of whether the carrier deliberately backdated the bill and acted fraudulently. The assumption here is that the carrier is necessarily aware of the fact that the bill is misdated, and that the bill of lading is issued in international trade with the purpose that it should be relied upon by those in whose hands it comes.

The carrier is therefore liable for the damages that occur as a consequence of the fact that the buyer has "*lost the opportunity to reject the bills of lading*".[3]

Under some national laws in the case of the issuing of a fraudulent antedated bill of lading the carrier losses the right to limit his liability (USA), while in some other countries the attitude of the courts is that such behaviour does not affect this right (UK). The possible benefits of a uniform regulation of this aspect should be considered.

2.2 Signature of the bill of lading

2.2.1 The issue

According to Article 23 a) (ii) of UCP 500, the bill of lading, in order to be acceptable for documentary credits, must be "*signed or otherwise authenticated by the carrier or a named agent for or on behalf of the carrier, [or] by the master or a named agent for or on behalf of the master*".

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[1] Standard Chartered Bank v. Pakistan National Shipping Corp. [1998] 1 Lloyd's Rep 704

[2] See SCHMITTHOFF, The law of practice of international trade, 1990, page 583: SASSOON, Cif and Fob Contracts. London 1984, page 48-49; Proctor & Gamble Philippine Manufacturing Corp. V. Kurt A. Becher GMBH AT. [1998] 2 Lloyd's Rep. 21 (C.A.)

[3] The Saudi Crown [1986] 1 Lloyd's Rep. 265-266

Article 14 of the Hamburg Rules states that "*when the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue the shipper a bill of lading*", which may be signed by a person having authority from the carrier. An almost identical provision is contained in article III.3 of the Hague-Visby Rules.

The main issues are:

- which are the effects of a bill of lading signed by *falsus procurator*?
- which are the acceptable means of signature of the transport document?

2.2.2 Possible Answers to the Issues

2.2.2.1 What are the effect of a bill of lading signed by a *falsus procurator*?

Under some national laws, the lack of authority to act on behalf of the (apparent) carrier does not affect the validity of the bill of lading. The possible effects of the said lack of authority appear to be:

a) that the (apparent) carrier assumes nevertheless the rights and liabilities under the contract of carriage, but has a recourse action against the person who signed the document without having to do so;

b) that the persons having signed the transport document would assume the obligations and the liabilities of a carrier;

2.2.2.2 Which are the acceptable means of signature of the transport document?

Under Article 14 of the Hamburg Rules and Article 5 of the United Nations Convention on International Multimodal Transport of Goods, the signature on the bill of lading or the multimodal transport document can be "*in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means*", if not inconsistent with the law of the country where the document issued.

The provision is endorsed in Article 20 of UCP 500, according to which "*a document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication*".

The provision contained in Article 14 of the Hamburg Rules appears, therefore, in line with the needs of international trade.

2.3 Identification of the carrier

2.3.1 The issue

The nature of the bill of lading as a document of title, as well as the provisions contained in Articles 1.7 and 14 of the Hamburg Rules, seem to imply that the bill of

lading must necessarily allow the identification of the carrier. The signature is however not always final as to the identification of the carrier.

The position often expressed by many national laws or courts is that the signature is just one of the elements allowing the identification of the carrier, which may concur with other details or data, like the heading of the bill of lading, or the reference to a charter party, or a demise clause.

In the framework of the regulation contained in the Hamburg Rules, it has been stated that the combined effect of the second sentence of Article 14.2 and of the provisions of Article 10 is to render invalid an identity of carrier clause, because Article 14.2 deems the master signing the bill of lading to be the servant of the carrier (even though he may actually act as the servant of the actual carrier) and Article 10 makes the actual carrier jointly and severally liable with the carrier during the period he is in charge of the goods.[4]

The main issues are:

What are the elements that should be considered relevant for the identification of the carrier?

What are the implications for the purpose of the identification of the carrier of a valid incorporation of a charter party's terms in the bill of lading?

Irrespective of the applicability of the Hamburg Rules, should an identity of carrier clause be considered [still] valid in the framework of the Hague Rules?

2.3.2 Possible Answers to the Issues

2.3.2.1 What are the elements that should be considered relevant for the identification of the carrier?

A basic point is that, in any case, the carrier should always be identified on the basis of what appears on the face of the bill of lading. This is not only an implication of the nature of the bill of lading as a document of title, but is also expressly stated in Article 23 a) (i) of UCP 500 ("*appears on its face to indicate the name of the carrier*"). A similar provision is contained in Article 24 a) (i) with reference to non-negotiable sea waybills and in Article 26 a) (i) with reference to multimodal transport documents. Therefore, elements that are not included in the transport document cannot be taken into consideration for the purpose of identifying the person liable for the obligations incorporated in the said document.

The elements that could be considered relevant in order to identify the carrier, i.e. the person issuing (or in whose name is issued) the bill of lading are the following:

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[4] LUDDEKE JOHNSON The Hamburg Rules. From Hague to Hamburg Via Visby, LLP, London, 1995, page 29.

a) the statement by the person who has signed the bill of lading, declaring the name of his principal;

b) the signature by the master (or on behalf of the master), without any further specification, who is normally considered issuing the bill of lading on behalf of the shipowner.

c) the heading of the bill of lading.

No problem arises if, in a given case, the above mentioned criteria are consistent and lead to the same result (i.e. to the identification of the same person as the carrier).

The situation becomes more complicated when, applying the different criteria, different persons would be considered to have assumed the role of the carrier. In such cases the problem of deciding which one of the above mentioned criteria (i.e. which element should be considered more relevant for the identification of the carrier) arises.

Also in the light of the provision of Article 23 a) (i) of UCP 500, criteria mentioned under a) and b) (only one of which will be necessarily applicable) should prevail over the one mentioned under c).

The latter could, in fact, become relevant only in the following cases:

(i) the bill of lading is signed by a person qualifying himself as an agent, without expressly mentioning, however, the name of the person on whose behalf he is acting, or

(ii) in the case of a bill of lading signed by the master, expressly stating that he is issuing the document "on behalf of the carrier", without any further specification.

In the above mentioned situations, the use of a bill of lading having a certain heading could, perhaps, be qualified as an implied disclosure of the name of the principal.

A uniform regulation of the above mentioned aspects, even if not easy to develop, would be desirable.

2.3.2.2 What are the implications, for the purpose of the identification of the carrier, of a valid incorporation of a charter party's terms in the bill of lading?

(to be continued)

3 FREIGHT

3.1 Introduction

Freight is the term generally used for the remuneration payable to a carrier, whether payable by the sender, consignee, shipper or charterer. If no remuneration is payable, the provisions of the proposed Instrument will nevertheless apply. Legal problems related to freight are part of the interrelation between sales law and the law of carriage.

Related questions concern how freight is determined, when freight is earned, when it is payable, who is liable to pay the freight and how the carrier may protect himself in case the freight is not paid. The carrier may, of course, protect himself when it comes to the payment of freight (and for that matter of demurrage) by asking for security. Here, however, only solutions given in law are dealt with, such as the right of lien on the cargo as security for the freight or at least the right to refuse to release the cargo to the receiver before the freight is paid. Maritime law seems to be more detailed and specific with respect to related matters than corresponding rules for other carriers. The Warsaw Convention of 1929 in art. 8 spells out:

"The air consignment note shall contain the following particulars:-

(k) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;--".

There are also in the other transport conventions certain direct or indirect provisions with respect to the payment of freight. Although there are provisions giving the carrier a right of lien or a right to refuse to deliver the goods, unless the freight and other costs shall have first been paid, the impression is that freight questions are basically taken care of in the parties´ contract. In CIM art. 17 §1 and 17 §2 reference is made to applicable tariffs but also makes clear that all costs (freight and different costs) shall be paid either by the sender or by the consignee and that the costs which the sender wishes to pay shall be noted in the consignment note. Thus, in general terms there seems to be a high degree of common understanding of related questions in different transport law systems.

In some instances there is also a relation between the carrier´s liability and the freight, in so far as the carrier´s liability may be limited in amount to the freight paid. Generally the questionnaires point at a rather high degree of universalism in the legal approach to the different questions related to the freight issues.

Any provisions regarding freight, as suggested below, should be of a non-mandatory nature.

3.2 When is freight earned/payable?

The basic legal notion is that there should be an exchange of performance between a debtor and a creditor. Thus a buyer should pay the seller for goods in exchange for the goods just as the purchaser of carriage services should pay the carrier in exchange for carriage provided.

In many instances this is not possible for practical reasons (in particular in international sales) and with respect to the earning and payment of freight this problem is obvious since the carrier's performance runs over a period and it is not self evident that the freight should be paid only after the carriage has been performed, although it seems reasonable that earning of the freight occurs upon the performance of the carriage, and that payment is then also required. It may, however be solved differently by the parties.

13:10 of the Swedish Maritime Code (1994: 1009) ("SMC") provides that **"Freight shall be payable on receipt of the goods [by the carrier]".**

3.3 Loss of goods/repayment of prepaid freight

As already stated SMC requires prepayment of freight in connection with liner traffic, but it also clearly spells out that prepaid freight shall be returned if the cargo or part thereof is not delivered to the merchant.

This is the same main rule as is applied in English law. English law has as its basis that, unless otherwise agreed, freight is payable only upon delivery of the cargo to the merchant, provided that the cargo is not so damaged that "the nature of the thing has been altered".

If, however, payment has been made in advance, it will depend on the contractual situation whether the prepaid freight shall be regarded as a loan (to be repaid) or as a final advance payment. There are also cases where the freight is earned before the payment.

Bills of lading are frequently marked with a clause running along the following or similar lines: *"freight prepaid and deemed to be earned upon shipment and is non-returnable whether cargo lost or not lost"*. This means that irrespective of whether the cargo is carried or not, whether the cargo is delivered or not, whether the cargo is damaged or not the carrier is entitled to receive and keep the freight from the moment it has been paid, without any obligation to return it or part of it. It is another thing that the carrier may be liable to pay damages in case of loss of damage to the goods.

Thus SMC 13:10 (cf also 14:24) prescribes: **"For goods which do not remain at the end of the carriage, freight shall be paid only if the goods have been lost due to their own propensity, insufficient packing or fault or negligence on the sender's side."**

3.4 Distance freight - freight pro rata for delivery short of place of destination

In Scandinavian law there is also a principle, sometimes recognised as a general principle of transportation law, to the effect that as soon as the carrier has moved the cargo towards the point of destination, he is entitled to a proportionate part of the freight, even if the cargo has not been carried to the destination.

As mentioned above in 3.4 the English principle is that the carrier is entitled to freight upon delivery of the cargo at the port of discharge. The possibility to claim proportionate freight as compensation for part transportation is limited under English law.

SMC art. 13:15 referring to art. 14:21 prescribes: **"If a part of the carriage has been performed when the contract is cancelled or avoided or when for any reason the goods are unloaded in a port other than the agreed port of discharge, the carrier shall be entitled to distance freight according to the provisions of chapter 14 section 21."**

3.5 Who is liable to pay the freight?

3.5.1 Introduction

The sales contract is the basis for the payment of the freight as between the seller and the buyer. The contractual relation between carrier and cargo owner is not always synchronised with the contractual relation between seller and buyer, and it is, as always, in such dissonance that legal problems arise. Under the sales agreement the transportation clause distributes between the seller and the buyer the risk for the goods and the payment of freight and certain other matters. Thus taking the traditional FOB and CIF (Incoterms) clauses it will normally be the buyer who is liable to pay the freight under an FOB clause, and in many cases it is the buyer who negotiates and contracts with the carrier, whereas the seller will often be the person delivering the goods (i.e. the shipper). In a cif contract the seller will often be the charterer or the sender and the buyer in many cases the consignee.

It is principally important to distinguish between the different relations under the sales contract and under the contract of carriage respectively. Particularly difficulties arise in connection with the contract of carriage where the carrier is dealing with that party contracting for the carriage and/or delivering cargo for carriage (the shipper) and the consignee (receiver) of the cargo. It is here not possible to delve into all different questions stemming out of the interrelation between the sales contract and the contract of carriage and the various parties thereunder. But it has to be kept in mind that the seller and the buyer may have different positions in the bill of lading. The counter party of the carrier may thus be the "contractual" shipper or the "actual" shipper. In many legal systems the consignee is not regarded as a party to the transport document, whereas in other legal systems the transport document is regarded as a document covering a three party relation.

Disregarding liens and lien clauses one may then ask who is liable for the payment of freight: the shipper, the consignee, the bill of lading holder or someone else? Are those involved liable jointly and severally? Who is then ultimately liable? If there is only a bill of lading involved the shipper will be primarily liable to pay the freight. In the case of a bill of lading issued subsequent to a charter party the charterer is undoubtedly (unless the parties have agreed otherwise) liable to pay to the

shipowner the agreed freight under the charter party, but failing such payment is there a second (or for that matter a third) payor?

The characteristics of the bill of lading as a (quasi) negotiable document of title may also mean that the holder of the bill of lading may have a duty to pay the freight, even if not mentioned as the consignee in the document. The same would probably also be true with respect to a person under a waybill who has acquired the cargo during the transit. If there is a claim for freight this latter person may then turn out to be liable for the payment of the unpaid freight at least if he claims delivery of the goods.

3.5.2 The shipper

The basic principle is that the counter party of the carrier is liable to pay the freight. This will in most cases be the contractual shipper.

If looking at English law section 2 of the Bills of Lading Act less provided that *"nothing herein shall prejudice or affect....any right to claim freight against the original shipper or owner"*.

Now section 3(3) of the Carriage of Goods by Sea Act 1992 ("UK Cogsa 1992") replaces sec. 2. It provides that so far as the Act as a whole imposes liabilities, those liabilities are without prejudice to the liabilities under the contract of any person as an original party to the contract. It therefore seems to maintain the status quo in respect of freight payment.

3.5.3 The consignee

In respect of general cargo art. 13:19-13:22 in SMC lays down some principles with respect of the consignee´s liability to pay freight. 13:19 lays down that, unless freight has been paid already, the consignee has a duty to put up funds for the freight and other claims that the carrier may have under the bill of lading. The second para of that article adds that in case the goods are released otherwise than against the presentation of a bill of lading the consignee´s duty to pay the freight is limited to situations where he has been notified of the claims or otherwise knew or should have known that the carrier had not been paid. 13:20-22 lay down the principles that in case the consignee does not pay, the carrier may refuse to release the cargo until payment has been made or acceptable security has been provided. The next step is that the carrier may lay up the goods and ultimately sell them.

Thus the general principles are quite clear, namely that the carrier may rely on the cargo as security for the freight payment and in case the consignee demands delivery of the cargo he will also be liable to pay outstanding freight. In some law systems the consignee will be regarded as a contractual or quasi-contractual party in the transport document with a duty to take delivery of the goods and thereby liable to pay the freight.

3.5.4 Intermediate bill of lading holders

There may, however, also be other parties involved, for example banks holding bills of lading as security or intermediate sellers and buyers trading with the goods during the transit by transferring the bills of lading to new holders. Should such parties be held liable to pay the freight?

The UK Cogsa 1992 is not explicitly clear in this respect but the Act imposes contractual liability on a bill of lading holder where he seeks to enforce rights under a contract of carriage or takes or demands delivery of the goods. That means that the carrier is rather well protected in respect of his claims for freight or compensation for certain other costs. As far as can be reasonably judged there will not under the Act be a right to sue the intermediate bill of lading holder.

3.5.5 The marking of the bill of lading

The terms "freight collect" and "freight prepaid" seem both to be universally understood in the different member countries. The former means that the carrier shall basically turn to the consignee (receiver) for payment of freight whereas the shipper still remains liable unless a cesser clause shall relieve him of this duty. The latter implies that the carrier shall have been paid by the shipper and thus that the carrier is basically denied the right to claim freight from the consignee (receiver).

Basically a "prepaid bill of lading" thus means that the carrier may not refuse to release the cargo to the consignee, since there is evidence that freight has been paid, and the carrier has then no claim against the cargo/receiver. However, in case the shipper is aware of (should have been aware of?) the freight not being paid in spite of the marking of the bill of lading, the consignee may nevertheless have a duty to pay.

There are a great number of variations between "freight prepaid" and "freight payable upon delivery", but the questions that may arise basically turn around the same basic principles.

Another generally accepted principle seems to be that the carrier is entitled to payment of freight also in respect of cargo that has been damaged. Failing a specific clause stating that freight is earned upon shipment and non-returnable, there may be different solutions in cases where the goods have been lost before discharge/delivery or where they have been damaged to the extent that they have changed character.

3.6 Lien

Many legal systems recognize a right of lien on the cargo as security for the carrier´s claim for freight. Here again there may be national solutions with respect to the creation of a lien or of a right of retention. The carrier may have a fullfledged lien in the sense that he is entitled to sell the cargo/part of the cargo to make himself paid out of the purchase amount obtained from the cargo sold. He may also have some

protection through a milder principle giving him instead the right to refuse to release the cargo without having first received payment of freight. His right may be lost once he has lost possession of the goods. Lien clauses are frequent in bills of lading and voyage charter parties.

Another angle of the lien clause is the cesser clause, which is sometimes hidden in a lien clause, and which spells out that *e.g.* once the carrier has left the port of loading, he will no longer have the right to make any claim against the charterer/shipper/sender, unless there has been a notation in the bill of lading to the effect that the carrier has failed to succeed in exercising his claim for freight at the port of loading. Should cesser clauses be valid?

3.7 Demurrage, deadfreight and other charges

The question may be raised how ancillary claims such as deadfreight and demurrage should be dealt with. Should these be separate rules or should these ancillary claims follow the rules related to freight, whenever applicable.

3.8 Liabilities of the Shipper

Issues also arise as to the liabilities of the shipper other than for freight, deadfreight and demurrage, and which such liabilities should remain exclusively the liabilities of the shipper and which should be assumed by the consignee or successive holders of the bill of lading.

4 DELIVERY AND RECEIPT OF THE GOODS AT DESTINATION

4.1 Introduction

Delivery completes the voyage of the goods. As a rule, its marks the end of the responsibility of the carrier for the goods (see Hamburg Rules Article IV).

Delivery is only to a limited extent dealt with in the Hague-Visby Rules (HVR). The running time for the notice period and the timebar starts upon delivery of the goods concerned. Further harmonisation of law as to various aspects of delivery may be desirable.

Particular attention deserves to be given to the matter of delivery without production of bills of lading in the discharge port. Here, over the past few decades practices in a substantial number of trades have deviated from the traditional bill of lading system so much that it is paramount that further rules of law have to be developed, which duly take into account the current practices.

"Consignee" in this section means the person entitled to take delivery of the goods.

4.2 Definition of Delivery

The act of delivery has a contractual element and a factual side. Starting point is the contract of carriage: the goods must be deemed to be delivered when the carrier has made them available to the consignee in the manner as agreed in the contract of carriage. Contract terms may be express and specific, or be less specific such as most fio provisions, or include an (express or implied) reference to the customs of the trade or the port involved.

Difficulties may arise if no contractual provision exists or can be inferred. In some national laws the placing of the goods at the free disposal of the consignee is regarded as delivery. In other jurisdictions some act of actual receipt is necessary. If 'delivery' is to be defined, this item has to be discussed.

If some act of actual receipt is desirable, does the acceptance of a delivery order by the consignee or his acknowledgement that the bill of lading has been accomplished (see also par. 4.4) suffice?

In the first meeting of the ISC the prevailing view was that delivery under a contract of carriage primarily is a contractual matter and not a two-sided act. This principle could be worded as follows:

"The carrier has to deliver the goods in the manner and on the time as has been agreed in the contract of carriage or as it can be inferred therefrom. In the absence of any provision in the contract of carriage to that effect, the goods are deemed to be delivered when they actually are taken over by the consignee, or at such earlier time as the carrier has placed the goods at the disposal of the consignee. In the latter case the carrier must have notified the arrival of the goods at the place of destination to the consignee or to person indicated by the shipper as the notify party or, in the absence of any these persons, to the shipper."

alternative:

"Delivery is the actual taking over of the goods by the consignee unless it has been provided otherwise in the contract of carriage or, after notification of the arrival of the goods at the place of destination to the consignee or to the person indicated by the shipper as the notify party or, in the absence of any of these persons, to the shipper, the goods were already at an earlier time placed at the disposal of the consignee."

4.3 Time of Delivery and Discharge

Under HVR the part of the contract of carriage that is subject to mandatory law, covers the period between loading and discharging of the goods. Delivery, *e.g.* under a fio clause, may contractually be defined as the moment that the hatches of the vessel have been opened and the goods are ready to be taken away by the consignee. As a result, a certain period of time may elapse between delivery and discharge, with the consequence that under the contract of carriage a carrier may be held liable for

loss or damage to the goods which may occur during a certain period after their delivery to the consignee. Must this item receive explicit attention in a future draft? (It may even happen that a consignee decides not to discharge at all, but agrees with the carrier that the goods will remain on board for on-carriage to a new destination under a new contract of carriage.)

More frequently it happens that after discharge (when usually a before-and-after clause applies) a certain period of time will run between the moment of delivery (as according to the definition to be drafted) and the actual taking away of the goods by the consignee. During such period the goods may be regarded to remain under the custody of the carrier if the actual bailee acts on behalf of the carrier or under the responsibility of the consignee if the actual bailee must be regarded the representative of the consignee. Sometimes, the custom of the port or trade makes this point clear or it may be inferred from who pays the bill of such bailee. But in many cases this matter may be unclear. Might an assumption be useful? If so, should it then be assumed that in such event the bailee acts on behalf of the carrier or of the consignee? Should it be provided that any case this period is not covered by the terms of the contract of carriage? Does it make a difference whether the bailee is an authority to which the goods have to be transferred before the consignee is allowed to take them away?

Due to shortage of time these subjects were not discussed in the ISC. A first draft could be the following:-

"Upon delivery of the goods the [contract of] carriage has come to an end. In the event the goods remain in the custody of the carrier after their delivery, the carrier will act as [an agent] [on behalf] of the consignee even if he does so in his own name. [However, if the goods have been delivered before their discharge from the vessel, the carrier will remain liable for their loss or damage in accordance with the [mandatory] liability provisions of this legal instrument until the moment that they have been discharged.]

In the event the carrier has to hand over the goods in the discharge port to an authority who will take care of their delivery to the consignee, such authority will be deemed to accept the goods [as the agent] [on behalf] of the consignee".

The sentence relating to the fio – issue is put between [ ] because of the fundamental differences about the meaning of the fio – clause. One view regards the fio clause as determining the scope of the contract of carriage, and thus it shortens the duration of the contract until a certain moment before discharge, while the other view is that, whatever the intention of the parties, a carrier can never escape his (mandatory) responsibility for a proper discharge of the goods.

4.4 Discharge of the carrier of his obligations under the contract of carriage

In practice, many carriers require that a consignee who tenders the bill of lading to the carrier in order to receive his cargo, puts his signature on the back of such bill of lading. As a minimum, such signature evidences that such bill of lading has been accomplished.

Should a carrier be provided a legal right to obtain such evidence? Should it be provided that such signature is solely an acknowledgement that the bill of lading has been accomplished and that the goods have been placed at the disposal of the consignee, but that such signature is not related to the status of the goods themselves?

A wording could be:

"On request of the carrier the consignee will provide a confirmation of delivery of the goods to the carrier in [accordance with the usage as applicable at the place of destination] [the customary manner]."

4.5 Relation with other contracts

It is clear that a functional relation exists between the "delivery" of the goods under the D-terms of Incoterms, if applicable between seller and buyer under the sales contract, and the delivery of the goods by the carrier to the consignee/buyer under the contract of carriage. For the time being, a possible harmonisation between trade terms and transport terms may be left to the commercial parties.

However, in view of the fact that the carriage usually forms part of a whole series of connected contracts, which, taken together as a whole, reflect a single (sales) transaction, it may be useful to provide for some form of general obligation to be laid on the parties to a contract of carriage, to the effect that they have to behave in such a way (also under other connected contracts) that the other party under the contract of carriage may be able to perform duly; refer also to par 4.7. The joint aim should be the benefit of the whole transaction, which may require that the different persons involved have to co-operate with each other over the boundaries of their own single contract.

This issue has not been discussed either. Legally it may include the creation of a sort of quasi – contractual relation between the parties to the contract in the strict sense, i.e. the shipper and the carrier, and the persons which have some connections to the contract of carriage without (in some or in all jurisdictions) being a party to that contract at all or before the moment that they become a party to the contract. The following illustrates the point:

"Any party to a contract of carriage as well as any other person who at any time may derive certain rights from the contract of carriage or is to assume certain obligations thereunder has to act towards any other party to the contract of carriage as well as towards such any other person in such a way that the other party or such any other person will be able to perform duly under the contract of carriage [or under the contract that is functionally related to the

contract of carriage and to which any of the parties to the contract of carriage or such any other person is a party]."

"Any other person" would include consignees, fob shippers, intermediate bill of lading holders and actual carriers. The circle may be drawn wider so as to include *e.g.* Himalaya clause beneficiaries and possibly others.

It is appreciated that this idea conflicts with the privity of contract principle. However, not only in respect of transportation issues but nowadays also in a growing number of other network-type relations, the privity principle is sometimes more a legal obstacle than a useful legal tool for arriving at acceptable practical results. With the aid of legal fictions, implied terms, stipulations made for the benefit of third parties, etc., lawyers manage to circumvent the privity principle, as circumstances so require.

When will time come that one step further may be set and a cautious (quasi) contractual relation can be laid between persons that are parties to different contracts all belonging to the same network of contracts? These persons may have functional working relations, which in some form or another deserve to be properly recognised in law.

4.6 Obligation of the consignee to accept delivery of the goods

Under the contract of sale the buyer/consignee may be entitled to reject the goods. Or the goods may have a negative value at their arrival in the discharge port, either right from the beginning of the voyage (*e.g.* carriage of waste) or due to events occurring during the carriage (*e.g.* contamination).

This kind of case leads to the question whether the consignee is entitled to decline delivery of the goods by the carrier under the contract of carriage. Most responses to the questionnaire (Question 3.2.1) suggest that the consignee is not. Should an express provision to that effect be inserted?

Does it matter whether the consignee must be deemed to have become a party to the contract of carriage? Are other possible exceptions to this possible obligation of a consignee desirable?

If the consignee fails to honour its responsibility as to delivery, or if the consignee simply does not show up, is the carrier entitled to address himself to the shipper? Is it a joint and several responsibility of consignee and shipper that delivery can be effected?

Does it matter if the shipper is no longer the holder of the bill of lading? If so, should it only be the responsibility of the holder of the bill of lading that delivery can be effected or is it a joint and several responsibility of shipper and bill of lading holder?

Is it desirable to introduce a duty for the carrier to notify the arrival of the goods to the consignee (if known to him) or to the person as indicated by the shipper to be the 'notify party'?

Is it desirable to have an express provision for cases that a carrier is actually unable to transfer the goods to a consignee, *e.g.* allowing the carrier to warehouse the goods, to sell them afterwards, or to dispose of the goods as he deems fit under the circumstances? Should such warehousing or disposal be regarded as a 'constructive delivery'? Should such selling or disposal take place under some form of local court supervision?

These issues were discussed. Most delegates were in favour of a duty to be expressly laid on the consignee to accept delivery. It was indicated that in such event the carrier should have a duty to notify.

Further it was accepted that if the consignee fails to accept delivery or no consignee shows up at the place of destination or for any other reason the carrier is not able to deliver, in principle the contractual counterpart of the carrier has to foot the bill and should give the carrier proper instructions how to get rid of the goods.

However, one step further and, also when a bill of lading has been issued, to regard the carrier as being released from his obligations under the contract of carriage in respect of delivery of the goods if he delivers the goods in an above case on instruction of the shipper, was considered against the actual practice and requirements of the trade. Nevertheless, the problem was recognised and as a part solution some delegates suggested that a certain period should be determined after which a bill of lading should loose its value.

It can be argued that, being a contract of carriage, a bill of lading per definition can only function as a document of title as long as the goods have not reached their destination. Only the fact that such never has been spelled out in law (because it is so much inherent in the whole bill of lading system as to be self understood), has opened the way to the extensive misuse of the bill of lading as a document of title. It can therefore be argued that a draft Instrument should restore the bill of lading system, as it ought to be. Otherwise, Bolero and similar electronic systems will always loose out against the free way of misuse that is currently available in practice.

The argument is "illustrated" in paragraph 4.9.

4.7 Delivery without production of a bill of lading in the discharge port

4.7.1 If the holder of a bill of lading has the exclusive right to claim delivery of the goods in the discharge port and the consignee is under a obligation to accept delivery of the goods from the carrier in the discharge port, logic dictates, that the holder of a bill of lading is obliged to claim and accept delivery of the goods. And that, if he does not like to do so himself, he has to appoint somebody else to do so on his behalf. *A fortiori*, he should not be allowed to hide himself.

4.7.2 Many times, however, practice and, sometimes, the law as well, does not follow these rules of the game. Frequently, bills of lading cannot be produced in the discharge port when the vessel arrives. Delays may occur in the process of transferring the bill of lading between all the parties involved in the sale(s) of the goods during their carriage, with the result that the bill of lading will not be timely available. More often, however, the cause of the problem is more structural. In many branches of trade it is customary that the credit terms, as agreed between sellers and buyers, are longer than the voyage of the goods lasts, with the result that a seller (or his bank) still retains the bill of lading as a security instrument at the moment that the bill of lading is needed in the discharge port for the purpose of delivery of the cargo. It also often occurs that a buyer/consignee first has to resell the goods before he is financially able or willing to take up the bill of lading from the bank that provides the credit to him, and that meantime the goods already have arrived in the discharge port.

These practices are widespread. Fair estimates are that in the liner trade in 15% of all cases no bill of lading is available in time in the discharge port. In the bulk trade matters are much worse: the average percentage is estimated to be 50%, while in the oil- and related trades the percentage is close to 100%. It has therefore become a standard clause in many charterparties that the charterer is entitled to instruct the carrier as to the person to whom the carrier should deliver the cargo in the event the bill of lading is not available in the discharge port.

These practices could develop because of the traditional anonymity of the bill of lading holder. It might be illusory to assume that they will disappear when the law would clearly spell out the duties of a bill of lading holder, as indicated in the beginning of this paragraph.

Nevertheless, the making of a serious attempt thereto is long overdue.

4.7.3 In order to protect the carrier, he is often offered an indemnity, either from the consignee or from the charterer, which preferably should be countersigned by a bank. Even when such indemnity includes satisfactory terms and the countersigning bank is first class, this 'solution' is no more that a second-best choice. It does not take away that, in practice, the carrier remains forced into a position of the guarantor of the purchase price of the goods that his vessel carries. And this even in respect of (often future) sales that may have taken place many months before shipment of the goods. This, obviously, had never been the intention of the bill of lading 'system'.

Since Cleopatra's times ("charta partita") the maritime transport document legitimates the person to whom a carrier must deliver the goods in the discharge port. If from the cargo side the document is deprived of this function, the consequences thereof should be borne by the cargo as well and not, as it is at present the case under the bill of lading contract, by the carrier.

Therefore, the essence of a real solution is that, in the event a carrier delivers the goods to a certain person in the delivery port on instruction of the shipper, charterer or bill of lading holder (any of them, depending on the circumstances of the

case), he should be released from his contractual obligation to deliver the goods (or to pay their value) to the bill of lading holder.

(As to the relation between the charterer and the bill of lading holder it should be borne in mind that the charterer, being the contractual counterpart of the carrier and often a fob buyer himself, has the duty to instruct the carrier to issue the bill of lading to his (or an earlier) fob seller. Under many jurisdictions such bill of lading holder / fob seller is deemed to be the representative of the charterer. Therefore, if either of these two has given the carrier the instruction as to delivery, the carrier should be released as aforesaid.)

4.7.4 It is universal law that a bill of lading is a document of title and, as such, may have important functions beyond the contract of carriage. It may even be accepted that such role may be related to sales transactions (long) before the bill of lading concerned came into existence.

But it should never be forgotten that these other functions are based on rights derived from the contract of carriage. Such contract is, as to the goods carried, by its very nature only related to the period that these goods are (undelivered) on board the vessel. Once they have left the vessel and they are, on instruction of the person who is contractually entitled to give such instruction to the carrier, delivered to the person entitled to such delivery under the contract of sale, the role of the bill of lading as to the goods is over. Endorsement of a bill of lading made after delivery of the goods to such a person can only mean the transfer of contractual rights under the contract of carriage other than the right to claim delivery of the goods (or their value in terms of money).

In UK Cogsa, 1992, an interesting limitation to this rule is made: such endorsement only to take effect if it was made "in pursuance of contractual or other arrangements before delivery". In other words: an endorsement after delivery must have a link with an occurrence before delivery. This way, the problem of the (bona fide) delays in handling of bills of lading between the parties to a string of sales during (and before) carriage, has been solved under UK law.

Further, the desirability may be discussed of provisions with the effect to lift the anonymity of the bill of lading holder when the vessel arrives in the discharge port.

In the age that electronic registration of transfers of title has become available, a widespread misuse of the bill of lading system to the detriment of the carrier is no longer justifiable.

4.8 Rights of suit against the Carriers

It is stated above about the distinction between a claim for delivery and other contractual rights under the contract of carriage, such as a claim for shortage, is based on current English law[5].

In other jurisdictions the prevailing view may be that a claim for delivery of the goods and a claim for their (part) loss or damage are so much complementary that they cannot be separated from each other.

The basic question is whether the right to claim for loss or damage should be attached to the person to whom the goods have been delivered (on instruction of the shipper) or to the bill of lading holder. English law makes the choice in favour of the latter. But also good reasons may exist to attach these rights to the person to whom the goods actually are delivered.

Arguably if English law will be followed, the separation of the two rights has to be spelled out more clearly than is done in UK Cogsa 1992.

4.9 The following wording illustrates the development of the above arguments.

"The shipper or, in the event a bill of lading has been issued, the holder of the bill of lading, is obliged to advise the carrier, at the latest upon arrival of the goods at the place of destination, the name of the consignee who [actually] will take delivery of the goods at the place of destination. Provided the carrier has notified such consignee, or the person advised by the shipper as the person to be notified not being the consignee ("notify party"), of the arrival of the goods at the place of destination, the consignee or, in the event a bill of lading has been issued, the bill of lading holder are obliged to take delivery of the goods at the place of destination.

In the event a bill of lading has been issued in respect of the goods, any person taking delivery of the goods has to submit this bill of lading to the carrier.

If a bill of lading has been issued and the holder of the bill of lading fails to take delivery of the goods upon their arrival at the place of destination, or fails to advise the carrier the name of the consignee of the goods, or any of them fails to submit the bill of lading to the carrier, the obligation to take delivery [or to advise the carrier as to the person who shall take delivery on his behalf] shall rest upon the shipper.

In that event, such delivery of the goods at the place of destination to the shipper or to the person as advised by the shipper to take delivery of the goods without the bill of lading being submitted to the carrier, shall release the

[5] See "Right of Suit in respect of Carriage of Goods by Sea" Law Commission Report no 196 (1991) at pages 17 and 18.

carrier of his obligation under the bill of lading to deliver the goods to the holder of the bill of lading.

[Such holder will no longer be entitled to sue the carrier and any transfer of the bill of lading after such delivery of the goods will not transfer any rights under the contract of carriage],

or, alternatively,

[Such holder has lost the right to take of delivery of the goods and any transfer of the bill of lading after such delivery of the goods will only transfer other rights under the contract of carriage than the right to take delivery.] [Any person who becomes holder of the bill of lading not by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the delivery of the goods by the carrier is not entitled to exercise any rights under the bill of lading.]"

5 THE RIGHTS OF DISPOSAL AND THE RIGHT TO GIVE INSTRUCTIONS TO THE CARRIER

5.1 Introduction

The representative of the interests over the goods, whoever this might be under the applicable principles, will want to control the goods in one way or the other during the time of transit and of the custody of the carrier over the goods until the time that the goods have arrived at the destination. International Conventions in the field of maritime law (Hague Rules / Hamburg Rules) have so far not covered that issue. However, a number of Conventions covering other modes of transportation do so and thereby provide at least a basis for a possible further unification. Apart from that the solutions found in those Conventions do to a great extent coincide - a least in principle - with rules provided by some national laws.

One particular issue stems from the interaction of the contract of sale with the contract of carriage where the seller (shipper) would like to enforce his right under the sales contract to stop the goods in transit in order to protect the seller to collect his purchase price (see the United Nations Convention on Contracts for the International Sale of Goods 1980 Art. 71 Sec. 2).

5.2 What rights of the disposal does one have?

One of the features of every transportation contract is that the party to the contract (see 5.3 and 5.4 below) has the right to dispose of the goods. This right includes in particular the right to ask the carrier:

- to stop the goods in transit,
- to change the place at which delivery is to take place

- or to deliver the goods to a consignee other than the consignee indicated in the transport document.

Apart from these rights it is recognised that the holder of such right is also able to re-negotiate new terms with the carrier, whereas it is understood that the carrier in those circumstances is free to reject or accept such changes in the contract.

5.3 Who has the right of disposal?

The right of disposal is a contractual right and, therefore, it is certainly clear that it is the contractual party (i.e. the "contractual" shipper/sender) who can exercise this right.

5.4 When and on what basis does the identity of the holder of such right change?

This issue is one of the crucial elements of the principle of the right of disposal. The answers will very much depend on the type of documentary evidence of the contract of carriage used by the parties. The rules will be different depending on whether a bill of lading, a sea waybill, an electronic equivalent to either of the latter documents or no transport document at all was issued.

The most difficult case is when no document has been issued. There the answers will depend basically on whether one departs from civil or common law principles. In civil law the contract of carriage is considered to be a contract creating a third party benefit. The consignee therefore obtains a right on the basis of the contract of carriage. Since the carrier needs to have clarity on who at any one time is the lawful holder of the right of disposal, the civil law has stated that this right shall pass from the shipper to the consignee once the consignee, following the arrival of the goods at the scheduled place of delivery, has requested delivery of the goods. The solution is practical at least for details of delivery but finds no common law equivalent for the actual right to demand delivery and to request any other alternation in the terms of the contract since the concept of third party beneficiary contracts is not generally known to some common law countries. The ISC will have to discuss a suitable solution which might differentiate whether instructions to the logistical preparation of delivery are concerned or whether alteration of the contract terms are being requested. For the latter some additional acts of the (contractual) shipper (*e.g.* instruction to deliver; instruction to notify consignee etc.) might have to be provided.

In the case of carriage by waybill, the situation is easier since here one could base the transfer of the right of disposal on the fact that the original waybill has been handed over to the consignee. In order not to elevate the waybill to a document of title one would want to make the transfer of the right of disposal additionally depending from the fact that the consignee upon arrival of the goods at the scheduled place of delivery, has requested delivery of the goods. There is a practice that the shipper may provide that the consignee shall have the right of disposal already from the time when the transport document is drawn up, if the shipper makes an entry to that effect in transport document. The CMI Rules for Sea Waybills (Article 6) seems

to leave the right of disposal only to the shipper. This in contradiction with all other modes of transport where waybills are used.

In the case of carriage by bill of lading the only relevant time must be the moment when the shipper has relinquished the original document by handing it over to another person pursuant to the rules applicable to the formalities of transfer of the rights deriving from the bill of lading. The right of disposal will, thereafter, be transferred on the same basis to further holders of the bill of lading and eventually to the final consignee.

In case of carriage by a contract of carriage in electronic format the equivalent rules should apply, that is that it is the holder of the "original electronic data" (private key) who will be the only legitimate holder of the right to dispose as one element of its right of control pursuant to Article 7 CMI Uniform Rules for Electronic Bills of Lading.

5.5 What proof of identity does the holder of the right have to produce in order to exercise his right?

This issue might look similar to the one of transfer but must be clearly be seen as a distinct and different issue. Here one has to regulate the way the holder having obtained the right of disposal based on one of the above reasons (see 5.3 and 5.4 above) will exercise its right of disposal against the carrier. Again, the solutions will depend on the form of the contract of carriage, i.e. the choice of the type of transport document. There is a widespread tradition that the holder exercising its right of disposal will have to produce the full set of the original transport documents.

In the case of a bill of lading, the holder of the right must submit all originals. The CMNI draft specifies that he has to exercise this right prior to the arrival of the goods at the scheduled place of delivery. There is no apparent reasoning for this limitation of the right of disposal.

In case of a transport document other than a bill of lading (sea waybills) the solution will very much depend on how the right of disposal will be transferred in the context of a sea waybill. Should the ISC decide that the shipper will remain the holder of the right of disposal until the completion of the delivery of the goods to the consignee no specific transport document will be required. However, should the ISC decide otherwise and follow principles applicable to other modes of transport, which provide that the rights are transferred together with the transfer of a waybill and, therefore, the waybill is necessary for identification in exercising the right of disposal. In such case the holder of the right of disposal will be requested to produce a sea waybill. One could discuss whether the holder will have to produce the full set of all documents should several originals have been issued by the carrier. One could further discuss whether the carrier will have to include the new instructions given by the holder of the right of disposal in the transport document as it is especially stated in the CMNI draft.

In case of a transport contract in electronic format the holder of the right of disposal will have to provide the identification used in the electronic context (i.e. private key).

5.6 What are the conditions the holder of the right of disposal has to meet when exercising its right of disposal?

In order to discuss the conditions for the exercise of the right of instruction it is important to differentiate the types of instructions. One type of instruction is merely a specification of the contract of carriage and, therefore, will have to be carried out by the carrier without any objection or without creating a right of claiming additional costs. Others instructions are an exercise of an option which will then request the carrier to act accordingly, possibly with additional costs. The third type of "instruction" leads to an alteration of the contract of carriage, which has not automatically to be accepted by the carrier. There, the right of disposal is conditional to the acceptance to change the terms. Depending on the type of the instruction, the payment of costs or additional freight will be a condition to the right of disposal.

For all types of instructions it is important that the carrying out of such instruction is possible at the time when the instructions reach the person who is carrying them out and does not either interfere with the normal working of the carrier's undertaking or prejudice the shippers or consignees of other consignments.

A further condition is found in the CMR (road transport) where it is stated that the instructions may not result in a division of the consignment.

Where the carrying out of the instructions is not possible the carrier must notify the holder of the right of disposal.

5.7 Who is liable for eventual additional costs resulting from such instructions?

The most practical solution is that the holder of the right of disposal exercising its rights shall also be the party liable for eventual additional costs resulting from such instructions. The claim of the carrier for such costs must also be covered by the lien of the cargo.

5.8 Against whom can the right of disposal be enforced?

The ISC must discuss and decide who the recipient of the instruction must be. The logical person is the contractual carrier. However, in order to have an efficient instruction made the actual carrier would in most cases be the right person. The question then arises, whether the actual carrier is obliged and/or allowed to follow the instructions coming from a "third party" with whom he is not directly engaged in a contract.

5.9 In what situations should the carrier seek instructions from the cargo interests; how will he be able to find the rightful "holder" of the right of disposal?

The CMR provides that if for any reason it is or it becomes impossible to carry out the contract in accordance with the terms laid down in the contract of carriage before the goods reach the place designated for the delivery, the carrier shall ask for instructions the person entitled to dispose of the goods. In the context of maritime transport the question arises how the carrier can find out the identity of the holder of the right of disposal at the time he needs to receive instructions. He could, of course, always turn to the contractual shipper, who, however, might have lost his right of disposal by transfer of the bill of lading (or depending on the rules for sea waybills, by transport of those documents) without notification of that fact to the carrier.

6 BEFORE LOADING AND AFTER DISCHARGE

6.1 Introduction

Sea carriage is sometimes a small part of an international movement of goods yet the documentation is often still centred around a maritime bill of lading especially where a negotiable document is required. Even where a negotiable document is not required, forwarders still use a bill of lading-type document to evidence the contract. Most bills of lading in the container trades are of the "House to House" variety although there are numerous variants in use. Whilst we must deal with all types of trades, this paper inevitably concentrates to a large extent on "Through" or "Combined Transport" movements. However, the issues raised are often of wider relevance.

With goods that are containerised, or goods intended to be containerised, receipt of the "goods" prior to shipment could take place inland and the delivery at destination might also be made inland at a Container Freight Station (CFS) or Container Yard (CY). Such a CFS or CY could be at or near a port or at an inland point outside the port area.

In the container trades, even a port to port bill of lading will involve receipt and delivery at some point not directly connected to the arrival of, or discharge from, the ocean vessel. In most situations it is simply not possible to take delivery alongside the vessel.

Given this situation, the regime applicable to the period either side of ship's tackle is often confusing and obscure. Sometimes a mandatory regime will apply if local legislation has extended the scope of the Hague or Hague-Visby Rules. Sometimes the terms on the reverse of the bill of lading are relevant and will apply. It is submitted that this is generally an unsatisfactory state of affairs. Shippers, carriers and consignees could all benefit from greater certainty.

It is not proposed to deal with the principal liability issues in this paper, rather with the subsidiary issues, although the interplay between competing liability regimes requires consideration.

6.2 Port to Port shipments

6.2.1 Identification of subsidiary activities.

Even where a port to port bill of lading is used, issues arise in relation to both receipt and delivery. In the containerised trades, receipt of the cargo will rarely take place alongside. Rather the containers will be delivered to the carrier's CFS or CY, wherever this may be located. Similarly, at the port of discharge, the containerised goods will be taken by the carrier to the CFS or CY to await collection or to a place where the goods can be de-consolidated. There is often confusion as to whether the compulsorily applicable regime for sea carriage extends to the activities either side of the shipment by sea. Yet these activities are integral to the carriage agreed to by the parties. Sometimes the carrier purports to act as agent of the shipper in arranging the stuffing/de-stuffing and sometimes this is not dealt with at all in the documentation. Often a clue will be given in the way that the goods are described in the bill of lading, however it is submitted that it should be mandatory that the activities agreed to be performed by the carrier should be spelt out in the governing transport document.

The issue for consideration is that the transport document must identify all the subsidiary activities which are contemplated between time of receipt by the carrier and time of delivery.

6.2.2 Liability for subsidiary activities

In a port to port bill of lading it would be logical to extend the scope of any regime compulsorily applicable to the sea leg to those other activities incidental to the transport.

Thus where the goods are taken, for instance, by road to the CFS or CY delivery point, then it is suggested that the carrier should be responsible up to the geographical point where the goods are to be delivered and, time-wise, until the goods are collected. The latter responsibility should be subject to a reasonable notice period given to the consignee. The former extension would then mimic the carrier's responsibility for correct delivery which generally extends to actual delivery wherever this may be. The only exception to this might be in those parts of the world where delivery is compulsory to an independent third party i.e. a port authority. Here the carrier's liability should in theory cease.

The issue for consideration is that in a port to port bill of lading a carrier, in principle should have the same responsibility in respect of the goods entrusted to his care after receipt but prior to loading, and after discharge but prior to delivery, as he has for the sea carriage provided he is not obliged to deliver to a third party.

6.3 Shipments where more than one mode of transport is contemplated.

It is first necessary to distinguish two situations. First where a contracting carrier issues a document under which he only accepts responsibility for the part of

the transport he actually performs. This is referred to as a through bill of lading. The second is where a contracting carrier acts as principal for the whole transport whether actually performed by him or not. This is referred to as a combined transport bill of lading.

6.3.1 Through bills of lading

Clarification of the carrier's principal obligations.

These documents sometimes masquerade as combined transport documents. Some shipowners and many freight forwarders still issue them. Under these documents the carrier is only responsible for the part of the carriage actually performed by him even though he has arranged the complete carriage and the place of receipt and the place of delivery may both be inland. In English law such documents are perfectly valid and the shipowner (if he is the contracting party) can exclude all responsibility for anything occurring outside the sea leg actually performed by himself.

The only obligation the contracting party has for the parts of the carriage not performed by himself, is that he must exercise the level of skill that a competent freight forwarder or agent would use in selecting the other carriers. Even this liability could be excluded by contractual terms. Under this scenario it is sometimes difficult to reconcile the normal duties concerning delivery. Delivery to an onward carrier is technically delivery to the shippers/consignees agent even though such onward carrier was selected by the ocean carrier without the knowledge of the shipper/consignee. In theory the shipowner should not deliver the goods to the onward carrier without the surrender of the original bill of lading. In practise this doesn't always happen.

In many jurisdictions the obligation of an agent is in these circumstances rather confusing and vague.

It is suggested that the basic duties of a party issuing a through document be set out in any new rules.

6.3.2 Competing identities of the carrier

Where there is an identity of carrier clause in a transhipment bill of lading, confusion can often arise since it sometimes difficult to tell which sea leg constituted the ocean carriage and thus who is the carrier under this scenario.

It is suggested that the ocean vessel be clearly identified where transhipment is contemplated.

6.3.3 Liberties

Sometimes on-carriage by a different carrier, whether by sea or other means, is not expressly stated on the front of the bill of lading. In these cases the carrier almost

invariably relies on a liberty clause on the reverse side. These clauses have become more sophisticated over the years. Under UCP 500, transhipment is allowed where the goods are containerised even if the credit prohibits transhipment. Where the goods are not containerised, transhipment is not generally allowed. In the latter circumstances collusion between shipper and carrier often occurs. The shipper requires no mention of transhipment on the face of the bill and the carrier omits any reference to transhipment relying on the liberty clause on the reverse side. The wording of Article 23 of UCP 500 seems to encourage this. Similar liberties are often included in relation to other activities such as consolidation or de-consolidation of the goods.

Except in the case of containerised goods, it is suggested that carriers should not be permitted to rely on liberty clauses on the reverse side of their bills of lading where it is known in advance that transhipment will take place during the contemplated carriage.

6.4 Combined Transport Bills of Lading

6.4.1 Shipped clauses

Different issues arise where the contracting party issues a full combined transport document and assumes liability throughout the carriage as principal. The first issue to be considered relates to the "Received for Shipment" or "Shipped" clause on the front of the document. In other modes of transport the difference is not important, however with a negotiable document it is crucial. Originally a received for shipment bill of lading was not a negotiable document at all, merely a receipt and evidence of the contract that had been agreed. The document only became negotiable when it was endorsed with a notation "Shipped on Board" together with a date or was exchanged for a document with a "Shipped on Board" statement on its face. With the advent of house to house movements, some carriers have attempted to obscure the issue by having just one document with a hybrid clause stating "*Shipped on board the Ocean vessel or pre-carrying mode of transport where the place of receipt is named herein*"

UCP 500 is more stringent in its requirements for a shipped on board statement together with the name of the vessel and a date. One has to ask the question as to why this is now so critical where the sea carriage might represent a much smaller part of the overall transport than in the past. If banks are willing to accept security based on an NVOCC's document where the ultimate key to delivery is not held by the shipowner, then it may seem illogical to rely on such a statement. The important issue must be the security surrounding delivery. With the advent of secure electronic communications using digital signatures, there may yet be pressure to change.

It is suggested that consideration be given to facilitating the extension of the negotiability of a combined transport bill of lading to from the time the goods have actually be shipped on the first mode of transport.

6.4.2 Gaps between compulsory or identifiable regimes

An important issue relates to the uncertainty that exists in the application of compulsorily applicable regimes in relation to the contemplated modes of carriage and the gaps in between. For instance, in a typical combined transport bill of lading adopting the network liability principle, containerised goods might be taken from ship's side to the regular shipowner's CFS or CY in order to await collection by the onward road haulier. Such onward road haulage might be under domestic standard conditions or under a compulsory regime such as the CMR. However the road leg from the discharge port to the CFS or CY might be a considerable distance away and would most likely not be covered by either regime. In many cases this incidental carriage is performed by the sea carriers themselves or by an associated concern.

There is often much uncertainty as to what regime applies to these "in-between" sectors.

It is suggested that incidental legs of the transport be governed by an extension of the regime previously applying until delivery is effected to the carrier on the onward leg identified in the transport document.

6.5 Issue common to all three types of carriage

Interchange receipts and associated documentation.

One major omission from the regimes currently applying to modern liner trade transport regimes is any obligation on the contracting party to ensure that the appropriate evidential documents are obtained from subcontractors and are made available to interested parties on demand. Such documents as interchange receipts, way bills, consignment notes etc are part and parcel of every day life. However, there is no duty on a contracting carrier to maintain proper records so that the terms of engagement and evidence of performance of any subcontractor or, in the case of a CTO, himself can be ascertained.

It is suggested that contracting carriers be under a duty to obtain, keep and make available all usual interchange receipts, way bills and other contract terms of subcontractors involved in each carriage. Contracting carriers should also be obliged to require all their subcontractors to do the same.

Comité Maritime International

International Sub-Committee on Issues of Transport law

Agenda Paper for the Third Meeting
on 7th and 8th July 2000

Introduction

At its second meeting on 6th/7th April 2000 the International Sub-Committee ("ISC") considered the six topics contained in the Agenda Paper for that meeting. In respect of the first five topics, the Agenda Paper set out the issues which appeared to arise and put forward possible solutions. These topics were discussed and some tentative conclusions were reached. Two members of the Working Group, Professor Michael Sturley and Professor Gertjan van der Ziel, were appointed as a drafting team to prepare draft provisions for consideration at the ISC's third meeting. These drafts (in bold type), with commentary thereon, are contained in Sections 3-7 of this Agenda Paper.

The sixth topic in the Agenda Paper for the second meeting, then entitled "Before loading and after discharge", had not been discussed at the first meeting of the ISC on 27th/28th January 2000. Consequently that section of the Agenda Paper did not put forward any possible solutions. It was agreed at the second meeting that the section should be revised in the light of the debate at the second meeting, but that draft provisions should not be prepared at this stage. Section 1 of this Agenda Paper, now entitled "General Issues Relating to Contracts of Carriage where Sea Carriage is contemplated", does not contain draft provisions, but it does put forward "propositions" which generally describe how the law might be set out in a new instrument.

This Agenda Paper also contains at Section 2 what is in effect a discussion paper relating to the liability regime to enable the ISC to begin considering what provisions relating to liability may be incorporated in the new instrument. The Chairman of the International Sub-Committee on the Uniformity of the Law of the Carriage of Goods by Sea ("the Uniformity Sub-Committee"), Professor Francesco Berlingieri, whose report was presented to the CMI Assembly in May 1999 (published in CMI Newsletter No. 2 - 1999), gave invaluable assistance to the Working Group in the preparation of this section. It must be emphasised that this section of the Agenda Paper has been prepared purely for discussion purposes with a view to setting out the issues for discussion in as broad a framework as possible. It should not be interpreted, by implication or otherwise, as setting out the views of the Working Group on any of the more controversial issues. However where topics were discussed in the Uniformity Sub-Committee, this Agenda Paper records where some consensus emerged in the Uniformity Sub-Committee, as reflected in the May 1999 Report.

It is envisaged that some provisions of the new instrument should be mandatory and others non-mandatory or declaratory. This Agenda Paper has been prepared on this basis, although the draft provisions have been drafted in respect of each topic individually. Whilst some of the general principles discussed in this Agenda Paper could apply to charterparties, this Paper

has been prepared on the assumption that a new instrument will not have mandatory application to charterparties, which were excluded from the Working Group's terms of reference. At the next stage in the drafting process the outline of a new instrument as a whole must be considered and the proposed scope of its application defined with some precision. It should also be considered whether the mandatory provisions should be "mandatory both ways"; in other words whether no contractual derogation from the instrument, including an increase of the carriers' limits of liability, should be permitted, as is considered to be the effect of Article 41 of CMR.

Similarly, definitions contained in the draft provisions set out in this Agenda Paper apply only in respect of the relevant sections and are not necessarily apposite in other contexts. It is envisaged that the proposed new instrument will contain an article setting out a number of definitions which will apply throughout the instrument.

The Working Group hopes that it will be possible to prepare a draft outline of a new instrument, incorporating draft provisions, including provisions relating to the liability regime, and some commentary, for discussion by the ISC at a fourth meeting and thereafter for discussion at the Singapore Conference. The dates of 16th and 17th October were previously suggested as dates for such a fourth meeting; the Working Group would now like to bring the fourth meeting forward to **12th and 13th October** and it suggests that the meeting be held in **London**.

1 GENERAL ISSUES RELATING TO CONTRACTS OF CARRIAGE WHERE SEA CARRIAGE IS CONTEMPLATED.

1.1 INTRODUCTION

The issues raised under this section are intended to bring clarity to areas which are often uncertain when more than one mode of transport is contemplated or where the contract of carriage involves the performance of ancillary activities, the details of which are often obscure. Some of these issues impinge on the scope of application of an eventual instrument and on some liability related issues. The ISC felt that the character of a bill of lading was irrelevant to many of the issues raised under this section and that whatever was proposed should apply more generally to all relevant contracts of carriage. The terminology used has been changed accordingly. The propositions outlined below are not intended to be drafts, but to suggest the scope that the relevant provisions might adopt. They are designed also to provoke discussion on critical aspects of the issues concerned.

1.2 Port to port shipments

1.2.1 Identification of subsidiary activities

The proposition is: 'Any document or other evidence of a contract contemplating the carriage of goods by sea where the carrier agrees to perform activities between the time of the receipt of the goods and the time of delivery in addition to those relating to the actual performance of the carriage itself, must specify those additional activities and the terms on which it has been agreed that those activities will be performed. Such activities may include (but are not limited to), storage, containerisation or de-containerisation of goods, supply of electricity or provision of other facilities, arranging onward carriage as agent for the shippers/consignees and any similar activity.'

The proposition calls for a record of what has been agreed and the terms on which these additional activities are to be performed. Such a record can be electronic, paper or even voice recording. The point is that it should be discoverable particularly by a third party who may become interested in the goods at a later stage. Thought should be given as to whether the examples should be given at all or whether the list should be extended.

1.2.2 Responsibility for subsidiary activities

The Proposition is: 'Where the contract of carriage is limited to a 'port to port' shipment, the carrier assumes liability from the time that he has received the goods from the shipper to the time that he delivers them to the consignee on the same basis as the terms and conditions that apply to the sea carriage. Such an extension of the terms applying to sea carriage shall however cease prior to delivery to the consignee in the event that the carrier can prove that delivery

was effected in the discharge port to an authority or other third party to whom, pursuant to law or regulation applicable at the discharge port, the goods must be handed over and who will take care of their delivery to the consignee. One question is whether the restriction to 'port to port' movements is a) clear or b) too restrictive? The second question concerns compulsory delivery to a third party. Although primarily a drafting issue, the policy behind the provision may need further elaboration.

1.3 SHIPMENTS WHERE MORE THAN ONE MODE IS CONTEMPLATED

The Proposition is: Definition: Through carriage:

Where more than one mode of transport is contemplated by the contract of carriage and the carrier acts as an agent on behalf of the owner of the goods in arranging for any part of the transportation not actually performed by himself. Definition: Combined Transport: Where more than one mode of transport is contemplated by the contract of carriage and the carrier assumes responsibility throughout .

These definitions are designed to overcome any ambiguity in the use of the various terms in any new instrument.

1.3.1 Through Carriage

1.3.1.1 Carrier's principal obligations.

The Proposition is: 'Where the parties have agreed that the carrier will act as the agent of the owner of the goods in arranging any part of a through transport movement, the carrier, in addition to any duties imposed on a forwarding agent under the governing law of the contract, has a duty to use reasonable care in arranging such sub-contracts with carriers, bailees and/or others who are of good repute and possess reasonable experience for the tasks agreed. The carrier also has a duty to give the necessary instructions to ensure delivery in accordance with the original contract and to pay any freight due. The carrier has a further duty to employ subcontractors on terms which are usual for the particular mode of transport or which are compulsorily applicable in the territory where the subcontract is agreed. In deciding whether reasonable care has been used, account may be taken of the geographic, economic and social factors applying to any particular type or location of such transaction. In the event that the goods are lost, damaged or delayed during the custody of such a sub-contractor, the burden of proof shall be on the carrier to show that reasonable care had been taken or that the terms were usual in that particular trade or that the terms were compulsorily applicable.'

This proposition cannot be all embracing, however those things that could be considered the basic duties have been addressed. There could be other common duties which should also be mentioned. A reverse burden of proof has been employed as a sanction against abuse. The carrier will be in possession of all the facts, the cargo owners most likely will be in the dark.

1.3.1.2 Identity of the carrier

The proposition outlined below is designed to ensure that 'identity of carrier' clauses are not used to circumvent responsibility where it is not clear in the documents evidencing the contract of carriage which is the ocean vessel and which is the feeder vessel.

The Proposition is: 'Where the terms of a contract of carriage seek to limit the responsibility of the carrier to a particular leg of the sea carriage, or to define the identity of the carrier to the owner of a vessel performing a particular leg of the sea carriage, such terms shall be invalid unless the particular parts of the carriage referred to are clearly identified in the contract and any document issued thereunder.'

1.3.1.3 Liberty Clauses

The Proposition is: 'Any contract for the carriage of goods by sea must record the intention to tranship the goods at any time prior to delivery, where such intended transhipment is known to the carrier at the time that the contract of carriage is agreed. Where such a proposed transhipment is known, a general liberty clause in the contract is invalid unless the carrier proves that such a transhipment is a custom of the trade or where the goods are being shipped in a containerised service.'

This proposition is designed to make intended transhipments transparent. The sanction could go further and render such premeditated transhipments a breach of contract. The proposition is not intended to outlaw transhipments in the containerised trades or where transhipments are customarily performed.

1.3.2 Combined Transport Bills of Lading

1.3.2.1 Shipped Clauses

The Proposition is: 'Where a carrier issues a combined transport bill of lading confirming that the goods have been shipped on a vessel or other means of transport contemplated in the contract of carriage, such a document may be transferred to a third party under a contract for the sale of the goods unless such sale contract specifically prohibits such a transaction. In the absence of such a prohibition, transfer of the

document has the same effect as the transfer of a 'shipped on board' bill of lading.'

This proposition is designed to facilitate the negotiability of documents reflecting containerised trade without imposing arbitrary rules which might lessen the security of a negotiable bill of lading where the carriers are an unknown quantity.

1.3.2.2 Gaps between compulsory or identifiable regimes.

The Proposition is: 'Where the carrier moves or arranges for the movement of the goods between modes of transport governed by compulsorily applicable transport rules or rules where the carriage is subject to conditions applying rules approved by a national body, then such incidental movement shall be subject to the regime applying to the mode of carriage immediately preceding until delivery has been effected to the on carrier.'

This proposition is only relevant where a 'network' liability regime is in operation. It is irrelevant where a uniform system is in operation. The drafters will need to bear this in mind. Parts of the proposition are contentious to the extent that they raise a number of possibilities. For instance, should rules approved by a national body be good enough to limit the application of the rule? If so do we need to define national body further. Are there any other regimes which should supplant the general rule?

1.4 Issues common to all three types of carriage

1.4.1 Interchange receipts

The Proposition is: 'Where a contract for the carriage of goods is agreed on the basis of 'through carriage' or on a 'combined transport' basis, then the carrier has a duty to obtain interchange receipts or any documentation relating to the condition of the goods when transferred to the custody of a new carrier or bailee and which are normally received or exchanged in the particular trade in question. Such documents should be retained for a minimum period of [three] years and shall be produced to cargo interests on request. All subcontracts should contain a like requirement.'

This proposition gives some international import to local documentation which is of interest to the owners of the goods at some stage. It should also assist in tightening up procedures in relation to the activities of NVOCs and agents generally. One could easily apply a sanction if required, since failure to carry out the task could be rendered a breach of contract the consequences of which could be enumerated.

2 LIABILITY REGIME

2.1 Introduction

2.1.1 The basic ingredients of all liability regimes governing the international carriage of goods are the basis of liability, the exemptions from liability, the allocation of the burden of proof and the limits of liability. These ingredients are linked to one another and each of them exerts a significant influence on the others. In almost all regimes the loss of the right to limit occurs when the loss, damage (or delay in delivery) resulted from an act or omission of the carrier done with the intent to cause such loss, damage (or delay in delivery) or recklessly and with knowledge that such loss, damage (or delay) would probably result. Reference will hereafter be made to such a regime as "nearly unbreakable limits". When the right to limit is lost as a result of default on the part of the carrier, that regime will be referred to as "breakable limits".

2.1.2 The combinations that presently exist are the following:

2.1.2.1 objective or strict liability, irrespective of fault, with nearly unbreakable limits unless the carrier proves that he and his servants or agents took all necessary measures to avoid the damage, or that it was impossible to do so: Warsaw Convention 1929 as amended by the 1955 Protocol[1];

2.1.2.2 liability based on fault with the burden of proof on the carrier (presumed fault) and nearly unbreakable limits: Hamburg Rules;[2]

2.1.2.3 liability based on fault with a dual system of the allocation of the burden of proof, generally based on presumed fault but with some exceptions, where there is a presumed absence of fault, and (probably) breakable limits: CMR[3], COTIF;[4]

2.1.2.4 liability generally based on fault but with some exemptions, and a dual system of allocation of the burden of proof, partly based on presumed absence of fault and partly based on presumed fault, with (probably) breakable limits, and an obligation to exercise due diligence before and at the beginning of the voyage to make the ship seaworthy: Hague Rules;

2.1.2.5 liability generally based on fault but with some exemptions, and a dual system of allocation of the burden of proof, partly based on presumed absence of

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[1] Arts 18-20. Montreal Protocol No. 4 (which came into effect in June 1998) makes the limits unbreakable, and replaces the "all necessary measures" provision with a list of exceptions. A new Montreal Convention was adopted in 1999, but has not yet come into effect.

[2] Annex II ("the Common Understanding"). Art 5 provides that to avoid liability the carrier must prove that "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences".

[3] Arts 17, 18 and 29

[4] Arts 36, 37 and 44

fault and partly based on presumed fault, with nearly unbreakable limits, and an obligation to exercise due diligence before and at the beginning of the voyage to make the ship seaworthy: Hague-Visby Rules.

2.1.3 In all the above regimes there are provisions to the effect that in certain specified situations the carrier is not liable. Such situations will hereafter be referred to as "exceptions from liability". CMR, COTIF and the Hamburg Rules can broadly be said to allow the carrier to escape liability if he has not been negligent, or can prove that he has not been negligent. The "exceptions" or "excepted perils" in these regimes are matters which arise (or are presumed to arise) without the fault of the carrier. The exceptions in the Hague and Hague-Visby regimes (in particular Article IV Rule 2(a) which exempts the carrier in certain circumstances for the negligence of his servants) are more extensive, but the obligation to exercise due diligence (or *"diligence raisonnable"*) to make the ship seaworthy generally overrides the exceptions (save for latent defects - Article IV Rule 2(p)) if the loss or damage resulted from unseaworthiness.

2.1.4 The obligation to exercise due diligence to make the ship seaworthy has historical origins and can be said to reflect the particular circumstances of carriage by sea. The more extensive exceptions from liability in the Hague and Hague Visby regimes can also be said to reflect matters which arise (or are presumed to arise) without the fault of the carrier in the course of carriage by sea[5] (CMR and COTIF contain exceptions which reflect the particular circumstances of carriage by road and rail). They also reflect a greater influence of the common law tradition in the drafting of the Hague and Hague-Visby Rules than in the other transport conventions although the civil law tradition is reflected in Article IV rule 2(q).

2.1.5 The dual system of the allocation of the burden of proof exists, albeit to a varying extent, not only in all the maritime conventions, including the Hamburg Rules (as respects fire) but also in CMR and COTIF.

2.1.6 The unbreakability of the limits is unrelated to the greater or lesser strictness of the liability regime; it is in fact provided in all the more recent conventions, irrespective of the liability regime adopted by each of them. So are the limits, which appear to be fixed with reference to other elements, such as the average value of the goods carried and the global value of all the goods that may be carried on a single means of transportation.

2.2 Basis of liability

2.2.1 The instrument could provide for

[5] e.g. Article IV Rule 2(a), (c) and (l)

2.2.1.1 a mandatory objective or strict liability regime subject to (nearly) unbreakable limits[6], or

2.2.1.2 a liability regime based on presumed fault;

2.2.2 a liability regime based on presumed fault could include a specific obligation on the carrier to exercise due diligence to make the ship seaworthy

2.2.2.1 before and at the beginning of the voyage, and

2.2.2.2 continuously throughout the voyage.

There was consensus in the Uniformity Sub-Committee on the need for a provision such as described in 2.2.2.1 above, albeit that the Uniformity Sub-Committee was not considering the liability regime at large. There was no consensus as regards a provision imposing an obligation on the carrier to exercise due diligence to make the ship seaworthy throughout the voyage but the practical importance of this issue was questioned in the light of Article III Rule 2. This, perhaps, illustrates the need for a new instrument to set out the liability regime with greater clarity. It could also be argued that imposing an obligation on the carrier to exercise due diligence to make the ship seaworthy accords with the carrier's public law obligations to safeguard life at sea and the environment.

2.2.3 The regime mentioned in 2.2.1.1 would probably permit the establishment of a unique regime for all stages of multimodal transport and in any case would probably reduce litigation. The regime mentioned in 2.2.1.2 would permit the continuing application, albeit with some changes, of the present regimes, whether Hague, Hague-Visby or Hamburg.

2.3 Exceptions from liability

2.3.1 CMR, COTIF and the Hamburg Rules, broadly, exempt the carrier from liability arising from circumstances which he could not avoid and the consequences of which he could not prevent.

2.3.2 CMR, COTIF, the Hague and the Hague-Visby Rules exempt the carrier if he proves that the loss or damage resulted from inherent vice in the goods, defective packing and insufficiency of marks, and from the wrongful act or neglect of the claimant or

[6] The Working Group also considered a non-mandatory objective or strict liability regime, which would apply if the transport document so provided, or would apply unless the transport document provided otherwise and would override the Hague, Hague-Visby and Hamburg regimes by imposing greater responsibilities and obligations on the carrier as permitted by Article V and Article 23.2 respectively. The Working Group doubted whether such a regime would achieve the objective of uniformity, which the Working Group believes can only be achieved by a mandatory liability regime. It would be difficult to avoid conflicts with the existing regimes, unless a very strict liability regime and high limits of liability were adopted, and it would constitute a third regime governing the carriage of goods by sea to which the CMI has always been opposed. However the question is open for discussion.

shipper. Montreal Protocol No. 4 to the Warsaw Convention exempts the carrier if he proves that the loss or damage resulted from inherent vice or deficiency in packing.

2.3.3 Exceptions from liability such as those outlined above are not specific to any particular mode of transport.

2.3.4 The question then arises as to the extent to which the carrier should be exempted from liability for:

2.3.4.1 Fire, strikes and war. It could be argued that these exceptions fall within the general exception outlined in 2.3.1 above and would not need to be specifically catalogued if a provision such as 2.3.1 were to be adopted. Montreal Protocol No. 4 exempts the carrier if he can prove that the loss or damage resulted from an act of war or armed conflict, or an act of public authority.

2.3.4.2 Risks inherent in sea carriage such as perils of the sea and saving life or property at sea[7];

2.3.4.3 The negligence of the carrier's servants in the navigation of the ship;

2.3.4.4 The negligence of the carrier's servants in the management of the ship;

2.4 Allocation of the burden of proof

2.4.1 The fundamental rule under all the regimes is that the claimant has the burden of proving the condition or quality of the goods on delivery and that their condition or quality had deteriorated or decreased from when the carrier took them in charge (and by the time agreed).

2.4.2 In order to avoid liability the carrier must, in general, establish that he is relieved by one of the exceptions. Under the Hague and Hague-Visby Rules, if the claimant proves that the damage resulted from unseaworthiness, the carrier must prove that he exercised due diligence.

2.4.3 In certain cases the conventions provide for the reversal of the burden of proof or may allow contracting states to do so. For example under the Hamburg Rules if the loss, damage or delay was caused by fire, the burden of proof is on the claimant to establish that the fire arose from fault or neglect on the part of the carrier, his servants or agents. Under the Hague Rules, the Protocol of Signature permits contracting states to provide that the claimant is entitled, in case the carrier invokes one of the excepted perils enumerated in Articles IV rule 2(c) to (p), to prove that the

[7] Article IV Rule 2(b) of the Hague Rules and Article 5.6 of the Hamburg Rules

loss or damage resulted from a personal fault of the carrier or a fault of his servants or agents not covered by paragraph (a).

2.4.4 The instrument could provide for a reversal of the burden of proof in cases where, considering the cause of the loss or damage, it is reasonably likely that the act, neglect or default of the carrier has not contributed to such loss or damage.

2.4.5 The instrument could provide for contributing causes of the loss or damage (see Article 5.7 of the Hamburg Rules).

2.5 Liability of the performing carrier

2.5.1 The Uniformity Sub-Committee was of the view that the liability regime in respect of the performing carrier should be the same as that of the contractual carrier, save that the liability of the performing carrier should be limited to the part of the carriage performed by him.

2.5.2 The definition of "performing carrier" should be considered and whether it should be restricted (as in the Hamburg Rules) to a person to whom performance of the carriage has been entrusted by the contracting carrier. It should be considered whether and to what extent the liability regime of the contracting carrier may also be applied to independent contractors performing services ashore in respect of the handling of the goods before loading and after discharge.

2.6 Delay

2.6.1 There was consensus within the Uniformity Sub-Committee that a future instrument should provide that the carrier is liable for delay in delivery of the goods as well as for loss of or damage to the goods whilst they are in his charge.

2.6.2 Delay in delivery may be a consequence of the carrier's failure either to exercise due diligence, and the subsequent interruption of the voyage for repairs, or to proceed by the direct or customary route, or it may itself be a breach of the contract of carriage, or it may be the consequence of adverse weather encountered on the voyage.

2.6.3 It must also be considered whether a new instrument should contain a provision in the case of excessive delay to the effect that the goods shall be deemed to be lost, for the purposes of the measure of indemnity, if they are not placed at the disposal of the consignee within a period of time (e.g. 90 days) from the date on which the goods should have been delivered. It has been suggested that if the goods are placed at the disposal of the consignee after the lapse of the above period, the consignee should be given an option of either accepting payment of the indemnity for total loss, or accepting the late delivery of the goods, without prejudice to his claim for damages for delay.

2.6.4 The reference point for calculation of the limit for damages for delay should also be considered. In the Hamburg Rules the limit is calculated by reference to the freight payable for the goods delayed (Article 6.1(b)).

2.7 Deviation

In discussion of this topic in the Uniformity Sub-Committee it appeared that in certain jurisdictions it would contribute to clarity if it could be stated that a breach of the uniform rules, including any breach that could be classified as an unreasonable deviation, does not entail the non application of the rules. It was agreed, therefore, to recommend that a future instrument should contain a provision to that effect.

2.8 Deck cargo

There was a consensus within the Uniformity Sub-Committee that a future instrument should apply also to deck cargo and that it should contain a provision along the lines of Article 9 of the Hamburg Rules.

2.9 Limitation of liability

2.9.1 There was general support within the Uniformity Sub-Committee for the package-kilo limitation adopted by the Hague Visby Rules and then by the Hamburg Rules, except that it should be made clear that the unit is the shipping unit.

2.9.2 It is suggested that, in accordance with the view expressed by a large majority of the Uniformity Sub-Committee, the limits should apply to the aggregate of all claims, including claims in respect of damages for delay.

2.9.3 The current limits applicable under the transport conventions are:-

2.9.3.1 Warsaw	17 SDRs per kilo
2.9.3.2 COTIF	17 SDRs per kilo
2.9.3.3 CMR	8.33 SDRs per kilo
2.9.3.4 Hamburg Rules	2.5 SDRs per kilo or 835 SDRs per package or unit
2.9.3.5 Hague-Visby Rules	2 SDRs per kilo or 666.67 SDRs per package or unit

The question of the amounts should, it is thought, be considered at a later stage.

2.9.4 The Uniformity Sub-Committee considered that a new instrument should also contain provisions for the automatic review of the limits along the lines of those adopted in the Protocol of 1996 to the LLMC Convention.

2.10 Loss of the right to limit

The wording of the provision on the loss of the right to limit liability has become almost standardised. It is suggested, however, that it should be made clear, as in Article 8 of the Hamburg Rules, that the act or omission of the carrier be linked to the loss complained of and, as in Article 4 of the LLMC Convention, that the act or omission must be a personal act or omission of the carrier.

2.11 Time Bar

The Uniformity Sub-committee was undecided whether the time bar period should be one or two years.

2.12 Liabilities of the Shipper

2.12.1 The Uniformity Sub-Committee considered that a new instrument should contain a provision setting out the general duties of the shipper in respect of goods delivered to the carrier, including his special duties in respect of dangerous goods and including an obligation adequately to prepare and package the goods for carriage by sea. Such a general provision should be followed by specific provisions along the lines of those set out in Article III Rule 5 and Article IV Rule 3 of the Hague Rules and Articles 12 and 17.1 of the Hamburg Rules.

2.12.2 As regards the shipment of dangerous cargo there was consensus in the Uniformity Sub-Committee that a new instrument should contain provisions similar to Article IV Rule 6 of the Hague Rules and Article 13 of the Hamburg Rules, but opinions were divided as to which was to be preferred and in particular whether the shipper's liability for the shipment of dangerous cargo was strict, or subject to Article IV Rule 3.[8]

3 INSPECTION OF THE GOODS AND DESCRIPTION OF THE GOODS IN THE TRANSPORT DOCUMENT

3.1 **(a) After the carrier receives the goods, the carrier must issue a transport document if the shipper requests one.**

(b) The shipper and the carrier may agree that the transport document will be non-negotiable. Such an agreement may be express or implied. In the absence of such an agreement, the shipper is entitled to a negotiable bill of lading or other negotiable transport document.

(c) If the carrier issues a transport document, the transport document must -

[8] See Effort Shipping Co. Ltd v. London Management SA, The Giannis NK [1988] 1 Lloyd's Rep 337

(i) describe the apparent order and condition of the goods at the time the carrier receives them from the shipper;

(ii) show the leading marks necessary for identification of the goods as furnished in writing by the shipper before the carrier receives the goods; and

(iii) show the number of packages, the number of pieces, the quantity, and the weight as furnished in writing by the shipper before the carrier receives the goods.

3.1(a) corresponds to existing law and practice in most countries, and to the current international regimes (including the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules). Implicit in 3.1(a) is the concept that the carrier need not issue a transport document if the shipper does not request one.

3.1(b) alters the existing law and practice in most countries. Under the current international regimes, a shipper is generally entitled to a negotiable bill of lading. In some trades, however, such as short ferry voyages, shippers never ask for a negotiable bill of lading and a negotiable document would serve no purpose. 3.1(b) permits a carrier to offer a service in which negotiable documents are simply not available. The shipper and the carrier may expressly agree (*e.g.* in the booking note) that a negotiable transport document will not be issued. In some circumstances, the shipper and the carrier will be deemed to have so agreed by implication (*e.g.* by the custom of the trade). But if there is no agreement, either express or implied, then the shipper will continue to be entitled to a negotiable bill of lading or other negotiable transport document. (It is important to recognize that electronic documents may some day supersede bills of lading entirely. The proposal leaves open the possibility that a negotiable transport document other than a bill of lading (*e.g.*, an electronic equivalent) may some day be as fully acceptable in commerce as the current negotiable bill of lading.)

3.1(c)(i) confirms the understanding that is clearly expressed in the *travaux préparatoires* of the Hague Rules and carried forward in subsequent international conventions. *See, e.g.*, Hamburg Rules arts. 15(1)(b), 16(1)-(2). The courts in some countries have departed from this principle.

3.1(c)(ii)-(iii) generally corresponds to existing law and practice in most countries, and to the current international regimes (including the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules). The proposed draft does alter the existing law in one significant respect: The carrier's obligation to issue a transport document showing the information furnished by the shipper in this proposal is not qualified by any exception when the carrier has no reasonable means of checking the information furnished by the shipper. Under current law, the carrier may (in theory) simply omit this information when it has no reasonable means of checking the accuracy. Under this proposal, the carrier must issue a transport document showing the information furnished by the shipper even when it has no reasonable means of checking the accuracy (but it may protect its interests with a qualifying clause under 3.2).

3.1(c)(ii) also omits the requirement that "the marks must be stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which the goods are contained, in a manner that would ordinarily remain legible until the end of the voyage." In view of the alteration noted above (which means that the carrier must include information furnished by the shipper even when it has no reasonable means of checking the accuracy), it seems inappropriate to permit the carrier to omit information furnished by the shipper concerning the marks when the carrier believes that the marks might not remain legible until the end of the voyage. Once again, the carrier's remedy should be to protect its interests with a qualifying clause under 3.2. This change is unlikely to make any difference in practice.

With respect to 3.1(c)(ii)-(iii), the ISC agreed that the shipper must furnish the necessary information in writing *before* the carrier receives the goods, and that it is not sufficient to furnish the information before the carrier issues the transport document.

With respect to 3.1(c)(iii), the ISC agreed that the transport document must include all of the listed information furnished by the shipper (*e.g.* the number of pieces and the weight), and that it would not be sufficient to include only one of the items on the list (*e.g.* the number of pieces or the weight) when the shipper desires fuller information.

3.2 (a) Under the following circumstances, a carrier issuing a transport document may qualify the information mentioned in 3.1(c)(ii) or 3.1(c)(iii) with an appropriate clause in the transport document to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

(i) For non-containerized goods, the carrier may include an appropriate qualifying clause in the transport document if the carrier can show that it had no reasonable means of checking the information furnished by the shipper.

(ii) For goods delivered to the carrier in a sealed container, the carrier may include a qualifying clause in the transport document with respect to

(a) the leading marks, or

(b) the number of packages, the number of pieces, or the quantity of the goods inside the container,

if the carrier can show that it had no reasonable means of checking the information furnished by the shipper.

(iii) For goods delivered to the carrier in a sealed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has

not weighed the container if (a) the carrier can show that the clause is accurate, and (b) the shipper and the carrier did not agree in writing prior to the shipment that the container would be weighed and the weight would be recorded on the transport document.

(b) For purposes of 3.2(a)(i) and 3.2(a)(ii), a "reasonable means of checking" must be not only physically practical but also commercially reasonable.

3.2(a) corresponds to existing law and practice in most countries. Although current law generally permits the carrier to protect itself by omitting from the transport document a description of the goods that it is unable to verify, this protection is essentially meaningless in practice. Even if the carrier is unable to verify the description, the typical shipper still requires a transport document describing the goods in order to receive payment under the sales contract. Commercial pressures therefore deny the carrier the one form of protection that is clearly recognized under current law. Qualifying clauses represent the carrier's attempt to regain its protection. Common examples of qualifying clauses include "said to contain" and "shipper's weight and count." Other qualifying clauses may also be effective, depending on the particular needs of the case.

The standards for including a qualifying clause under 3.2(a)(i)-(ii) are generally similar to those under the proviso to article 3(3) of the Hague Rules and article 16(1) of the Hamburg Rules, except that this proposal eliminates the Hague Rules and Hamburg Rules language excusing the carrier from including the otherwise required information when there are reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods. The consensus of the ISC was that when the carrier has reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods, the carrier is obligated to check the information if it has a reasonable means of doing so. Thus the carrier would be excused from including the otherwise required information only when there is no reasonable means of checking it. The reasonable suspicion exception is accordingly redundant.

Clauses regarding the weight of containerized goods create special problems. In some ports, facilities for weighing loaded containers simply do not exist. In such cases, it is an easy matter for the carrier to prove that it had no reasonable means of checking the weight information furnished by the shipper. But even in ports where weighing facilities exist, and could be used, it is often customary to load containers without weighing them. Sometimes this is because the time spent weighing containers would delay the ship's departure (particularly when the shipper delivers the container to the carrier shortly before sailing). Often it is because the weight is of no commercial importance, and the time and expense of weighing a container is unjustified in the absence of any commercial benefit. In some cases, however, the weight is of commercial importance, and the consignee should be permitted to rely on the statement of weight in the transport document unless it is clear that the carrier has in fact not weighed the container.

In view of these special problems with qualifying clauses regarding the weight of containerized goods, 3.2(a)(iii) specifically addresses the issue in unique fashion. The

proposal requires a clear statement that the carrier has in fact not weighed the container. The carrier can include such a statement only if it is true (*i.e.*, if the carrier did not weigh the container) and if the shipper and the carrier did not agree in writing prior to the shipment that the container would be weighed and the weight would be recorded on the transport document. 2(a)(iii)(b) recognizes that in some cases the container's weight is of commercial importance, and that in such cases the shipper may legitimately insist on having a weight listed in the transport document without a qualifying clause. A shipper may protect this legitimate interest with an explicit agreement prior to shipment (*e.g.*, in the booking note). In the absence of such a prior agreement, however, the carrier may assume that the container's weight is of no commercial importance. The carrier may then load the container without weighing it, any weight listed on the transport document may be qualified - without proof that the carrier had no reasonable means of checking the weight furnished by the shipper.

3.2(b) clarifies the meaning of "reasonable means of checking." Opening a sealed container or unloading a container to inspect the contents, for example, would not be commercially reasonable, even if it might be physically practical in some circumstances. Thus a carrier issuing a transport document would always be permitted to qualify the description of goods delivered by the shipper inside a sealed container - unless the carrier had some physically practical and commercially reasonable means of checking the information furnished by the shipper (which would have to be something other than opening the container). For example, if the carrier had an agent present when the shipper stuffed the container, and that agent verified the accuracy of the shipper's information during loading, then the carrier would not be permitted to qualify the transport document's description of the goods.

3.3 (a) Except as otherwise provided in 3.3(b), a transport document is -

(i) prima facie evidence of the carrier's receipt of the goods as described in the transport document; and

(ii) conclusive evidence of the carrier's receipt of the goods as described in the transport document [when the transport document has been transferred to a third party acting in good faith or when a third party acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the transport document].

(b) If a transport document contains a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under section 3(a), to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under 3.3(c).

(c) Subject to 3.3(d), a qualifying clause in a transport document is "effective" for the purposes of 3.3(b) under the following circumstances:

(i) For non-containerized goods, a qualifying clause that complies with the requirements of 3.2 will be effective according to its terms.

(ii) For goods shipped in a sealed container, a qualifying clause that complies with the requirements of 3.2 will be effective according to its terms if the carrier delivers the container intact and undamaged with the seal intact and undamaged.

(d) Notwithstanding 3(c), no qualifying clause will be effective if a person relying on the description of the goods in the transport document can show that the carrier or any of the carrier's employees or agents responsible for issuing the transport document did not act in good faith when issuing the transport document.

3.3(a)(i) simply confirms the widely recognized rule that, as a general matter, a transport document is prima facie evidence of the carrier's receipt of the goods as described in the transport document.

3.3(a)(ii) recognizes that, in order to protect innocent third parties who rely on the descriptions in transport documents, in some circumstances a transport document is not simply prima facie evidence but conclusive evidence. The ISC was unable to reach consensus on the definition of these circumstances, however, and thus this sub-section is bracketed to show the need for further discussion.

3.3(b) simply describes the effect of a qualifying clause when it is "effective." It is worth noting that a qualifying clause does not necessarily defeat the prima facie or conclusive evidence of the description of the goods in full. A qualifying clause such as "shipper's weight," for example, would not affect the evidentiary value of a description of the goods to the extent that it listed the number of packages in the shipment or described the leading marks.

There are sharp distinctions between commercial expectations with respect to containerized and non-containerized goods. 3.3(c)(i) addresses only non-containerized goods. Whenever the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it is entitled to qualify any statement regarding the leading marks, the number of packages or pieces, and the quantity or weight of the cargo, as appropriate, and the clause will be "effective."

For containerized goods, the carrier will often not be in a position to verify any of the information furnished by the shipper, but this is not always the case. To take the most obvious example, the shipper may have delivered break-bulk cargo to the carrier and the carrier may have stuffed the container. Some containers are not fully enclosed (*e.g.*, "flat rack" and "rag top" containers), and the carrier has at least some ability to verify the contents of such containers. Indeed, sometimes the carrier will have a representative present when a container is stuffed, even though the shipper ultimately delivers a sealed container for shipment. Thus the carrier must show that it had no reasonable means of checking the information furnished by the shipper before it can rely on a qualifying clause - even for containerized goods.

The carrier's classic rationale for relying on a qualifying clause and escaping liability in a containerized goods case is that the carrier delivered to the consignee exactly what it received from the shipper: a sealed container (the contents of which could not be verified). As soon as the carrier delivers something different (*e.g.*, a container that is so damaged that goods may have been lost during shipment or a container that has been opened during the voyage), the equities shift. At this point it is clear that the carrier has done at least something wrong, and the consignee's entitlement to rely on the description of the goods in the transport document becomes much stronger. 3.3(c)(ii) recognizes this shift in the equities.

3.3(d) simply recognizes the general maxim that no one should be allowed to profit from his or her own wrong-doing. For example, if the carrier knows that the containers do not in fact weigh anything near to the weight listed in the transport document, and the carrier chooses not to weigh the containers because it knows that it would discover this discrepancy and be required to correct the transport document, a consignee could well prove the carrier's failure to act in good faith when issuing the transport document. Other situations in which 3.3(d) might apply would be including a qualifying phrase in the transport document that is known to be inaccurate or including a qualifying phrase when the description of the goods in the transport document is known to be inaccurate.

4 DATE AND SIGNATURE OF THE TRANSPORT DOCUMENT

4.1 (a) If the carrier issues a transport document, the transport document must —

(i) state the date —

(A) on which the carrier took possession of the goods, or

(B) on which the goods were loaded on board the vessel, or

(C) on which the transport document was issued;

(ii) adequately identify the carrier and the shipper who have entered into the contract of carriage in conjunction with which the transport document is issued; and

(iii) be signed on behalf of the carrier identified under 4 1(a)(ii).

(b) The absence in the transport document of one or more of the particulars referred to in 4 1(a), or the inaccuracy of one or more of those particulars, does not affect the legal character of the transport document. The issuer of the transport document is liable to the shipper or other holder of the transport document for any damages that are proximately caused by the failure to include any of the particulars referred to in 4 1(a), or by the inclusion of inaccurate particulars.

(c) If the transport document is dated but fails to indicate the significance of the date, then the date will be deemed to be —

(i) the date on which the goods were loaded on board the vessel, if the transport document is an "on board" bill of lading or a similar document indicating that the goods have been loaded on board a vessel; or

(ii) the date on which the carrier took possession of the goods, if the transport document is a "received for shipment" bill of lading or other document that does not indicate that the goods have been loaded on board a vessel.

(d) If the transport document fails to identify the carrier who has entered into the contract of carriage but does indicate that the goods have been loaded on board a named vessel, then the registered owner of the vessel shall be presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a demise charter at the time of the carriage and the demise charterer accepts responsibility for the carriage of the goods.

All of the provisions on this subject are included in a single section, as they seem so closely related that there is no need to divide them into separate sections. Indeed, 4 1(a) is drafted in such a way that it could be expanded to include all of the items that must be included in a transport document. Thus 4 1(a), for example, could be combined with 3 1(c) (which begins with the same introductory phrase).

4 1(a)(i) gives effect to the ISC's consensus view that *some* date should be included in the transport document. This draft gives the carrier three choices of date that may be used. Perhaps there should be an open-ended fourth choice, *e.g.*, "such other date as the parties may agree is relevant in the context of the contract of carriage." This option is not included in the draft as the possibility was not discussed at either meeting of the ISC. This section does not address the consequences of failing to include the date. That issue, on which there was considerably less consensus, is addressed in 4 1(b). This section also does not address the consequences of including a date without specifying its significance. That issue, on which there was considerable consensus, is addressed in 4 1(c).

4 1(a)(ii) gives effect to the ISC's consensus view that the carrier and the shipper should be identified in the transport document. The question of what identification is "adequate" will vary with the circumstances. As a general rule, the transport document should list at least the name and address for both the carrier and the shipper. This section does not address the consequences of failing to identify the parties. That issue, on which there was considerably less consensus, is addressed in 4 1(b).

4 1(a)(iii) gives effect to the ISC's consensus view that the transport document should be signed on behalf of the carrier. This section does not define signature, but a definition

section of the final instrument should include a provision comparable to article 14(2)-(3) of the Hamburg Rules. This section also does not address the consequences of an unauthorised signature, on which there was no consensus and very little discussion. The ISC will need to provide more guidance before a draft can address that issue.

The first sentence of 4 1(b) gives effect to the ISC's consensus view that the validity of the transport document does not depend on the inclusion of the particulars that should be included. For example, an undated bill of lading will still be valid, even though a bill of lading *should* be dated. The first sentence of this section also extends the rationale behind that consensus view to hold that the validity of the transport document does not depend on the *accuracy* of the particulars that should be included. Under this extension, for example, a misdated bill of lading will still be valid, even though a bill of lading should be accurately dated.

The second sentence of 4 1(b) attempts to address the consequences of failing to accurately date the transport document, failing to accurately and adequately identify the carrier and the shipper, or failing to accurately sign the transport document. This is not an issue on which the ISC reached a consensus, but there seemed to be support for at least the limited approach taken here. After further discussion (including the closely related discussion on liability issues), there may be support for a broader approach. For example, there was some support for denying the carrier the benefit of unit limitation in cases where the carrier knowingly misdated the transport document, or denying the carrier the benefit of the one-year time bar in cases where the transport document does not adequately identify the carrier. Such possibilities must be considered in conjunction with the related liability issues.

4 1(c) gives effect to the unchallenged suggestions concerning — perhaps even the ISC's consensus view of — the consequences of including a date without specifying its significance.

4 1(d) gives effect to the views expressed in the Uniformity Sub-Committee. The issue remains controversial, but it was agreed in April that the ISC would proceed on the basis of the May 1999 Report for the time being. Further work will be necessary on this provision in any event, for it does not deal with the situation in which neither the carrier nor the ship is identified in the transport document.

5 FREIGHT

Hereunder follow a few provisions meant to reflect the 'lex maritima' on freight issues. The drafts are based on the views as expressed in the answers to the questionnaire and during discussions in the first two sessions of the ISC.

Some of the provisions have to be regarded as being of mandatory nature, others are declaratory only. It is attempted to make clear in the drafts themselves what their nature is.

5.1 **For the purpose of this section 5 'freight' shall include deadfreight.**

5.2 a. **Freight shall be deemed to be earned upon delivery of the goods to the consignee[9] in accordance with Section 6.2, unless the parties have agreed that the freight shall be earned, wholly or partly, at an earlier point in time or at an earlier occasion.**

b. **[Unless otherwise agreed,]**

(i) **[no freight will become due for any goods which are lost before the freight is earned,]**

(ii) **per distance (pro rata itineris) freight will become due for any goods which are delivered to the consignee at a place other than the place of destination as originally intended, provided the carrier is not in breach of his obligations under the contract of carriage.**

This provision follows the main rule that the carrier must have performed duly before his remuneration becomes due. Obviously, this provision is not of mandatory nature. Practice may differ. In the various modes of inland transport (at least in Europe) this main rule is usually followed. In maritime container trade, however, it is customary that bills of lading include the provision that the freight is already earned upon receipt of the goods by the carrier. In maritime charterparty trade a lot will depend on the usages of the particular trade. It is not uncommon that charterparties include that the larger part of the freight is earned and payable at some point in time in the beginning of the voyage (e.g. upon shipment of the goods, on the third day after issue of the bill of lading, etc.) and the balance somewhere at the end of the voyage (e.g. when opening hatches, three days after delivery of the goods to the consignee, etc.).

It is not provided for in the draft that that the freight should be stated in the transport document. Unless national law requires otherwise, parties should be left free in that respect. Freight by its very nature is of confidential nature and it is up to the parties how they want to evidence their agreement on freight. This may be different if the transport document is negotiable. (see 5.5 below)

5.2.b(ii) reflects the idea that in the event of partial performance under the contract of carriage the carrier is only entitled to freight in proportion of his performance. It should be borne in mind that that the term 'consignee' includes the shipper if he still is entitled to receive the goods.

[9] 'consignee' to be defined (elsewhere) as the person entitled to delivery of the goods.

5.3 a. **Freight shall be payable when it is earned, unless the parties have agreed that the freight shall be payable, wholly or partly, at an earlier or later point in time or at an earlier or later occasion.**

b. **Freight shall remain payable once it is earned, even if thereafter, [through whatever cause], the goods will be lost, damaged, or otherwise not delivered to the consignee in accordance with the terms and conditions of the contract of carriage.**

c. **[Unless otherwise agreed,] payment of freight shall not be subject to set-off, deduction or discount on the grounds of any counterclaim that the shipper or consignee may have against the carrier.**

5.3.a states the main rule that the freight is payable when it is earned. Parties may agree otherwise. Often, parties do not make the distinction between freight earned and freight payable. Whether they do or not, is a matter of interpretation of the contract, which interpretation may be influenced by the corresponding provisions in other contracts such as the contract of sale relating to the same goods. It is thought that in an international instrument of general nature no rules of interpretation of certain freight provisions in contracts of carriage should be given.

The usual exception to the main rule is that parties agree that the freight is payable *before* it is earned. It is not excluded, however, that parties for some reason or another agree that the freight will become payable at a later moment than it is earned. Also the invoice payment conditions may entail that the freight becomes payable (long) after it is earned.

5.3.b includes the generally accepted principle that events, which occur after the moment that the freight is earned, are irrelevant to the obligation to pay the freight to the carrier.

Discussion may arise whether this principle also should apply if the goods get lost, etc. through default of the carrier for which he may be held liable by the consignee. The draft takes the view that in such case the freight should form part of the damage to the goods, which may be claimed from the carrier.

Freight payment should be without prejudice to any claim against the carrier. Normally, at the moment that the freight is payable, it is still open whether a valid counterclaim exists and, if so, the amount of such claim. Therefore, in 5.3.c the rule is given that, in principle, a set-off is not allowed.

5.4 a. **The shipper[10] shall remain liable for the payment of the freight.**

b. **If the contract of carriage provides that the liability of the shipper, wholly or partly, will cease upon a certain event or after a certain point of time,**

[10] 'shipper' to be defined (elsewhere) as the contractual counterpart of the carrier.

such cessation is only valid if and to the extent that all the amounts payable to the carrier under the contract of carriage may actually be satisfied through the carrier enforcing his rights as referred to in 5.6.

It may be expected that the parties to the contract of carriage have agreed which person(s) is/are liable to pay the freight: the shipper, and/or the consignee, and/or any third party. This liability may be joint, several, or joint and several.

The first paragraph of this provision, therefore, has a limited character. It is only meant to provide that, if the person agreed to be liable to pay the freight, fails to do so, the carrier always remains entitled to fall back on his contractual counterpart, the shipper.

The only exception to this rule is provided for in 5.4.b. Parties may agree on a cesser clause, but this clause is only valid if and to the extent that the carrier can satisfy all amounts still due to him from the proceeds of sale of the goods by exercising his rights under 5.6.

5.5 a. **Notwithstanding article 5.4.a. above, if a negotiable transport document contains the statement 'freight prepaid' or wording of similar nature, such statement will have the effect that a third party holder of such transport document shall not be liable for the payment of the freight.**

b. **If a negotiable transport document contains the statement 'freight collect' or wording of similar nature, such statement will have the effect that the consignee may be liable for the payment of the freight.**

In the explanatory note on 5.3 it is said that the new instrument should refrain from giving contract interpretations in respect of freight. An exception should be made, however, in respect of the usual statements 'freight prepaid' and 'freight collect' in bills of lading. Reason for this is the protection of the third party holder of a negotiable transport document. A third party holder must be able to learn from the contents of the document whether he might be held liable *in personam* for the freight.

On purpose, 5.5.a is drafted in such a way that it is left open whether 'freight prepaid' also means that the freight is earned upon shipment. Again, that would be a matter of interpretation of the contract of carriage.

Also, 5.5.a. is meant not to exclude that another person than the shipper may be liable for the freight. Otherwise, it would conflict with article 5.4.a. It is only meant to say that later holders than the shipper do not run the risk of becoming liable *in personam* for the freight.

5.5.b is drafted in similar way. It does not say that in the event of 'freight collect' the freight is payable at destination or that the consignee shall be the (only) person liable for the freight.

Whether the consignee actually is liable for the payment of the freight, will depend on the terms of the contract of carriage. In practice, a carrier usually does not accept a freight collect

booking without first having requested the (intended) consignee whether he agrees to pay the freight.

5.6 a. Notwithstanding any agreement to the contrary, a carrier is entitled to retain the goods until payment of

(i) the freight, demurrage, damages for detention and all other costs incurred by the carrier in relation to the goods,

(ii) any damages due to the carrier by the shipper on account of breach of shipper's obligations under the contract of carriage,

(iii) any contribution in General Average to the carrier relating to the goods

has been effected, or adequate security for such payment has been provided.

b. [Such right of retention must lead to an effective recourse against the goods by the carrier to whom the payment is due.]

[If the payment as referred to in the previous paragraph will not, or not fully, be effected, the carrier is entitled to sell the goods (according to the procedure, if any, as provided for in the applicable national law) and to satisfy the amounts payable to him from the proceeds of such sale. Any remainder of the proceeds of such sale shall be made available to the consignee.]

Again, it is a general principle that, when necessary, 'the goods must pay for its costs and freight'. National law differs in respect of the legal basis for this principle. Also national law works out this principle in various ways. The common denominator, however, seems to be a right of the carrier to retain the goods until payment and to seek recourse against the goods if no payment will be effected.

It should be discussed further how detailed this provision should be. In 5.6.b two versions are provided. Further detailed versions are possible as well. The risk of more details is to run into avoidable conflict with certain principles upheld under national law.

A further item of discussion may be whether carrier's right of retention also should apply to freight under a 'freight prepaid' bill of lading.

6 DELIVERY TO THE CONSIGNEE

Delivery completes the voyage of the goods. As a rule, it marks the end of the responsibility of the carrier for the goods (see Hamburg Rules, article 4).

Delivery is only to a limited extent dealt with in Hague-Visby Rules. The running time for the notice period as well as the timebar period starts upon delivery of the goods concerned. Further harmonisation of law as to various aspects of delivery may be desirable. Hereunder follow a few provisions for further discussion.

6.1 **For the purpose of this section 6 'consignee' means the person entitled to take delivery of the goods, which person in that capacity may include the shipper.**

The first part of this definition is identical to the definition of 'consignee' in the Hamburg Rules. The advantage of this definition is its neutrality as to the legal basis on which 'the person' is entitled to take delivery of the goods. National law differs a lot in that respect.

The final part 'which person etc.' is not strictly necessary, but may be useful for better understanding of the functionality of the definition.

6.2 a. **Delivery of the goods by the carrier shall take place in the manner and on the time as has been agreed in the contract of carriage or as it can be inferred therefrom. In the absence of any provision in the contract of carriage to that effect, the goods are deemed to be delivered when they actually are taken over by the consignee.**

b. **In the event the carrier has to hand over the goods in the discharge port to an authority or other third party to whom, pursuant to law or regulation applicable at the discharge port, the goods must be handed over and who will take care of their delivery to the consignee, such handing over will be regarded as a delivery of the goods by the carrier to the consignee.**

This article deals with the definition of delivery. The first sentence underlines that delivery is primarily a contractual matter. Parties are free to determine how the delivery of the goods will be effected. If certain usages of the trade or port of discharge exist and the contract is not quite specific as to delivery, these usages may, under the applicable national law, be deemed to be part of the contract.

It may occur that the contract of carriage is silent on the matter of delivery. For these cases the second sentence of 6.2.a develops a general rule.

In a few countries the carrier is not allowed to deliver the goods directly to the consignee, but he has to hand over the goods to an intermediary, often a local authority, who takes care of the actual delivery to the consignee. 6.2.b deals with this situation.

6.3 **The responsibility of the carrier for the goods shall terminate upon delivery of the goods to the consignee or upon the carrier otherwise disposing of the goods in compliance with 6.6 below. In the event the goods remain in the custody of the carrier after their delivery without any [express or implied] contract being concluded between the carrier and the consignee covering that**

period, the terms and conditions of the contract of carriage will continue to be applicable during such period, but all acts of the carrier will be for risk and on account of the consignee, even if the carrier acts in his own name.

[However, if the goods have been delivered before their discharge from the vessel, the carrier shall remain liable for their loss or damage in accordance with the [mandatory] liability provisions of this legal instrument until the moment that they have been discharged.]

This article deals with the legal consequences of delivery. As such, delivery marks the end of the responsibility of the carrier for the goods and the beginning of the responsibility of the consignee for these goods.

It frequently happens that after discharge the goods will remain under the custody of the carrier for some time. In such cases first it has to be determined whether this period is covered under the contract of carriage or that delivery in the legal sense has taken place already. If delivery has not been effected yet (see 6.2), the terms and conditions (usually including limitation of liability, before and after clause and Himalaya clause) still apply.

But if delivery in the legal sense has taken place already, the legal basis of the succeeding custody of the goods by the carrier may be uncertain. A contractual basis may exist, e.g. when the consignee has requested the carrier to store the goods temporarily. Then, a storage contract succeeds the contract of carriage and the carrier acts as storekeeper. Also, it may be possible that an implied contract can be construed on the basis of a certain applicable custom of the port.

The second sentence of the article deals with the situation that such succeeding custody has no contractual basis. The situation referred to in 6.6 is a clear example. Applicable national law may determine that a carrier in such event should act as *e.g. negotiorum gestor* or otherwise. It seems useful to provide for a general rule that in these cases the carrier (including his subcontractors) will act under the protection of the terms and conditions of the contract of carriage, but that everything he does is at the risk and for the account of the consignee.

The last sentence relates to a situation that, through the application of a fio clause, the delivery, under the applicable national law, has taken place *before* discharge. The various national laws differ on the question whether under such a fio clause parties are allowed to exclude the carrier's liability for loss or damage to the goods before the goods have been discharged. It is useful that uniformity on this issue should be achieved.

6.4 **On request of the carrier, the consignee shall provide a written confirmation of delivery of the goods to the carrier [in the manner as customary at the place of destination].**

In practice, many carriers request some form of written evidence from the consignee that he has delivered the goods to him. This article provides a legal basis for this custom.

In the event that a negotiable transport document has been issued, often the accomplishment of the document is evidenced by the signature of the latest holder of the document on its reverse side.

6.5 a. If no negotiable transport document has been issued,

(i) the shipper shall advise the carrier, at the latest upon arrival of the goods at the place of destination, of the name of the consignee;

(ii) the carrier shall deliver the goods in accordance with 6.2 to such consignee upon production of proper identification;

(iii) if the shipper has not advised the carrier as to the name of the consignee according to paragraph (i) above, or the consignee named by the shipper does not take delivery of the goods at the place of destination, the carrier shall advise the shipper accordingly, whereupon the shipper shall take delivery of the goods himself.

b. If a negotiable transport document has been issued,

[to be completed]

6.5.1 Non Negotiable Transport Documents

6.5.a deals with the question to whom the carrier has to deliver the goods and how he can find this person.

The starting point is that the contractual counterpart of the carrier, *i.e.* the shipper, has to advise the carrier about the name of the person to whom the carrier should deliver. Subsequently, the carrier is obliged to deliver the goods to this person in accordance with the terms and conditions of the contract of carriage. Sub-paragraph (ii) follows the wording of the CMI Rules on Sea Waybills.

In sub-paragraph (i) of this article it is not provided that a consignee is obliged to take delivery. It appeared from the answers to the questionnaire and the discussions in the ISC that most national laws take the view that a consignee must have the opportunity not to accept delivery of the goods by the carrier.

Therefore, sub-paragraph (iii) of this article only provides for the legal consequences when the intended consignee does not take delivery. The responsibility for the delivery will then rest on the shipper. If he also fails to do anything, 6.6 will apply, where it is laid down what the carrier is allowed to do with the goods in these events.

If such consignee does not show up at the place of destination or otherwise declines to take delivery of the goods, the obligation to release the carrier of the goods remains on the shipper.

These principles are worked out in the above draft, the application of which is restricted to carriage under a non-negotiable document or no document at all.

6.5.2 Negotiable Transport Documents

If the carriage is under a negotiable transport document, the situation is much more complicated. Hereunder follows an overview.

6.5.2.1 In case of a negotiable transport document, the first main rule is that its holder has the exclusive right to take delivery of the goods at the place of destination under surrender of the document to the carrier. This rule serves to protect the carrier and means that the carrier will only be discharged from his obligations under the contract of carriage if he delivers the goods to such holder.

A second main rule is that the transfer of the negotiable transport document may be used as part of the mechanism whereby the property in the goods is transferred from seller to buyer, or whereby a pledge of the goods is conferred on a lender. It is understood that in some jurisdictions it is a rebuttable presumption that legal title to the goods passes with the transfer of a negotiable transport document. In others the intention of the parties as evidenced by the underlying contract of sale or pledge governs the matter.

These two main rules are fairly universally applicable, but cannot be found in any international convention. They may be laid down in national law, in statute and case law, and are supplemented by usages and practices, which sometimes may be regarded as conflicting with the two main rules.

Often, these conflicts come to surface in case no holder of the negotiable transport document takes delivery of the goods at the place of destination. In this field, much legal uncertainty exists, resulting in risks for traders / (future) holders of the transport document and carriers alike. These ambiguities should be dealt with within the scope of this project. However, perceptions between the interested parties differ so much that first thorough discussions should take place before the drafting of provisions on these issues sensibly can be started. In order to provide some guidance to these discussions two key elements are addressed hereunder.

6.5.2.2 First, it has to be realised that different categories exists in respect of the causes of the non-availability of the negotiable transport document at the place of destination:

(a) There are many inadvertent causes, like genuine delays in the documentary process. If these lead to legal problems, solutions primarily have to be sought in a better business control. Sometimes, practical or ad hoc solutions may satisfy the parties concerned.

(b) More serious problems arise when the non-availability is caused intentionally or structurally. Main examples are:

(i) The consignee is not interested in the goods because they have a negative value. They may have such value right from the outset, such as in the case of carriage of rags, used tyres and disposals. Sometimes, the goods may have acquired a negative value due to events during the carriage, e.g. they become contaminated or otherwise damaged resulting in the need of a costly disposal operation (environmental regulations!). Or it happens that at the end of the carriage it appears that governmental measures prevent the importation of certain (low value) goods.

(ii) The consignee does not take delivery due to a genuine business reason under the sales contract. He may be dissatisfied with a previous shipment of the same goods and, therefore, wants to reject them under the sales contract. Or the buyer returns the goods and the seller does not want them either. And it frequently happens that the consignee first has to resell the goods before he is financially able or willing to take up the negotiable transport document from the bank holding that document under a documentary credit or collection and that such resale has failed yet. Etc.

(iii) Structural causes inherent to the trade of the particular goods: Credit terms under the sales contract may be longer than the voyage of the goods will last. Or the usual long string of buyers and sellers of the goods may prevent that the document is timely available at the place of destination. Such string may include sales that have been concluded long before the goods were shipped and the transport document issued.

6.5.2.3 In all the above cases under (b), the first main rule in respect of negotiable transport documents, i.e. the presentation rule, is ignored by the holder / consignee. In the case (b), (iii), also the document no longer plays a role in respect of transfer of title to the goods. As between seller and buyer title

usually[11] passes on the basis of a series of letters of indemnity. In these letters sellers guarantee to the buyers that they have title to the goods, while they all know that the bill of lading is in the hands of a seller earlier in the string who holds the bill of lading to secure payment of the goods.

6.5.2.4 The frequency of the non-availability of the document at the place of destination should not be underestimated. Fair estimates are that in liner shipping in 15% of all cases no document can be surrendered where such would be necessary. In the charterparty trade such figure may be as high as 50%, while in some important commodity trades, such as the mineral oil trade, the percentage rises to a near 100%. Many charterparties nowadays include the standard clause that a carrier has to deliver the goods at the place of destination without production of the bills of lading but on instruction of the charterer only.

The tendency is that the above given figures are still increasing.

6.5.2.5 A second key element is the different perceptions that exist as to what the negotiability of a transport document includes. In a certain way, a negotiable transport document is a promissory note. But what are the contents of the promise contained in the note? Remarkably, many negotiable transport documents are not quite specific in that respect. They just promise to transport the goods to their place of destination and that the goods will be delivered against surrender of the document.

6.5.2.6 On the one end of the spectrum the view exists that a carrier promises to any holder of the document to deliver the goods to him ("document is key to the warehouse"), or, failing such delivery, to provide the countervalue of the goods in money[12]. This is the view commonly held by traders and their bankers as referred to above under (b), (iii). As a result, a carrier may regard himself as having become the guarantor of the payment of the purchase price of the goods. Then, he should be allowed to act accordingly, i.e. to limit his credit risk in similar ways as banks do, e.g. requiring counter guarantees, fixing a maturity date on the note, etc. This view also might require a redefining of the presentation rule. Also, under this view, the legal function of the transfer of a bill of lading has to be addressed[13].

6.5.2.7 The other end's view is that the promise is to the shipper and that it includes to deliver the goods upon their arrival at their place of destination to the holder of the document against surrender thereof. The arrival of the goods is

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[11] Whether it actually does, will depend on the wording of the letter if indemnity and the law applicable to the transfer of title (often the lex rei sitae), which may be another law than the law applicable to the contract of sale.

[12] In some jurisdictions a carrier is not entitled to limit its liability for claims based on wrong delivery or conversion.

[13] E.g. UK COGSA 1992, article 2, (2), refers to a bill of lading "possession (of which) no longer gives a right – as against the carrier – to possession of the goods to which the bill relates".

the contractual maturity date of the note. Title to the goods can only pass through transfer of the document during the period of transport because only during this period the carrier is bailee of the goods.

The consequence of this view might be that, if after arrival of the goods at their place of destination the holder of the document fails to exercise his right under the document, the shipper has to take care of delivery of the goods. Because of the maturity, the document has lost its title function after such delivery and any later passing of the document may transfer, at best, a claim which the shipper may have against the carrier.

6.5.2.8 In view of the fact that the law on this key issue of transport and trade law is uncertain and practice has gone its own risky way to a great extent, it is obvious that time has come to create clarity and, hopefully, uniformity.

6.6 **a. When the goods have arrived at the place of destination and the goods are not taken over by the consignee under 6.2 or 6.5, (a), (iii), or the carrier is under the applicable law or regulations not allowed to deliver the goods to the consignee, the carrier is entitled, at the risk and on account of the person entitled to the goods, to store the goods at any suitable place, to unpack the goods if they are packed in containers, or to act otherwise in respect of the goods as, in the opinion of the carrier, circumstances reasonably may require. He is entitled to cause the goods to be sold in accordance with the practices, or the requirements under the law or regulations, of the place where the goods are actually kept. After deduction of any costs incurred in respect of the goods and, as the case may be, other amounts as referred to in [5.6.a] and due to the carrier, the proceeds of sale must be kept available to the person entitled to the goods.**

b. The carrier is only allowed to exercise his right referred to in the first paragraph of this article after he has given a notice to the consignee, or the notify party[14], if any, or otherwise to the shipper of the arrival of the goods at the place of destination.

Occasionally, it occurs that at the place of destination the carrier is not able or entitled to deliver the goods. The consignee may not show up or declines delivery of the goods while the shipper is not interested either, or the goods may be attached or delivery of them may otherwise be legally prevented. In this type of cases, often the carrier has to do something in order to get rid of the goods.

Generally, this article follows the provisions in the various national laws on this issue. The carrier should be given a reasonable freedom to act, but always within the limits of reasonableness. If he decides to sell the goods, applicable national law may provide for some

[14] 'Notify Party' should be a defined term. It means the person, not being the consignee, stated in a negotiable document as the party to be notified of the arrival of the goods at the place of destination.

form of court supervision. The net proceeds of such sale must be kept available to the person entitled to the goods on whose behalf the carrier has acted. Such person has not necessarily to be a party to the contract of carriage, but may be an owner of the goods or an insurer.

7 RIGHT OF CONTROL

A carrier who transports certain goods is only the bailee of these goods. Unless the goods may have been abandoned, always a person exists who must be regarded to be in control of the goods.

The legal basis of such control may vary. The person in control may be the owner of the goods, a pledgee, or any other person with certain rights as against the goods. Two relevant examples are: A seller may under a sales contract have reserved 'the right of disposal' of the goods until certain conditions are fulfilled. The goods remain his property after delivery to the buyer until the condition, e.g. payment of the goods, is fulfilled. Also, a seller may have the 'right of stoppage in transit', i.e. the right of the unpaid seller who has transferred the ownership of the goods to his purchaser, to resume possession of the said goods during their transit to the agreed place of delivery. This right is restricted to specific circumstances, such as insolvency of the buyer[15] (See UN Convention on Contracts for the International Sale of Goods 1980 ("Vienna Sales Convention"), Article 71, sec. 2.)

These rights as against the goods, which certain persons may have on a statutory or contractual basis other than the contract of carriage, should be exercisable under the contract of carriage by these persons. In other words, these rights have to be "translated" into certain rights under the contract of carriage.

Another matter is that certain persons under the contract of carriage itself must be regarded as being entitled to give the carrier specific instructions relating the carriage and/or the delivery of the goods. Examples of these are the instruction to carry the goods at a certain temperature or to deliver them at a certain point of time at the premises of the consignee.

The giving of instructions of this kind to the carrier may be in accordance with the terms and conditions of the contract of carriage. In other words, the following up of these instructions is part of his normal performance of the contract of carriage. However, they may also fall outside that scope. A request to deliver the goods at another place of destination is clearly a request to amend the contract of carriage itself. Same applies to a request to split a consignment during its carriage and to deliver the parts of it to different persons.

From the above it may be concluded that in various senses a variation exists in respect of the underlying reasons of the wish to instruct the carrier, which may result in different legal consequences. Therefore, control of the goods during their carriage is an issue which has to be dealt with under transport law.

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[15] This right may be lost if the goods have been resold for valuable consideration and a negotiable transport document has been endorsed to a third party acting in good faith.

The existing maritime conventions are silent about the right of control. Practices that have developed under the bill of lading system may have been the reason that in the past no urgent need was felt. However, with the growing use of non-negotiable documents in maritime carriage and, in future, probably carriage without documents at all, in a new instrument rules have to be developed covering this issue.[16]

Hereunder follow a few draft provisions for discussion. The first draft provision is an attempt to define the right of control.

7.1 a. **The right of control of the goods during the carriage means the right to instruct the carrier in respect of these goods during the period that they are in his custody. Such right to instruct the carrier may include:**

(i) **the request of delivery of the goods before their arrival at the place of destination;**

(ii) **the substitution of the consignee for any other person including the person who exercises the right of control;**

(iii) **any other instruction which qualifies as a variation of the contract of carriage;**

(iv) **to give or to modify instructions in respect of the goods in accordance with the terms and conditions of the contract of carriage.**

b. **The right of control is a transferable right. Unless a negotiable transport document is issued, the transferor shall give due notice to the carrier of any such transfer.**

As to the terminology, it is preferred to use the term 'right of control'[17]. The carrier has the actual control of the goods as a bailee. Here, the legal control of the goods is the essence. It must be emphasised that this right of control, as referred to in the above article, is a right *under the contract of carriage.*

Where there exists an actual carrier and a contractual carrier, the addressee of the instructions is the contractual carrier. If and to the extent required by the nature of the instruction, a contractual carrier has to pass on the instruction to the actual carrier.

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[16] The conventions relating to other modes of transport where the transport documents are non-negotiable include provisions on the right to instruct the carrier, see CMR article 12, Warsaw Convention article 12 and COTIF-CIM articles 30 – 32.

[17] CMR, article 12, refers to "the right of disposal" and Warsaw Convention, article 12, to "right of disposition". The use of these terms under transport law may create ambiguity in view of the existence of the term "right of disposal" under the law relating to the sale of goods. COTIF-CIM refers to "modification of the contract of carriage". However, not all instructions may be modifications of the contract of carriage, at least not in maritime transport. The term "control" is used in article 7 of the CMI Rules for Electronic Bills of Lading. Under these Rules "control" has been translated into French as "*disposition*".

The instructions referred to under (i) and (ii) are typically those which are needed under the contract of carriage by the person who is in control of the goods during their transport under a contract of sale or pledge. The 'delivery of the goods before their arrival at the place of destination' is the "translation" of 'the right to stop the goods in transit' into transport law terms. The instruction to substitute the consignee means that the stopped goods can be delivered to another person than the original consignee. It may be expected that these two instructions will be used in conjunction. Taken together, they form the minimum requirement for the execution under the contract of carriage of the control of the goods under the sales contract. It may be desirable to add further instructions, such as to temporarily store the goods (in an intermediate port or at the place of destination) or to return the goods to the place of their origin. These further instructions are covered under (iii).

All these instructions (i), (ii) and (iii) qualify as variations of the contract of carriage. However, because of their special functions under the contract of sale, instructions (i) and (ii) have to be followed up by the carrier, provided that certain conditions are met (see 7.3, (a), below).

The instructions under (iv) are the 'normal' instructions under a contract of carriage, of which examples already are given above.

7.1.b gives the rule that the right of control may be transferred. A consignee who pays for the goods may wish to acquire the right of control upon such payment. Also a bank may need of the right of control if it is the pledgee of the goods.

In the event of a non-negotiable document the transfer of the right of control will normally take place through assignment of this right. In the case of a negotiable document this right will be transferred when the document is endorsed and transferred.

The next question is *who* holds the right of control under the contract of carriage. Here, a distinction has to be made whether a negotiable transport document has been issued or not.

7.2 a. When no negotiable transport document is issued,

(i) the shipper and the consignee may agree who will hold the right of control, of which agreement the carrier shall be given due notice by the shipper;

(ii) in the absence of any specific agreement, the shipper holds the right of control as well as the consignee as from the moment such consignee under the applicable national law may have become a party to the contract of carriage;

(iii) in the event both the shipper (or his transferee) and the consignee (or his transferee) hold the right of control, any instruction referred to in

7.1, (a), (i), (ii) and (iv) given by the consignee (or his transferee) is subject to any earlier or later instruction to the contrary given by the shipper (or his transferee); any instruction referred to in 7.1, a (iii) given by the consignee (or his transferee) requires the consent of the shipper (or his transferee) before the carrier is allowed to carry out such instruction;

(iv) any person holding the right of control shall on request of the carrier produce proper identification.

b. When a negotiable transport document is issued, the holder of that document is the exclusive person entitled to exercise the right of control. On request of the carrier he shall surrender the negotiable document to the carrier. In the event that more than one original of the negotiable document is issued, all originals shall so be surrendered.

The starting point is that the right of control is a contractual matter. Parties are free to determine who will have the right to control the goods during their carriage. In the event the goods have been paid for and the ownership of them has been transferred to the consignee upon loading of the goods, the transport document may state that the right of control is in the hands of the consignee. And if during the carriage the goods will be paid for by the consignee, he may wish the right of control transferred to him.

It is obvious that the carrier should be made aware which person is in control, either right from the beginning of the carriage or as from any stage during the carriage. It should be left to the parties how to effect this.

When no specific agreement is made, the shipper is the person who should be in control of the goods. He may need this control as long as the goods are in the custody of the carrier. Not uncommon is the instruction to the carrier not to deliver the goods before the carrier has received the consent thereto from a third party, e.g. a bank that first must confirm that the goods have been paid for. Same applies to an instruction in respect of climate or temperature conditioned goods that these should not be delivered before a certain point in time or before the goods have reached a certain condition. These kind of instructions 'not to deliver before', which may run parallel with certain corresponding rights or obligations of the seller under the contract of sale, should not be frustrated by any action of the consignee.

On the other hand, a consignee may wish to give the carrier instructions on delivery, which may require a certain lead-time from the carrier. This desirability has found recognition in i.a. CMR Convention[18] and in some national laws, where the shipper looses his right of control

[18] See CMR, articles 12, (2), and 13. Here the right of control is connected to possession of the second copy (CMR consignment notes are issued in three copies) of the consignment note. This second copy is carried with the goods. A shipper looses his right of control when this second copy is handed over to the consignee. A consignee is entitled to require the handing over of the second copy as soon as the goods have arrived at their place of destination. As from the moment the consignee possesses the second copy or the moment that he claims the goods, "the carrier shall obey the orders of the consignee".

in favour of the consignee upon the latter becoming a party to the contract. In these jurisdictions the consignee may become a party by claiming the goods when they have arrived at the place of destination.

In the above draft the compromise has been devised that both the shipper and the consignee (the latter only if and from the moment that national law may attribute such right to him by becoming a party to the contract of carriage) may have the right of control, supplemented with a priority rule[19]. Shippers' instructions must have priority when they conflict with actions of a consignee.

With such a rule, a shipper is assured that an essential instruction given by him cannot be frustrated by the consignee, while a consignee, who under the applicable national law may be entitled to give instructions to the carrier, can do so as long as the shipper will not resist.

Obviously, this system applies only to those instructions which a carrier is obliged to follow up. If any instruction would lead to a genuine modification of the contract of carriage, such has to be agreed by the parties to the contract, including the shipper.

The draft has not taken over the requirement of i.a. CMR and COTIF-CIM, that the person wishing to exercise his right of control, has to identify himself by showing a certain copy of the transport document. No legal need exists for such specific manner of identification. To follow CMR and COTIF-CIM in this respect, would be against the current practice in maritime transport and, additionally, in view of all modern communication techniques available, an outdated manner of identification as well.

Paragraph 7.2.b follows the established rules and practices relating to the right of control when a negotiable transport document is issued.

The requirement that the full set of originals has to be surrendered, means that, when one original is carried on board, the shipper is in control as long as he possesses the other originals. The original on board is deemed to be carried on behalf of the shipper. When in such event the shipper has parted with the other originals, or the various originals may have come into the hands of different persons, the result is that nobody under the contract of carriage is in (legal) control of the goods anymore.

Also, a seller who under article 71, (2), of the Vienna Sales Convention has the right to stop the goods in transit, is not able to exercise that right under the contract of carriage after he has parted with (any original of) the negotiable transport document(s). He will have to seek other means to prevent delivery of the goods by the carrier, e.g. through timely attachment of the goods.

7.3 a. **The carrier shall follow up any instruction as referred to in 7.1, (a), (i), (ii) and (iv), provided that the execution of such instruction is reasonably possible at the moment that it reaches the person under a duty to perform it,**

[19] Such priority rule has been inserted in sea waybills and has worked well in practice.

does not interfere with the normal operations of the carrier or result in damages to the carrier or any person interested in other goods carried on the same voyage. The following up of any instruction as referred to in 7.1, (a), (iii), will be subject to agreement of the parties to the contract of carriage.

b. The execution of any instruction by the carrier may not result in any additional expenses, loss or damage to the carrier or to any other person interested in other goods carried on the same voyage. The person giving instruction to the carrier shall indemnify the carrier or such other person against any such additional expenses, loss or damage, if they nevertheless occur.

c. In the event a negotiable transport document is issued, any instruction as referred to in 7.1, (a), (i), (ii) and (iii) shall be stated in that document.

The functional relation between the contract of carriage and the contract of sale and related contracts carries with it that a carrier, in principle, must comply with the request to deliver to the goods before they have reached their destination. Same applies to the request to substitute the consignee for another person. A carrier will have to submit to these variations of the contract of carriage, because they are essential elements of the legal control of the goods.

The carrier has to satisfy any instruction 'in accordance with the terms and conditions of the contract of carriage' for quite another reason. A carrier must be deemed to have agreed to this kind of instruction when he concluded the contract of carriage.

Certain conditions of a mainly operational nature apply to both types of instructions. The conventions, mentioned in footnote 17, include similar conditions. It follows that, if these conditions cannot be met, a carrier is not obliged to carry out the instruction and he should advise the person giving such instruction accordingly.

The third category of instructions mentioned in 7.3.a relates to a straight variation of the contract of carriage. Like any contract variation, the carrying out of these instructions, including any conditions as appropriate in the circumstances, has to be agreed between the parties to the contract.

7.3.b is a general provision which should be applicable to any instruction given to the carrier during a voyage. The other transport conventions include comparable provisions.

7.3.c gives a rule aimed at the protection of third party holders of a negotiable transport document. These holders, generally, must be able to rely on the contents of the document. Therefore, any amendment of the contract of carriage has to be reflected in a negotiable document.

A similar rule is not given for non-negotiable documents. The evidentiary status of such a document is different. In addition, the person giving the instruction may not posses the document. Further, it may be expected that any instruction is either given in writing or confirmed in writing. Therefore, it is submitted that no need exists to provide for a specific evidentiary rule when the contract of carriage is laid down in a non-negotiable document.

7.4 Goods that are delivered pursuant to 7.1, are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in [section 6], are applicable to these goods as well.

The carrying out of the instructions may result in a delivery of the goods otherwise than originally intended. For avoidance of doubt, it seems useful to provide that the general provisions relating to delivery are applicable to such extraordinary delivery as well.

Finally, this section should include a draft provision relating to the issue to whom a carrier should address himself in the event that he needs some instruction *from* the cargo side in respect of the goods. This matter is related to the question how the carrier can find the person to whom he is entitled to deliver the goods, which question, in particular when a negotiable document is issued, requires further discussion before appropriate provisions can be drafted. Therefore, for the time being, a provision on this matter is left out.

REPORT OF IUMI G.A. DRAFTING WORKING GROUP GENERAL AVERAGE – HOW SHOULD IT BE CHANGED?

Nick Gooding, Eamonn Magee, Matthew Marshall, Ben Browne

REPORT OF IUMI G.A. DRAFTING WORKING GROUP
GENERAL AVERAGE - HOW SHOULD IT BE CHANGED?

The purpose of this report is to point to possible changes which might be proposed by property underwriters to the rules governing General Average worldwide. The aim of these changes is to rein back the progressive extensions in the scope of General Average which have taken place over at least the last 100 years with a view to lessening the burden which General Average places on property underwriters worldwide. It is felt that now that insurance is so very much more universally held by shipowners, the loss should lie where it falls to a greater extent than it does at present. The current concept of General Average is now felt to be outdated for a number of reasons (including the increased use of insurance, the fact that under many laws salvage is apportioned between ship and cargo in proportion to their values and the increased complexity of modern commerce which frequently makes the collection of G.A. security and the adjustment of G.A. contributions disproportionately expensive). Despite this it is recognised that there is an argument for continuing G.A. in certain limited classes of situation and that it would be difficult to abolish G.A. altogether (as it might be replaced by claims at common law, for example, and because the maritime legislative community worldwide is not yet "ready" for such a novel step). The first task of this report, therefore, is to propose a statement of principle governing General Average similar to Rule A of York-Antwerp Rules in its purpose.

1. Redefinition of General Average

It is proposed that a definition of General Average be drawn from a slightly amended Section 66 Marine Insurance Act 1906 which would state:

> *"(1) A General Average loss is a loss reasonably, proximately and directly caused by or consequential on a General Average act. It includes General Average expenditure as well as General Average sacrifice.*
>
> *(2) There is a General Average act when and only when any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety in time of peril for the purpose of preserving from peril the property."*

At first sight it might be thought that if an attempt is going to be made to radically confine the ambit of General Average, substantial amendments are going to have to be made to Section 66 Marine Insurance Act 1906. In practice we feel only minor changes are required. Perhaps the most significant change is the deletion of the words "imperilled in the common adventure", coupled with the insertion of "for the common safety" in para. 2 as to which see Section 3.

With these minor amendments the wording of Section 66 Marine Insurance Act 1906 is a suitable basis for the new concept of General Average.

The broad intention behind the new definition would be to cover (where reasonable):

- jettison of cargo (see 10 below)
- salvage (but see 15 below)
- damage intentionally and reasonably caused to ships' engines by working them when aground in a reasonable attempt to refloat and/or lighten
- crews' extra wages and overtime and consumption of extra fuel and stores while in the grip of a peril (but not at a place of refuge)
- provided that the G.A. expenses/sacrifices claimed are intentional and reasonable, it should not matter whether the owner or master makes the decision to incur them.

We would suggest that the following types of expenditure should not be included in G.A. under the new regime:

- ordinary crew wages during the peril (except crew overtime while the vessel is in the grip of a peril)
- environmental expenses of any kind save only Article 13 salvage enhancements for environmental threats and Rule XI(d) expenses if for common safety
- costs of transhipment to destination
- ship's expenses at a port of refuge
- temporary repair costs (unless carried out while the ship and cargo are in the grip of a peril e.g. in a salvage operation)
- the cost of discharging, storing and reloading cargo while the vessel repairs at a port of refuge (these expenses will be borne by the carrier under the contract of carriage)
- consumption of extra fuel/stores once the immediate peril has ceased to exist.

We would propose that the draft rules should expressly state the types of claim included and excluded from G.A. as examples for the sake of clarity.

The foregoing does not consider how substituted expenses should be treated: on the one hand the substituted expenses can save property underwriters expense by permitting a shipowner flexibility in deciding what expenses he can safely incur whilst at the same time it can also be said that substituted expenses are a vehicle for allowing the shipowner to recover expenses which he otherwise would be unable to. Substituted expenses should be abandoned (see 9 below).

2. "In time of peril"

One of the key intentions behind the proposed reform is to stop expenses going into G.A. after the ship and cargo have been brought to safety (for example to a port of refuge). A definition of the word "peril" will therefore need to be reached. At present it is arguably the case at common law that a peril exists if a situation prevails in which the vessel and cargo "might or could" become a CTL (see Lowndes and Rudolph para A.27). It is submitted that a peril should only continue until ship and cargo are in a condition of reasonable safety. It should not therefore usually continue after the arrival of the vessel at a port of refuge. Thus the costs of a standby tug in port would not be recoverable but the costs of a tug escorting a vessel proceeding to a place of safety would be recoverable in G.A. It is perhaps worth considering the words of Roche J in *Vlassopoulos -v- The British & Foreign Marine Insurance Co Limited* [1929] 1 K.B.187. In that case the propeller of MV "MAKIS" fouled some wreckage while on passage from Bordeaux to Cardiff and the vessel was obliged to put into Cherbourg for repairs. Roche J held that the ship and cargo were in danger and said:

> *"It is not necessary that the ship should be actually in the grip or even nearly in the grip of the disaster that may arise from the danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a General Average act.*
>
> *That is all I think which need be said with regard to that matter unless I add this: that "peril", which means the same thing as "danger", is the word used in General Rule (A), just as it is the word used in the Marine Insurance Act Section 66. The word is not "immediate peril or danger". It is sufficient to say that the ship must be in danger or that the act must be done in order to preserve her from peril. It means, of course, that the peril must be real and not imaginary. It means that it must be substantial and not merely slight or nugatory. It must be a danger."*

It is hard to disagree with Roche J's words and it is therefore probably unwise to confine the severity of the peril which would qualify for G.A. but merely the length of time over which G.A. expenses can be incurred and then recovered. It is submitted that the words "in time of peril" in Section 66(2) Marine Insurance Act 1906 should, properly interpreted, have this effect.

One question which may arise is whether contractual salvage awards or settlements involving services rendered in part when ship and cargo are in peril and in part after they have reached a place of safety shall be apportioned in G.A. and, if so, on what basis. To avoid complication it is suggested provisionally that no such apportionment should be done.

As to the severity of the peril or danger which qualify sacrifices/expenses for G.A., this must to some considerable extent depend on each case. Examples at Lowndes & Rudolph para A.33 are helpful when considering this aspect of the matter. It is further admitted that the peril must be real and not imaginary (at present, despite the words of Roche J, there is conflicting authority on the question of whether an imaginary peril is sufficient - see for example Lowndes & Rudolph A.37).

3. **Common Maritime Adventure/Common Safety**

We consider the concept of "Common Safety" should underlie the "new" General Average replacing the Common Maritime Adventure concept which now forms the basis of the York Antwerp Rules. There are 3 points to make about the concept of common maritime adventure:

- It is widely thought that expenses based upon the principle of common maritime adventure are more extensive than is necessary to give shipowners sufficient encouragement to take prudent steps to preserve ship and cargo in time of peril. Once the peril is past expenses such as those incurred in a port of refuge or temporary repairs are more properly in the domain of maintenance. In other words, the "Common Safety" approach will reduce the exposure of Hull and Cargo Underwriters to G.A. claims.

- Technically, where there are two or more discharge ports and the General Average act occurs after part of the cargo has been discharged, the common maritime adventure has finished and no G.A. can be recovered. Obviously this is dealt with in various ways by different adjusters worldwide and in practice contributions are recovered. Nevertheless, this is intellectually untidy and it would be better to have some specific proviso dealing with it. This could be resolved by providing that cargo contribute only up to the time when it leaves the ship (although it is recognised this might increase the amount of work to be done by Adjusters); there should be a special clause dealing with cargo in lighters between ship and shore.

- Another difficulty about the idea of a common maritime adventure is that the word "adventure" implies a voyage. In this way it is argued that a hulk storing a bulk product such as oil or wheat, not on a voyage, cannot declare General Average because there is no common maritime adventure. This seems inequitable but it is an inequity to which property underwriters would normally have no real objection. However, in the interests of fairness and consistency with the concept of "Common Safety" we are prepared to include in G.A. storage tanks, FPSO's and vessels at sea, stationary or otherwise.

We further consider Tugs and Tows should continue to be allowed to declare General Average.

It follows from the foregoing that the Non Separation of Interests Clause now incorporated into Rule G of the York-Antwerp Rules 1994 will no longer be required (see also para. 9).

4. **Reasonableness**

A Rule Paramount would be included making it incumbent upon the claimant to show that the sacrifice/expense was both reasonably made and reasonable in amount. To the extent that it is unreasonable, credit should not be given in G.A. This was always the position at common law (before the York-Antwerp Rules were introduced) - see *Anderson -v- Owen SS Co* [1884] 10AC and is now enshrined in the Rule Paramount of the York-Antwerp Rules 1994.

5. Causation

The courts presently interpret Section 66 Marine Insurance Act 1906 to mean that the G.A. loss must be directly caused by the G.A. act even though the word "directly" is omitted before the word "caused" in the section. It is, however, rather unclear as to whether or not the cause should be reasonably foreseeable (see *McCall -v- Houlder Bros* [1897] 2 Com Cas 129 which is authority for the proposition that it is not necessary for a particular loss to have been contemplated to be included in G.A. provided it is incidental to the General Average Act). We believe that losses should be reasonably foreseeable to be included in G.A. under the proposed re-definition.

In *Austin Friars -v- Spillers and Bakers* [1915] 3 KB 586 the defence was unsuccessfully raised that there can be no G.A. act if what was done consisted of inflicting a tort on a third person's property. Under the proposed redefinition of G.A. we do not believe that Austin Friars would be decided differently.

6. Loss through Delay

Rule C of the York-Antwerp Rules 1994 provides that:

> *"Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever such as loss of market, shall not be admitted as General Average."*

We would not wish to change this position except to include the words "port charges and associated expenses of being in port" after the word "demurrage".

7. The Effect of Fault

Although the fault based regime of the Hamburg Rules is attractive, the Working Group felt that it would not be appropriate to include it in a re-drafted York-Antwerp Rules. However, the Working Group did not wish to provide any further exemptions for shipowners beyond those already contained in the Hague and Hague-Visby Rules. Recognising that a substantial number of general averages are caused by poor maintenance, particularly in the engine room, the Working Group wished to provide some incentive to owners to improve their record in this respect. The Working Group therefore recommends that the new Rules should include a clause which prevents shipowners from recovering contributions in respect of general average losses which are caused by breaches of the ISM Code, the STCW Convention (once it enters into force) and/or the Rules of the Classification Society with which the vessel is entered (if any). This would have the benefit of encouraging owners to comply with the International Safety Conventions (excluding all but Chapter IX of SOLAS (ISM)) which must surely appeal to Governments while at the same time offering a solution to the apparent injustice of asking cargo to pay for the consequences of the faults of the shipowner. Engine breakdowns arising out of latent defects which give rise to general average losses will continue to entitle shipowners to declare and recover general average contributions.

It is suggested that Rule D of the York-Antwerp Rules 1994 should be incorporated into any revised set of Rules with the following proviso:-

> *"Provided that no party to the common maritime adventure shall recover any general average loss or be entitled to have made good any general average sacrifice or expenditure if and to the extent that such general average loss, sacrifice or expenditure is shown to have been directly caused by or consequential upon any breach of the ISM Code or the STCW Convention or the Rules of the Classification Society with which the vessel is classed.*
>
> *This Rule shall apply whether or not the party concerned is obliged by law or otherwise to comply with the ISM Code or STCW Convention and whether or not the vessel is in fact classed. If the vessel is not classed then for the purposes of this clause it shall be deemed to be classed with Lloyd's Register 100A1 and the Rules applicable to a vessel of that class shall apply to the vessel for the purposes of determining whether any breach of Class Regulations has occurred".*

8. **Onus of Proof**

(a) **Claiming losses/expenditure**

It is proposed that no amendment to Rule E of the York-Antwerp Rules 1994 should be made and that it should be incorporated into the new Rules as it currently stands. In other words the onus of proof lies upon the party claiming in general average and the time limits for the presentation of documentation etc. contained in Rule E of the York-Antwerp Rules 1994 shall be incorporated into the new Rules.

(b) **Resisting claims for G.A. Contributions on the merits**

We believe that, as at present, the paying party (usually H&M Underwriters and Cargo Underwriters) should prove the shipowner is not entitled to collect a contribution. However, this should be made fairer than at present by the introduction of an obligation to allow access to the vessel and relevant papers by the paying party's surveyor(s) (see para. 31 below).

9. **Substituted Expenses**

We propose Substituted Expenses should be abandoned.

Rule F of the York-Antwerp Rules 1974 states:

> *"Any extra expense incurred in place of another expense which would have been allowed as General Average shall be deemed to be General Average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the General Average expense avoided."*

The most usual substituted expenses scenario occurs when a vessel has suffered damage and put into a port of refuge where it will be necessary to carry out repairs before the

voyage can be completed. The cost of discharging, storing and reloading the cargo would exceed the cost of on-carriage to destination and, under the York-Antwerp Rules as they stand, it seems quite reasonable that the shipowners should have the option of transhipping the cargo to destination and recovering the transhipment costs in G.A.

However, if it is intended to substantially amend the York-Antwerp Rules to remove from General Average expenses and sacrifices suffered or incurred once ship and cargo are no longer in the grip of a peril then it would follow that this usual scenario could not arise because the cost of discharging, storing and reloading cargo would not in any event be recoverable in G.A.

It might be said that there could be other occasions on which a right to claim substituted expenses would be useful but we cannot think of an example of such an occasion: the definition of General Average set out in Section 66 Marine Insurance Act 1906 is wide enough to include any reasonable sacrifice or expense: it is submitted that Rule F is only necessary because of the way in which the numbered Rules of the York-Antwerp Rules have drawn the limits of G.A. so clearly and so widely. In the circumstances, we cannot see the need to retain a substituted expenses rule. To abandon substituted expenses would merely be to restore the English common law position (see Lowndes & Rudolph General Average and York-Antwerp Rules 12th Edition para F.02 et seq).

10. Jettison of Cargo

At present Rule I of the York-Antwerp Rules provides that no jettison of cargo should be made good in General Average unless such cargo is carried in accordance with the recognised custom of the trade. No change to this position is proposed.

11. Loss or Damage by Sacrifices for the Common Safety

Rule II YAR 1994 allows loss and damage to be made good in G.A. when incurred for the common safety. It is not proposed this should be changed.

12. Extinguishing Fire on Shipboard

Rule III of the York-Antwerp Rules 1994 allows for the making good of damage done to a ship and cargo by water or otherwise, including damage by beaching or scuttling a burning ship in extinguishing a fire on board, to be made good as General Average (with a minor exception in respect of smoke damage): it is submitted that this is perfectly reasonable and falls within the revised definition of General Average.

13. Cutting away Wreck

Rule IV of the York-Antwerp Rules prevents the recovery in G.A. of the costs of cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident. Once again, this is consistent with the revised idea of G.A. if done when ship and cargo are in actual danger.

14. Voluntary Stranding

Rule V of the York-Antwerp Rules 1994 provides that intentional voluntary stranding for the common safety is a G.A. act and it is not suggested that this should change.

15. Salvage

In a talk on the 1994 York-Antwerp Rules delivered shortly after the final text of the Rules had been approved in Sydney, Ian Stevens of LCO said:

> *"For some reason or another, which I cannot readily ascertain, Rule VI – Salvage Remuneration - never seemed to get much of an airing. And yet if there is any rule which causes aggravation, this surely is it.*
>
> *Prima facie, the wording of the rule is innocuous, particularly when the shipowner has incurred expenditure in the nature of salvage on behalf of all parties to the common adventure, and thereafter seeks to recover cargo-owner's share or shares in General Average.*
>
> *What really aggravates me - no I do not get hysterical - are those situations where each party to the adventure provides its own security to salvors and separately settles its proportion of the salvage remuneration. Why in the name of the York-Antwerp Rules, is it necessary to go through what may be a lengthy and costly process of re-apportioning the salvage settlements in General Average, often in instances where salved and contributory values are more or less identical? And why should one or more parties who may have had the expertise and good business sense to settle with salvors for a lesser remuneration than paid by other salved interests lose the benefit of their skill, because all payments are thrown into the melting pot of General Average?*
>
> *All this nonsense only adds to the cost of General Average.*
>
> *My section has seen a number of adjustments where the General Average expenditures comprised the salvage remuneration, and very little else. If the salvage had been excluded the adjustment fees would probably have been of limited amount, but the inclusion of the salvage has enabled a considerable inflation of the charges. Not good news for cargo or for underwriters."*

As is well-known, Rule VI was only introduced in the 1974 York-Antwerp Rules and has been accused of creating more work for General Average adjusters and more expenses for marine property underwriters than almost any other single change to the Rules in the last 50 years. Clearly this must be tackled, but how?

We propose the replacement of Rule VI by a clause along the following lines:

> *"(a) salvage payments (including legal fees associated with such payments) shall lie where they fall and not be brought into General Average save only that any amounts paid by one party to the general average in respect of the proportion (calculated on salved values and not G.A. contributory values) of another party or parties shall be apportioned*

between the parties to the general average in accordance with these Rules.

(b) In paragraph (a) of this section references to salvage payments and the like expressions shall be construed as excluding payments under Article 14 of the 1989 Salvage Convention and similar provisions (including SCOPIC). "

Outright abolition of Rule VI would create a situation where a shipowner may have to pay the full amount of cargo's contribution and be unable to recover cargo's proportion. In many jurisdictions, such as the Netherlands and Spain, the shipowner is mandatorily or at the option of the salvor the debtor for the salvage remuneration. For this reason it is not felt that it would be practicable or fair to exclude salvage from G.A. completely.

All the foregoing applies only to Article 13 awards: as in Rule VI(b) YAR '94 Article 14 awards special compensation and SCOPIC remuneration should not be allowed in G.A.

16. **Damage to machinery and boilers**

Rule VII York-Antwerp Rules 1994, when read in conjunction with the new Rule Paramount requiring "reasonableness", would appear to be in accordance with the new definition of G.A. We assume that under the proposed re-definition of General Average (and, indeed, under the 1994 YAR) the *"ALPHA"* [1991] 2 Lloyd's Rep 515 would, if heard today, be reversed.

17. **Expenses lightening ship when ashore and consequent damage**

Rule VIII of the York-Antwerp Rules 1994, emphasising, as it does, the fact that it does not apply to environmental liabilities, would once again appear to fall within the new definition of G.A. and, as such, would appear to be unobjectionable.

18. **Cargo, ship's materials and stores used for fuel**

The new Rule IX of the York-Antwerp Rules 1994 would appear on the face of it to be acceptable. Cargo etc. used as fuel will be made good only if used for fuel for common safety while ship and cargo are in actual danger.

19. **Expenses, wages and maintenance of crew and other expenses in the port of refuge**

As already discussed, we recommend Rules X and XI (a), (b) and (c) expenses should be disallowed in G.A. (but see para 33).

20. **Damage to cargo in discharging, etc.**

At present, Rule XII York-Antwerp Rules 1994 reads:-

"Damage to or loss of cargo fuel or stores sustained in consequence of their handling discharging storing re-loading and stowing shall be made good as

General Average when and only when the cost of those measures respectively is admitted as G.A."

The vast majority of cases where Rule XII allowances apply are in circumstances where cargo is discharged at a port of refuge. However, there are circumstances where damage to or loss of cargo, etc., might occur as a result of, for example, a ship-to-ship transhipment of oil at sea when salvage services are being rendered under a lump sum rather than a "no cure, no pay" contract. In such circumstances, it would appear reasonable to allow cargo losses in transhipment to be recovered in G.A. However, if cargo losses are allowed, should also losses to the hull be allowed (such as, for example, ranging damage with the transhipment tanker)? We propose that the wording of Rule XII be amended to include wording to the effect that the damage/loss must occur to the cargo, etc., while the ship and cargo are in the grip of peril but not otherwise. The scope of this rule will be thus very substantially reduced.

21. Deductions from cost of repairs

Under the new concept of G.A., some repairs will still be allowed (e.g. repairs consequent upon a deliberate grounding to avoid a worse peril or repairs to boilers and machinery made necessary by a bona fide and reasonable attempt to refloat a vessel aground). However, there seems no reason not to make deductions in respect of "new for old" where old material or parts are replaced. It should not be forgotten that this was the case in the 19th century and because of the difficulty in arriving at a suitable deduction, certain "customary deductions" were applied to all repairs other than to damage sustained on a vessel's maiden voyage. The customary deductions were fixed at 1/6th for chain cables and 1/3rd for all other repairs and replacements except for anchors and materials and stores that had not been put into use which were allowed in full. A different scale of deductions, depending on the age of the ship, was approved by the A.A.A. in 1887 as a rule of practice with the introduction of iron and steel ships. This was slowly whittled away until we now have the present position.

We tentatively propose the introduction of a modern scale to make the rule operable which will require the input of a hull and machinery surveyor. Alternatively, we could go back to the scale contained in the 1924 or 1950 Rules. We propose that we should consult with the London Salvage Association on this topic.

Although this proposal is in accordance with the laws of many countries (e.g. see Art. 226 Greek Maritime Code) it is contrary to existing hull practice (new for old - no deductions) and could therefore be regarded as inconsistent with market practice but we feel this objection is outweighed by the need to deter "maintenance G.A.'s".

22. Temporary repairs

The comments relating to permanent repairs above apply equally to temporary repairs. Much of the criticism of Rule XIV arises out of the House of Lords decision in the *"BIJELA"* [1994] A.C. which supported the accepted practice of average adjusters that temporary repairs of accidental damage effected at the port of refuge are allowable as G.A. up to the savings in general average allowances resulting therefrom. If temporary repairs at a port of refuge are no longer included in G.A. (as is proposed), there is no need to address this problem in the new Rules, as such temporary repairs will not be

recoverable. The only sort of temporary repairs which might be recoverable are those consequent upon a G.A. sacrifice made while the vessel and cargo are in actual danger (such as, for example. deliberately grounding the vessel in order to save both vessel and cargo by averting a risk of total loss). Deductions should be made for materials used in temporary repairs and later discarded and sold for scrap or otherwise disposed of and credited to the claimant.

Therefore, the scope of the temporary repairs Rule will be drastically curtailed but not, it is suggested, extinguished altogether.

23. Loss of freight

We think that it is only fair and reasonable that freight arising from damage to or loss of cargo shall be made good as G.A. either when caused by a general average act or when the damage to or loss of cargo is so made good. An example of this might be when cargo is jettisoned for the common safety. It is not felt that this is a loss which should be better borne by freight insurers.

24. Amount to be made good for cargo lost or damaged by sacrifice

We have no particular argument with Rule XVI of the York-Antwerp Rules 1974 and 1994 on this topic. Contributory values and damage to ship will be dealt with in paragraph 25 below.

25. Contributory Values

We cannot recommend any changes to the way in which contributory values are calculated now. Justice demands that G.A. contributory values should be assessed at the end of the adventure as stated in Rule G York-Antwerp Rules; we considered York-Antwerp Rules XVII and XVIII carefully. A number of questions arose including:-

(a) Should cargo value be assessed on the basis of the commercial invoice rendered to the receiver or, if there is no such invoice, from the cargo's shipped value (as at present)? We felt that on balance this is the most workable method of assessing cargo's contributory value.

(b) Should the cargo value include insurance and freight at risk of "interests other than the cargo"? We decided it should not.

(c) Should the ship's value be assessed without taking into account the beneficial or detrimental effect of any demise or time charter party to which the ship may be committed (as at present)? We felt the status quo should be preserved in this respect principally due to the difficulty and expense of arriving at a ship contributory value taking these factors into account.

(d) Should the concept of "made good" be retained? If the concept of "made good" was to be abolished then provision would have to be made to ensure that the owners of sacrificed property only receive a fair proportion of the value of the sacrifice/expense which would otherwise have been "made good" and not 100%.

This is done by "making good" at present, it is a fair system and should be retained.

(e) Where cargo is sold short of destination should it contribute upon the actual net proceeds of sale (as at present)? We felt it should.

(f) Should cargo's contributory value be assessed only once it arrives at its eventual destination (which may be many hundreds of miles from the discharge port)? It is felt that despite the advantages of such a proposal from a cargo insurers' point of view that G.A., whether based on common safety or common maritime adventure, is primarily a shipping doctrine and that it is more suited to the sea voyage only where common interests face the same peril. Accordingly, contributory values should continue to be assessed at the discharge port.

(g) Should Passengers' luggage and personal effects contribute in G.A. (at present they do not)? We felt that to ask these interests to contribute would greatly increase the cost of G.A.'s (and in particular, of obtaining security) for very little gain in fairness. Accordingly passengers' luggage and personal effects should not contribute in G.A.

26. Undeclared or wrongfully declared cargo

We have no particular argument with Rule XIX York-Antwerp Rules 1994 and recommend no change should be made to this rule.

27. Provision of funds and interest

It is proposed that commission on G.A. expenditure and the entitlement to pre-adjustment interest should be abolished.

(a) Commission

Historically the position at common law was to allow no commission for advancing funds in G.A.

The best argument we have heard for retaining Rule XX commission is that it is an historic custom in a substantial number of countries (although not the U.K.). For example, in Belgium, Lowndes & Rudolf say that the practice was to allow a commission of 2%, in Germany a customary commission of 1% was allowed on G.A. disbursements, while in the United States the figure was 2.5%. Commission came in before interest was introduced and was described as "the cost of raising funds". When interest was first introduced in 1924, the commission rule was not deleted and thus, in effect, the parties to G.A. are paying twice in respect of the same item. To tackle this criticism, adjusters now attempt to justify commission as being the administrative costs to a shipowner of dealing with a G.A. situation but then, in addition to that, seek sometimes to recover the same expenses under the heading "administration telexes etc." or "agency". This is often abused. We propose that administrative costs, telexes, telephones and other communication charges should be excluded from G.A. completely.

At Sydney an attempt was made to apply the 2% commission to all G.A. expenditure, but this was successfully opposed by observers from IUMI and LUA as being an unwarranted expansion of G.A. and the amendment was withdrawn.

(b) Interest

It is felt that G.A. Adjustments are taking too long to be published and that some incentive must be given to owners to co-operate with their adjusters more actively than at present. This should speed up the production of G.A. Adjustments to the benefit of all parties. It is therefore proposed that no interest shall be recoverable on general average disbursements until the publication of a final G.A. Adjustment. However, interest on general average contributions should from time to time be recoverable at the interest rate applied to judgments in the country of the currency of the Adjustment from the date of publication of the final Adjustment to the date of payment. It is recognised that the abolition of the 7% fixed rate will give rise to uncertainty but it was felt that fixing the new rate by reference to the currency of the Adjustment will be fairer in view of the very wide differences in the interest rates from country to country. In order to avoid "currency shopping" it may be prudent to oblige the Adjuster to publish the Adjustment in the currency in which more G.A. disbursements were incurred than any other.

It is recognised that this provision may give rise to increasing requests for payments on account in circumstances where underwriters may not know whether they are liable to contribute. Although it is not intended that special provision should be made for this situation in the rules, it may be necessary to reconsider the wording of general average guarantees and bonds to provide that payments on account shall only be made in circumstances where there is no doubt that the party demanding the payment on account is indeed entitled to receive his contribution.

28. **Jurisdiction**

At present, the Rules have steered clear on what jurisdiction should govern the adjustment and, in practice, we think this must remain a matter of contract between the parties.

29. **Time bar**

As is well known, there are a vast range of different time bars from jurisdiction to jurisdiction and Rule E of the 1994 York-Antwerp Rules is the first attempt to address this problem. Rule E is a rather watered-down version of the proposal put by LUA representatives at the BMLA G.A. Sub-Committee meetings which was that there should be a contractual time limit of one year within which parties claiming in G.A. should produce their adjustment and, if not accepted, should commence proceedings, failing which the claim becomes time-barred. The period of one year after discharge was chosen by analogy with the Hague and Hague-Visby Rules time limit. The argument against introducing a one year time limit was that frequently repairs were not completed within a year following completion of discharge. If the present proposals are

adopted, repairs will form a smaller proportion of G.A. adjustments and so this argument will have less force. ILU statistics show that although 65% of G.A. Adjustments are produced within 2 years of the casualty these comprise only 1/3 of the amounts claimed in G.A. We therefore propose a general contractual time limit for G.A. claims in an attempt to speed up the general G.A. process. A suitable clause might read:-

> *"All parties to the general average and their guarantors (if any) shall in any event be discharged from all liability whatsoever in respect of claims for general average contributions unless judicial or arbitral proceedings have been instituted within a period of one year after the date upon which the general average adjustment has been published or six years after the general average act (whichever is the earlier). These periods may, however, be extended if the parties so agree after the cause of action has arisen.*
>
> *This rule shall supersede any domestic law which provides for a different time limit to that specified herein for the commencement of suit in respect of claims for general average contribution between the parties to the general average and their guarantors. This rule shall not apply as between the parties to the general average and their insurers (except in so far as such insurers are acting as guarantors)".*

30. **Currency Devaluation**

No interest should be liable to contribute more than the total contributory value of his property involved in the G.A. as assessed in the currency in which the cargo is insured at the time the Adjustment is published. Any shortfall shall be borne by the claimant(s) in G.A. without recourse to the concerned interest or his insurer.

31. **Surveyors**

It is suggested that a new rule should be incorporated into the revised rules to the effect that no contribution shall be due from any party whose surveyor or surveyors has/have been refused access to the vessel and its documents and any documents relating to the vessel for its maintenance not on the vessel which are reasonably requested in writing to be inspected by any party or those acting on their behalf, with a view to determining whether or not that party shall be liable to contribute in general average. Whoever appoints the Surveyor should pay for him.

32. **Drafting**

The Working Group proposes that the re-drafted rules should not be divided into numbered and lettered rules. The distinction is confusing and unnecessary. Views are invited.

33. **Environment**

It is recommended that the existing position regarding the inclusion of environmental liabilities in G.A. as set out in Rule C and Rule XI(d) of the York-Antwerp Rules 1994 should remain. It is recognised that this will result in property underwriters continuing

to bear the environmental liabilities they do at present but limited to only those incurred while the ship and cargo are in the grip of a peril. The environmental liabilities currently allowable under the 1994 YAR are:

- Environmental element in salvage awards by virtue of Article 13(i)(b) of the Salvage Convention 1989 - Rule VI York-Antwerp Rules 1974 as amended in 1990 and 1994.

- The four circumstances listed in Rule XI(d) York-Antwerp Rules 1994 which states:-

  "(d) The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:

  (i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;

  (ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X (a);

  (iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI (b), provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;

  (iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average."

  Because of the overriding proviso that to be allowed in G.A. an expense of sacrifice should be made or incurred "in time of peril" allowances under Rule XI (d)(ii), (iii) and (iv) will be considerably rarer than at present (see also para. 19).

34. **Ballast G.A.'s**

The Working Party has considered whether owners should continue claiming G.A. contributions in respect of ballast voyages. Logically this should not be possible unless of course bunkers belong to someone other than the owner. However, by rule of practice B26 they are accepted as being recoverable by the market. It has been suggested to the Working Party by experienced adjusters than Rule B26 was extended to exclude ballast G.A.'s but unfortunately was incorrectly worded and as a result, for over 50 years the market has been paying up on ballast G.A.'s when the intention originally was that they should not have been doing so. It is therefore recommended a rule should be inserted specifically preventing ballast G.A.'s which would accord with current practice in some markets at present.

35. **Adjusters' fees**

We regard this as outside our remit but we do have some thoughts which another Working Group may wish to consider.

A tariff might usefully be worked out for adjusters' fees to reflect a combination of:-

(a) time spent;

(b) the number of items in the adjustment; and

(c) the overall value of the adjustment

so that some way can be found to check that the fees are reasonable. Lawyers' fees can be taxed in accordance with (admittedly pretty complicated) criteria laid down by the courts but until June 1997 there appeared to be no way of reviewing an adjusters' bill without litigation (except by negotiation). We understand the AAA has recently established a costs taxation procedure for adjustments involving the London market which should go some way to addressing this problem. It may be helpful if this procedure could be extended to cover insurers and adjusters worldwide in due course.

36. **G.A. Security**

We regard this as outside the remit of this report.

Nick Gooding
Eamonn Magee
Matthew Marshall
Ben Browne

2nd April 1998

Comité Maritime International

Questionnaire

On an eventual revision of YAR 1994

1.

The YAR originally provided for the distribution of expenses and sacrifices over the contributing interests only as far as they were incurred for the common safety of ship and cargo. Later on the scope was extended to include expenses incurred for the common benefit – like port of refuge and substituted expenses. Do you think time has come to reduce the scope of the YAR to the principle of common safety?

2. If so, do you support

2.1.
that sacrifices and expenses should be included in G/A only if made or incurred while ship and cargo are "in the grip of a peril"?

2.2 that temporary repairs of the vessel in a port of refuge should be excluded from G/A?

2.3 that the same should apply to crew wages and maintenance in the port of refuge?

2.4
the the cost of discharging, storage and reloading of cargo in the port of refuge should no longer be allowed in G/A?

2.5 that no substituted expenses should be made good in G/A?

2.6 that no non separation agreement should be allowed in G/A (revision of rule G)?

2.7 that in consequence Rules X and XI should be abolished?

3.

Rule D deals with the influence of fault of one of the parties to the adventure. Such fault has had to be shown under the rules of the national law applicable in addition to the YAR. Do you think any non-compliance with international conventions like the "ISM Code or STCW should be considered a fault irrespective of the merits of the individual case and the applicability of such convention?

/..

4.

Salvage cases are settled in different ways in different countries. In some countries ship and cargo join in settling salvage remuneration, in other countries they do not. Do you support the view that salvage remuneration should not be distributed in GA if settled separately by ship and cargo with the salvor?

5.

Expenses preventing or minimizing damage to the environment have been included in the YAR only in 1994, evidently as a consequence of the revision of LOF and the 1989 Salvage Convention. Do you take the view that no such expenses should be allowed in G/A?

6.

The YAR have not included any rule on time bar leaving this matter to national law. Do you think a rule on time bar should be introduced so as to prevail over national law?

Any additional comments you may wish to make, particularly on items not dealt with in this questionnaire but treated in the report of IUMI, will be highly welcome.

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Questionnaire

1. Does your country's national law contain rules on marine insurance? If so, are they contained in an act? Please supply a copy of the relevant act.

2. If your country's national law contains rules on marine insurance exclusively in the form of court decisions, what is the shortest summing up of the main rules? Please supply a copy of that document.

3. If your country's national law contains rules on marine insurance in the form of an act, does that act apply to hull insurance only or to cargo insurance only or to both branches?

4. If your country's national law contains an act on marine insurance, please indicate which rules are obligatory. May we assume that all rules which are not obligatory are directory?

5. Has your country's marine insurance market adopted standard insurance conditions (like the English Institute Time Clauses Hulls and Institute Cargo Clauses)? If so, please supply a copy of such conditions.

6. Does your country's national law or, in the absence of such law, do the Standard Insurance Conditions used in your insurance market

6.1. require that the insured has an insurable interest? If so, is it required when entering into the contract of insurance or at a later stage? Has this to be an economic and legal interest?

6.2. result in termination of cover in the event of a breach of a warranty in the policy, regardless of whether the breach of warranty caused the loss which is the subject of the claim? If not, what is the effect of a breach of warranty?

6.3.impose upon the insured a duty of disclosure and, if so, only before the commencement of cover or during the currency of cover? If so, what is the nature and extent of that duty and what is the sanction for its violation?

6.4. provide a rule on misconduct of the insured during the period of cover; if so, please outline what is considered misconduct and what is the sanction.

6.5. provide that the insured has to take responsibility for the conduct of others including an insurance broker? If so, for whom?

6.6. provide that either the insured or the insurer or both of them have a duty of good faith? If so, please outline the extent of that duty.

6.7. provide rules on the insured value? If so please state at which time the subject of insurance is to be valued and how.

6.8.allow the insured to increase the risk during the currency of cover with or without informing the insurer and with or without obligation to pay an additional premium?

6.9. provide for exclusions from cover, in particular
6.9.1 for political risks like war, mines, strikes
6.9.2 for nuclear risks
6.9.3 for arrest or detainment by a court or government body
6.9.4 for ordinary wear and tear (or, in cargo insurance, inherent vice)
6.9.5 for inadequate maintenance, fault in design, construction or material
6.9.6 in hull insurance for unseaworthiness, loss of class or in hull or cargo insurance breach of safety regulations,
6.9.7 in hull insurance for change of flag, ownership or management,
6.9.8 for management issues (like non-compliance with the ISM Code)
6.10 provide cover for total or partial loss or damage to the subject matter insured, contri bution in general average and expense for ascertaining or averting or reducing loss or damage,
6.11 provide that the insurer is automatically subrogated to any claim against a third party the insured may have because of loss or damage covered or has the insured to assign such claim to the insurer?

7. What is the period of limitation for a claim under a policy.

JOINT INTERNATIONAL WORKING GROUP ON UNIFORMITY OF LAWS CONCERNING PIRACY AND ACTS OF MARITIME VIOLENCE

[DRAFT]
REPORT OF THE THIRD SESSION, LONDON, 23 AND 24 MARCH, 2000

1. At the invitation of the Comité Maritime International, the Group met for its Third Session at Ince & Co., Knolly's House, 11 Byward Street, London. The meeting commenced at 9:40 o'clock a.m. and concluded at 4:30 p.m., including an interval for lunch. Participating were:

on behalf of the Baltic and International Maritime Council **(BIMCO)** –

Mr. Grant Hunter, Piracy Project Consultant

on behalf of the Comité Maritime International **(CMI)** –

Patrick J. S. Griggs, Esq. (President)

Dr. Frank L. Wiswall, Jr. (Vice-President), Professor, International Maritime Law Institute; Past Chairman, IMO Legal Committee

Dr. Samuel P. Menefee (U.S. MLA), Professor of Law, Regent University; Maury Fellow, Center for Oceans Law and Policy, University of Virginia School of Law

on behalf of the International Chamber of Shipping **(ICS)** –

Ms. Linda Howlett, Legal Adviser

on behalf of the International Criminal Police Organization **(INTERPOL)** –

Mr. John Porter, Team Leader, International Division, UK National Criminal Intelligence Service

on behalf of the International Group of P & I Clubs **(IGP & I)** –

Hugh Hurst, Esq.

on behalf of the ICC International Maritime Bureau **(ICC-IMB)** –

Dr. Niranjan Abeyratne, Legal Adviser

on behalf of the International Maritime Organization **(IMO)** –

Mr. Augustin Blanco-Bazan, Deputy Director, Legal and External Affairs Division

Mr. Gaetano Librando, Senior Legal Officer, Legal and External Affairs Division

Mr. Brice Martin-Castex, Technical Programme Officer (Piracy), Marine Safety Division

on behalf of the International Transport Worker's Federation **(ITF)** –

Mr. Jean-Yves Legouas, Secretary, Seafarers' Section

Mr. Tom Holmer

on behalf of the International Union of Marine Insurance **(IUMI)** –

Dr. Gerfried Brunn, Chairman, Liability Committee

2. Dr. Wiswall served as Chairman and Dr. Menefee as Rapporteur of the Group. Regrets for non-attendance together with comments on the draft text of the Model National Law were received from Mrs. Gabriele Gottesche-Wanli, Legal Officer of the United Nations Office of Legal Affairs, Division of Oceans Affairs and Law of the Sea **(UNOLA/DOALOS)**. Regrets were likewise received from Dr.

William Gillen, Chairman of the Contact Group on Piracy, etc., formed by the Maritime Safety Committee of IMO.

3. Messages were received from Dr. Ludwig Weber, Director of the Legal Bureau of the International Civil Aviation Organization (ICAO), and from Mr. Rob Donald, Director of the Legal Department of the International Air Transport Association **(IATA)**, expressing interest in the work of the Group and requesting copies of the documentation produced by the Group.

4. Dr. Wiswall announced the lack of a response to the invitation to attend the Group's Third Session from the International Law Association **(ILA)** and from the United Nations High Commission on Refugees **(UNHCR)**, and said that a further attempt to elicit participation by these organizations would be made.

Review of Current Action

5. The representatives of IMB and INTERPOL provided current information:

(a) **IMB** cited the recent case of the ALONDRA RAINBOW as illustrative of the need for a Model National Law, and had provided a report on that incident (earlier circulated to the participants) prepared for the 72nd Session of the IMO Maritime Safety Committee. The even more recent attack on the GLOBAL MARS offered another example. IMB also provided copies of its Annual Report on Piracy and Armed Robbery against Ships for 1999, showing an alarming 40% increase in *reported* attacks over 1998. It could be safely assumed than many incidents went unreported. Particular problem areas again were Indonesia and the Singapore Straits area, as well as Bangladesh and Maylasia.

(b) **INTERPOL** noted an increase in the level of violence in cases where violence was employed, and the evident entry into the field by organized crime. INTERPOL has accordingly shifted its stance in the area of piracy and maritime violence from reactive to pro-active.

(c) **IUMI** reported that it would hold a meeting in September devoted to the growing problem of piracy and maritime violence.

(d) **ITF** voiced its belief that the problem of armed attacks on merchant ships had escalated to a degree that demanded some direct action at the level of the United Nations.

(e) **IMO** noted that regional conferences on the subject, including one currently taking place in Mumbai, were proving extremely effective.

Adoption of Agenda

6. The Group agreed to adopt with certain changes the Agenda suggested by the Chairman, attached to this Report as Annex A.

Approval of Report of Previous Session

7. Subject to certain changes proposed by the ITF, the Group agreed to adopt the Report of its Second Session prepared by the Rapporteur.

Questionnaire Responses

8. Further responses to the Group's Questionnaire had been received, and the Rapporteur distributed a revised synopsis adding the responses of Argentina and Hong Kong to those previously received. A revised version of this Synopsis is attached as Annex B.

9. It was again noted by the Chairman that there were very wide divergences between the applicable national laws of even those countries closely tied by history and culture, and that the indications of position in the Synopsis were sometimes based upon a guess as to the proper interpretation of vague provisions.

IMO Draft Code for Investigation of Incidents

10. The Report of the Contact Group to the 72nd Session of the IMO Maritime Safety Committee (Doc. MSC 72/17/4, 11 Feb 2000) was made available to the participants. If accepted, work on the IMO Draft Code for the Investigation of Crimes Involving Violence Against Crews, Passengers, Ships or Cargoes, would be complete, and all that would remain would be action by the IMO Assembly in November 2001 to make the Code the subject of a Resolution. A copy of the Report is attached as Annex C.

11. Considering matters held over from previous sessions, it was agreed that no attempt would be made to deal with the offense of barratry in the Model Law, but that an act otherwise falling within the model law would not be excluded from application because barratry was involved.
It was also agreed that, as to fixed platforms operating in the marine environment, the Model Law would be drafted to cover these structures as well as vessels, rather than attempting to draft a separate annex for platforms.

12. The representatives of IMO stated that the Organization was in favour of including such provisions and such wording in the Model Law as would give full effect to the 1988 Rome (SUA) Convention and Protocol for those States which had ratified or acceded to the Convention (with or without the Protocol), with the added benefit that the provisions of the Convention would be uniformly applied as national law in those States enacting the Model Law but not being Parties to the Convention or Protocols.

13. It was agreed that no mention should be made in the Model Law of the character of the punishment that should be meted out for an offense. At the same time, it was necessary that the Model Law should indicate an expectation of punishment sufficiently severe to deter commission of such incidents. ICS suggested that a footnote in the Model Law urging appropriate punishment should use the wording of Article 5 of the 1988 Rome Convention, providing that each State Party shall make such offences "punishable by appropriate penalties which take into account the grave nature of those offences."

14. It was suggested by INTERPOL that it was essential the Model Law cover acts committed *recklessly* as well as intentionally; this was agreed. It was also suggested by INTERPOL that those to be prosecuted must include any person who "aids, abets, counsels or procures" such an act as well as the active perpetrators; this was likewise agreed.

15. It was suggested by IUMI that in addition to penalties imposed for acts in violation of the Model Law, the Law state that when such acts result in loss of or damage to property, the offenders shall also be liable for whatever penalties exist under national law for that loss or damage.

16. It was generally agreed that Masters of vessels should be obliged to report without delay any incidents falling under the Model Law. The Group was reminded by the ITF, however, that care must be taken not to lay a trap for the Master or

members of the ship's crew that might unfairly penalize them; the other participants were sympathetic to this view.

Method and Future Schedule for Group's Work

17. It was agreed that the Group's Fourth Session would be scheduled for Thursday 12th and Friday 13th October 2000. Meanwhile the draft Report of the Third Session and a re-draft of the Model National Law will be circulated to all participants.

A revised Questionnaire will be sent to the CMI Member National Associations of Maritime Law, together with the re-drafted Model National Law, with responses requested by 15th September.

The re-drafted Model National Law will be submitted to a limited number of Governments for "pre-testing," with responses also requested by 15th September.

The Group at its Fourth Session will adopt a Report annexing a final text of the Model National Law. This document will be presented to the **CMI** 37th International Conference in Singapore, 12th – 16th February, 2001. The document will be discussed in the Conference following a seminar-style presentation by the Group's participating organizations. If the Conference votes to approve the Model Law it will be forwarded to the CMI Member Associations with the request to promote its submission and adoption as national legislation. If the Conference should fail to approve the Model Law, then a further meeting or meetings of the Group will be held and a re-drafted text submitted to all the constituent organizations for review.

Respectfully submitted,

Dr. Frank L. Wiswall, Jr.,
Chairman of the Group

Dr. Samuel P. Menefee
Rapporteur of the Group

ANNEX B

Comité Maritime International

[DRAFT]

REVISED TABLE OF RESPONSES OF THE CMI NATIONAL MEMBER ASSOCIATIONS TO THE QUESTIONNAIRE CONCERNING THE LAW OF PIRACY

23RD & 24TH MARCH, 2000

QUESTIONNAIRE

1. Does your country's national law define the crime of piracy? [If so, please supply a copy of the relevant portion and indicate that definition within the document.]

ARGENTINA		UNITED KINGDOM	YES
AUSTRALIA	YES	NORWAY	NO
GERMANY	NO	PORTUGAL	NO
HONG KONG		SPAIN	NO
JAPAN	NO	NEW ZEALAND	YES
DPR KOREA	NO	UNITED STATES	YES

2. Does your country have a national law specifically punishing the crime of piracy (as distinct from crimes that form elements of the crime of piracy)? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	YES
AUSTRALIA	YES	NORWAY	N/A
GERMANY	N/A	PORTUGAL	N/A
HONG KONG		SPAIN	N/A
JAPAN	N/A	NEW ZEALAND	YES
DPR KOREA	N/A	UNITED STATES	YES

3. If so, does your country's national law punish the crimes of attempted piracy and/or of conspiracy to commit piracy? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	YES
Australia	Yes	Norway	N/A

Germany	N/A	Portugal	N/A
Hong Kong		Spain	N/A
Japan	N/A	New Zealand	Yes
DPR Korea	N/A	United States	No

4. Does your national law provide for the trial of piracy committed within waters under your country's national jurisdiction? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	NO
AUSTRALIA	YES	NORWAY	NO
GERMANY	NO	PORTUGAL	NO
HONG KONG		SPAIN	NO
JAPAN	NO	NEW ZEALAND	YES
DPR KOREA	NO	UNITED STATES	YES

5. Does your national law provide for the trial of piracy committed outside your country's jurisdiction, *i.e.*, on the high seas and/or in waters within the jurisdiction of another State, on the basis that piracy is a universal international crime? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	YES/NO
AUSTRALIA	YES	NORWAY	YES/NO
GERMANY	NO	PORTUGAL	YES
HONG KONG		SPAIN	YES
JAPAN	NO	NEW ZEALAND	YES
DPR KOREA	NO	UNITED STATES	YES

6. Does your national law provide for the extradition of a person accused of the crime of piracy in another country to that State for trial? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	YES
AUSTRALIA	YES	NORWAY	NO
GERMANY	NO	PORTUGAL	NO
HONG KONG		SPAIN	NO
JAPAN	NO	NEW ZEALAND	YES
DPR KOREA	NO	UNITED STATES	YES

7. Does your national law provide that a person accused of the crime of piracy must either be tried in your country, or else extradited to another country for trial? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	NO
AUSTRALIA	NO	NORWAY	NO

GERMANY	NO	PORTUGAL	NO
HONG KONG		SPAIN	"YES"
JAPAN	NO	NEW ZEALAND	YES
DPR KOREA	NO	UNITED STATES	NO

8. What is the range of punishment under your national law for a person convicted of the crime of piracy? [Please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	LIFE
AUSTRALIA	LIFE	NORWAY	21 YRS.
GERMANY	?	PORTUGAL	25 YRS.
HONG KONG		SPAIN	20 YRS.
JAPAN	?	NEW ZEALAND	LIFE
DPR KOREA	?	UNITED STATES	LIFE

9. Specifically, does your national law provide for the capital punishment (death by execution) of a person convicted of the crime of piracy, where the pirate has not been convicted of the crime of capital murder (homicide in the first degree)? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	NO
AUSTRALIA	NO	NORWAY	NO
GERMANY	NO	PORTUGAL	NO
HONG KONG		SPAIN	NO
JAPAN	NO	NEW ZEALAND	NO
DPR KOREA	NO	UNITED STATES	NO

10. Does your national law provide for the capital punishment (death by execution) of a person convicted of the crime of piracy, where the pirate has also been convicted of capital murder (homicide in the first degree) committed in connection with the event of piracy? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	NO
AUSTRALIA	NO	NORWAY	NO
GERMANY	NO	PORTUGAL	NO
HONG KONG		SPAIN	NO
JAPAN	NO	NEW ZEALAND	NO
DPR KOREA	NO	UNITED STATES	YES

11. If a person has committed the act of armed theft of a vessel (or the taking of a vessel by threat of violent harm) within waters under your country's national jurisdiction, would that act constitute the crime of piracy under your national law? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**NO**
AUSTRALIA	**YES**	NORWAY	**NO**
GERMANY	**NO**	PORTUGAL	**NO**
HONG KONG		SPAIN	**N/A**
JAPAN	**NO**	NEW ZEALAND	**YES**
DPR KOREA	**NO**	UNITED STATES	YES

12. If a person has committed the act of armed robbery of persons on board a vessel (or the taking of property on board a vessel by threat of violent harm) within waters under your country's national jurisdiction, would that act constitute the crime of piracy under your national law? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**NO**
AUSTRALIA	**YES**	NORWAY	**NO**
GERMANY	**NO**	PORTUGAL	**NO**
HONG KONG		SPAIN	**NO**
JAPAN	**NO**	NEW ZEALAND	**YES**
DPR KOREA	**NO**	UNITED STATES	**YES**

13. Would the answers to Questions 11 and 12 above be different depending upon whether the vessel was moored or at anchor or, alternatively, was underway? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**NO**
AUSTRALIA	**NO**	NORWAY	**NO**
GERMANY	**NO**	PORTUGAL	**YES**
HONG KONG		SPAIN	**NO**
JAPAN	**NO**	NEW ZEALAND	**NO**
DPR KOREA	**NO**	UNITED STATES	**NO**

14. Would the answers to Questions 11 and 12 above be different depending upon whether the vessel was tied up alongside a wharf or quay or, alternatively, was not alongside but was moored or at anchor? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**NO**
AUSTRALIA	**NO**	NORWAY	**NO**
GERMANY	**NO**	PORTUGAL	**NO**
HONG KONG		SPAIN	**NO**
JAPAN	**NO**	NEW ZEALAND	**NO**
DPR KOREA	**NO**	UNITED STATES	**NO**

15. If a person has committed the act of armed robbery of persons or other violent acts against persons on an offshore platform or other fixed offshore structure within waters under your country's national jurisdiction, would such acts constitute the crime of piracy under your national law? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**NO**
AUSTRALIA	**?**	NORWAY	**YES**
GERMANY	**NO**	PORTUGAL	**YES**
HONG KONG		SPAIN	**NO**
JAPAN	**NO**	NEW ZEALAND	**NO**
DPR KOREA	**NO**	UNITED STATES	NO

16. If a person has committed the act of armed robbery of persons or other violent acts against persons on an offshore platform or other fixed offshore structure on the high seas, or within waters under the national jurisdiction of another State, would such acts constitute the crime of piracy under your national law? [If so, please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**NO**
AUSTRALIA	**NO**	NORWAY	**NO**
GERMANY	**YES**	PORTUGAL	**?**
HONG KONG		SPAIN	**NO**
JAPAN	**YES**	NEW ZEALAND	**NO**
DPR KOREA	**NO**	UNITED STATES	**NO**

17. If stolen goods or other property of victims of piracy is taken into custody by your country's authorities, what is your national law concerning its disposition when the victim makes a claim to the property? [Please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**SALVOR'S FEE**
AUSTRALIA	**RETURN**	NORWAY	**RETURN**
GERMANY	**RETURN**	PORTUGAL	**RETURN**
HONG KONG		SPAIN	**RETURN**
JAPAN	**RETURN**	NEW ZEALAND	**RETURN**
DPR KOREA	**?**	UNITED STATES	**NONE**

18. If instrumentalities of piracy (*e.g.*, weapons, fast boats, portable electronics, etc.) are taken into custody by your country's authorities, what is your national law concerning the disposition of such items? [Please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**SALVOR'S FEE**
AUSTRALIA	**FORFEIT**	NORWAY	**FORFEIT**
GERMANY	**FORFEIT**	PORTUGAL	**FORFEIT**
HONG KONG		SPAIN	**FORFEIT**
JAPAN	**FORFEIT**	NEW ZEALAND	**FORFEIT**
DPR KOREA	**?**	UNITED STATES	**FORFEIT**

19. If the property referred to in Question 18 were stolen by the pirates, does your national law provide for the restoration of such property in due course to an innocent owner when the owner makes a claim to the property? [Please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**SALVOR'S FEE**
AUSTRALIA	**YES**	NORWAY	**YES**
GERMANY	**YES**	PORTUGAL	**YES**
HONG KONG		SPAIN	**YES**
JAPAN	**YES**	NEW ZEALAND	**YES**
DPR KOREA	**?**	UNITED STATES	**NO**

20. If no claim is made to the property referred to in Questions 17 and 19, what is your national law concerning disposition of the property? [Please supply that portion of your law and indicate the relevant section within the document.]

ARGENTINA		UNITED KINGDOM	**FORFEIT**
AUSTRALIA	**FORFEIT**	NORWAY	**FORFEIT**
GERMANY	**"RETAIN"**	PORTUGAL	**FORFEIT**
HONG KONG		SPAIN	**FORFEIT**
JAPAN	**FORFEIT**	NEW ZEALAND	**FORFEIT**
DPR KOREA	**?**	UNITED STATES	**FORFEIT**

21. Does your country's law require the reporting of all incidents of piracy to a central national authority? If so, please supply the name and address of this authority, the numbers for electronic contact (telephone, fax, E-Mail, telex, cable, etc.) and the name and title of an individual to contact for further details.

ARGENTINA		UNITED KINGDOM	**NO**
AUSTRALIA	**NO**	NORWAY	**NO**
GERMANY	**NO**	PORTUGAL	**NO**
HONG KONG		SPAIN	**NO**
JAPAN	**NO**	NEW ZEALAND	**NO**
DPR KOREA	**NO**	UNITED STATES	**NO**

22. Does your country have any treaties or other standing agreements with *(a)* bordering States, *(b)* nearby States maintaining a naval establishment with high enforcement capability, or *(c)* other States in the region, concerning co-operation to suppress and/or punish piracy? [If so, please supply copies of such agreements if possible (otherwise citations to the agreements) and the names of the States parties.]

ARGENTINA		UNITED KINGDOM	**NO**
AUSTRALIA	**NO**	NORWAY	**NO**
GERMANY	**NO**	PORTUGAL	**NO**
HONG KONG		SPAIN	**YES/NO**
JAPAN	**NO**	NEW ZEALAND	**NO**
DPR KOREA	**NO**	UNITED STATES	**NO**

23. If your country is party to any relevant treaties or standing international agreements other than those referred to in Question 22 above, please supply copies of such agreements if possible (otherwise citations to the agreements) and the names of the States parties.

ARGENTINA		UNITED KINGDOM	**[LIST]**
AUSTRALIA	**[LIST]**	NORWAY	**NO**
GERMANY	**[LIST]**	PORTUGAL	**[LIST]**
HONG KONG		SPAIN	**[LIST]**
JAPAN	**NO**	NEW ZEALAND	**[LIST]**
DPR KOREA	**NO**	UNITED STATES	**[LIST]**

24. If your country has national laws specifically concerning maritime crimes of violence other than piracy, please supply those portions of your law and indicate the relevant sections within the documents.

ARGENTINA		UNITED KINGDOM	**YES/[TEXT]**
AUSTRALIA	**YES/[TEXT]**	NORWAY	**YES/[TEXT]**
GERMANY	**NO**	PORTUGAL	**NO**
HONG KONG		SPAIN	**NO**
JAPAN	**YES/[TEXT]**	NEW ZEALAND	**YES/[TEXT]**
DPR KOREA	**?**	UNITED STATES	**YES/[TEXT]**

25. Do you believe there would be general support in your country for broadening the scope of your national law (if necessary) so as to treat violent maritime crimes on the same basis as piracy is treated under international law?

ARGENTINA		UNITED KINGDOM	**?**
AUSTRALIA	**?**	NORWAY	**?**
GERMANY	**NO**	PORTUGAL	**YES**
HONG KONG		SPAIN	**?**
JAPAN	**?**	NEW ZEALAND	**NO**
DPR KOREA	**?**	UNITED STATES	**YES**

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