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Australian Maritime
Safety Authority

Places of Refuge

MLAANZ Conference 2002

Session 6 – Developments in Transportation Law

Australian Maritime
Safety Authority

John Gillies

Principal Adviser – Policy & Regulatory

Environment Protection Standards

Australian Maritime Safety Authority

Australian Maritime Safety Authority

Presentation Outline

1. Background to the Current Focus on Places of Refuge
2. IMO's Initiatives on Places of Refuge
3. Recent Australian Developments

Australian Maritime Safety Authority

1. Background to the Current Focus on Places of Refuges

Erika

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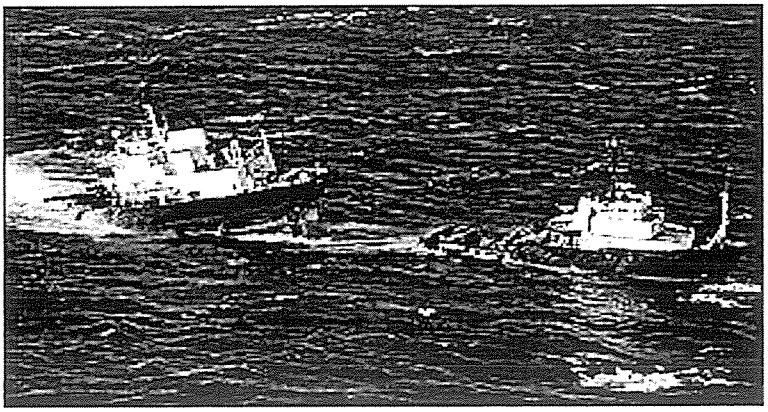

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Erika

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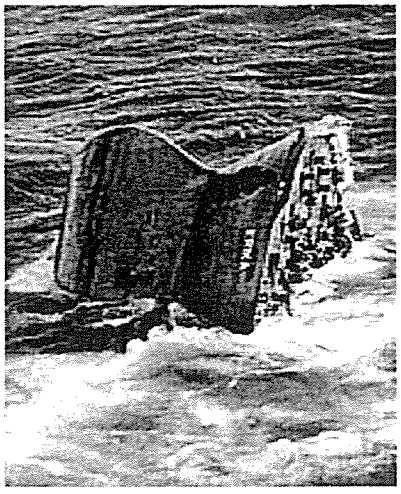

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Castor

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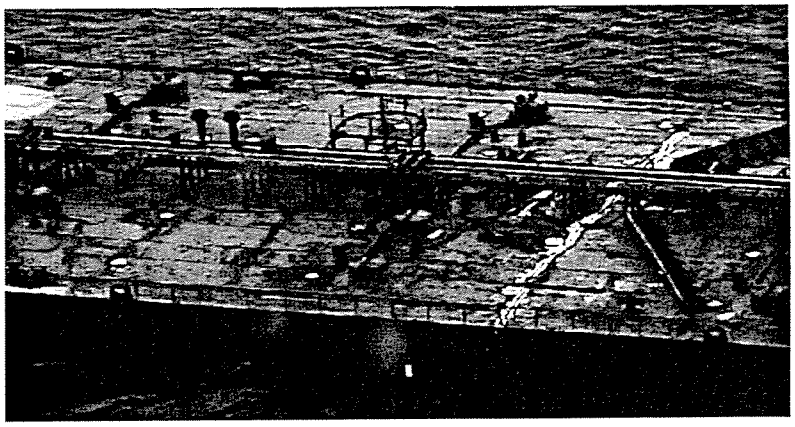

7

Earlier Incidents

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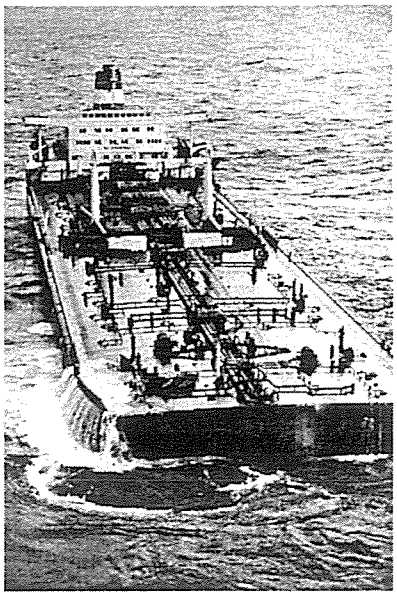
- *Andros Patricia* – 31 December 1978
  - Spain, Portugal, France, Britain refused
- Collision in July 1979 in the Western Atlantic between *Atlantis Empress* and *Aegean Captain*
  - Trinidad & Tobago Govt ordered offshore
  - largest ever ship-sourced oil spill

8



Kirki

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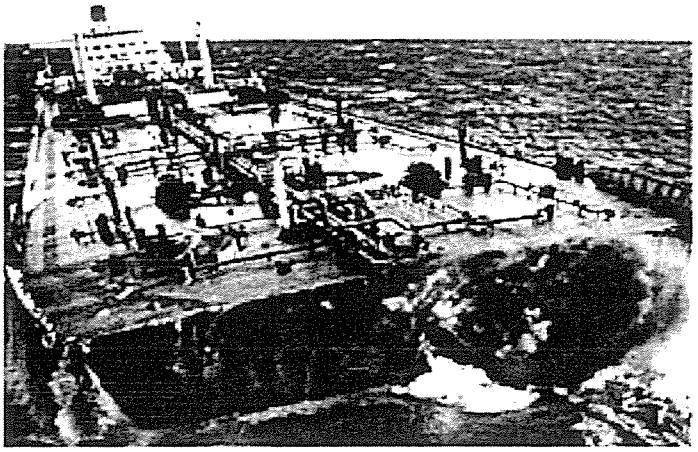
- 97,083 DWT Greek flagged tanker in bound to Kwinana
- Bow broke away forward of No.1 cargo tanks in heavy weather
- Approx 17,700t of Murban light crude oil escaped
- Refused entry to Fremantle and Dampier
- Ship-to-Ship Transfer 30nm from Dampier port limits
- Towed to Singapore for disposal

9

Kirki

Australian Maritime Safety Authority



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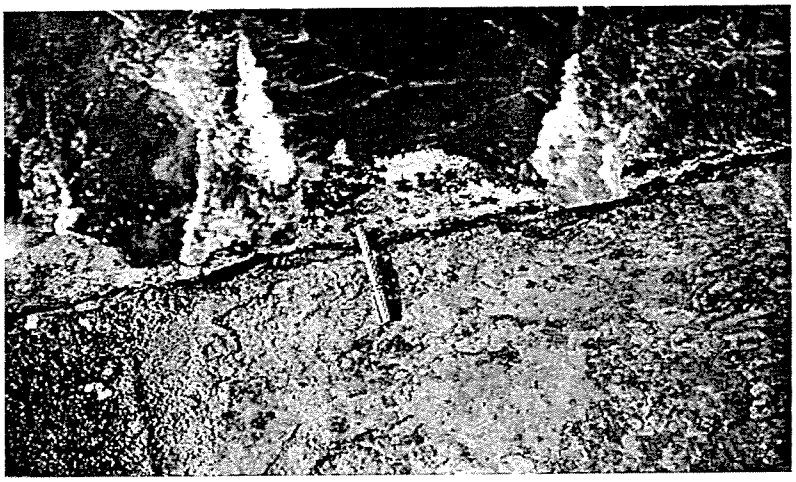
Kirki



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Terminology

- Port of refuge or safe haven
  - undue expectations
  - misnomer
- Place of refuge
- New term to maritime and IMO practices

Definition

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- A place of refuge – a place where a ship in need of assistance can find favourable conditions enabling it to take action to stabilize its condition, protect human life and reduce the hazards to navigation and to the environment, including ports

Reference

Australian Maritime Safety Authority

- Term does not appear in UNCLOS
- Only IMO reference is *Article 11* of Salvage Convention

Salvage Convention

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Article 11 states:

"A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as ***admittance to ports of vessels in distress*** *or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general."*

15

Operational Drivers

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- Generally, access to a place of refuge may be sought in circumstances involving:
  - a maritime casualty
  - *force majeure* or distress or
  - operational, logistical or medical situation

16

Applicable Ships

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- Any type of ship, including a warship, may invoke the right to a place of refuge provided there is a genuine distress, whatever its cause
- If a place of refuge is granted to a warship, most relevant international conventions, in particular those relating to intervention, liability and compensation, do not apply

17

Why Provide a Place of Refuge?

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- Longstanding maritime tradition
- Good seamanship
- Dealing with marine casualty in open sea
- Risk vessel's condition deteriorating
- Greater hazard to a coastal State

18

Aim of a Place of Refuge

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To protect:

- safety of crew, passengers & salvage crew
- safety of nearby human life and health
- ecological and cultural resources
- economic/socio-economic infrastructure
- Vessel's safety and its cargo

19

Need for Balance

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Need to balance competing factors including:

- long-established right of ships in distress
- duty to render assistance
- right to regulate, and to place conditions on, entry into ports
- right to protect coastlines and marine resources

20

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Summary (1)

- Definition and language problems
- Structurally damaged ship entering coastal States' waters
- Global concern
- Primary concern is safety of those on board
- Threat to the marine environment
- Reluctance to deal with such ships

21

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IMO Sec-Gen

- *"When dealing with ships in distress, the requirement is to find them an area of sheltered water where the situation can be stabilised, the cargo made safe and the salvors and authorities can evaluate what further steps are necessary without the pressure of a crisis hanging over their heads. The concern of port authorities that they should not be exposed to the risks of pollution, fire or explosion is well understood and is not in any way challenged. But equally, this is an issue which will not go away and must be addressed.* ***We cannot continue to permit a situation to unfold in which salvors dealing with a damaged vessel containing a potentially hazardous cargo have nowhere to go.***"

(Keynote address: 22nd World Ports Conference of the International Association of Ports and Harbours (IAPH), Montreal, Canada, May 2001)

22

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2. IMO's Initiatives on Places of Refuge

IMO

The IMO

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- Two primary committees:
  - Maritime Safety Committee (MSC) and
  - Marine Environment Protection Committee (MEPC)

IMO's Initiatives

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Guidelines for:

1. coastal States to use in the identification and designation of suitable places of refuge
2. the evaluation of risks associated with relevant operations, on a case-by-case basis and
3. Masters of ships in distress

25

Guidelines 1

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Guidelines for identification and designation of suitable places of refuge

- identification, assessment, designation and provision of such suitable places
- decision making processes

26

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Guidelines 2

Risk evaluation guidelines

– risk evaluation
– identification of events
– assessment of risks
– contingency planning
– emergency responses
– financial implications

27

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Guidelines 3

Guidelines for Masters of ships in distress

– Alerting and situation analysis
– Vessel status assessment
– Risk assessment
– Identification of hazards
– Identification of the required actions
– Establish responsibilities / communications
– Response actions and reporting procedures

28

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Issues

- Pre-designated places of refuge
- Regional approach
- Agreed decision making criteria
- Policy process is well developed and exercised

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Summary (2)

- IMO progressing place of refuge issue
- Developing 3 sets of guidelines
- Likely timing is 2003

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3. Recent Australian Developments

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Places of Refuge

- Comprehensively addressed by 1993 Review
- Better placed than many maritime nations
  - minimal passing traffic
  - States' jurisdiction over waters and coastal areas to enable selection of places of refuge
- Developed and agreed basic criteria
- Most jurisdictions developed guidelines

Australian Situation

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- Not a national approach
- Basic place of refuge criteria adopted in 1993
- AMSA / AAPMA Safe Havens & Salvage Workshop

33

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Workshop Recommendations

- Agreement to use the term place of refuge
- Recognition of need to develop national maritime place of refuge risk assessment guidelines

34

Australian Guidelines (1)

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- Who has authority to grant a place of refuge
- Who should make a request and to whom
- Information for place of refuge request
- Criteria for deciding whether to grant a request
- Decision making process
- Handing over casualty coordination, and
- Indemnities, letters of undertakings, etc

35

Australian Guidelines (2)

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- State/NT government maritime agency or AMSA has authority to grant request
- Follows existing jurisdictional arrangements
- Most appropriate person to make a request is person in charge of the ship at the time
- All requests through AMSA's Australian Rescue Coordination Centre

36

Australian Guidelines (3)

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- Prime contact point during an incident
- In Australian waters, places of refuge are determined on a case-by-case basis and are not pre-designated
- Explore option of continuing to respond to a maritime casualty at sea
- Expert inspection of the ship

37

Australian Guidelines (4)

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- Local, regional, State/NT guidelines/plans
- Communicate decision
- Assistance from other maritime administrations
- Few options available if request denied
- Alternative assistance arrangements
- Indemnities, Letters of Undertaking, etc

38

Powers of Intervention

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- *"The powers of intervention were conceived for dealing with a situation* ***where those in control of a polluting or potentially polluting vessel were blatantly not complying with the wishes of the relevant Commonwealth or State/NT agency*** *by failing to employ competent salvors for instance or by refusing to take a tow or refusing to proceed to a designated safe haven, or were unable to proceed with the salvage operations due to unforeseen developments.* ***It was not envisaged that they would be used to intervene in a situation where competent salvors were clearly doing all they could to bring a salvage incident to a successful conclusion.***"

39

Intervention Convention

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- International Convention relating to Intervention on the High Seas in cases of Oil Pollution Casualties 1969
  - allows parties to take measures on high seas to prevent, mitigate or eliminate grave and imminent danger from pollution or threat of pollution of the sea by oil
- Party can intervene where pollution is threatened "from acts related to such a casualty, which may reasonably be expected to result in major harmful consequences"
  - enables intervention where salvage operations go wrong

40

Intervention Convention – Application

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- Legislation complementary & proven effective
- Commonwealth has authority to direct a ship involved in a maritime casualty to enter a port or sheltered area irrespective of consent of port authority and/or State government
- Does not extend to requisition of port tugs or other assets
  - except in circumstances where asset is a salvor in possession of the ship

41

Liability & Compensation

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- IMO liability/compensation conventions apply
- Use of indemnities & letters of undertaking
- Address costs, liability & compensation

42

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Summary (3)

- Developing national guidelines
- Influence debate/respond to IMO
- Not pre-designated
- Authority to direct a ship to enter a port or place of refuge irrespective of consent of port authority and/or State government
- Commonwealth power does not extend to requisition of port tugs or other assets

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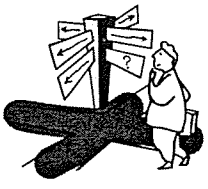
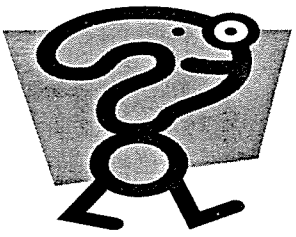
Thank you



Questions



The UNCITRAL Draft Preliminary Instrument on the Carriage of Goods by Sea

By
Susan Downing

The views expressed in this paper are the views of the author alone and do not represent those of the Australian Government or of the Attorney-General's Department.

The 10th session of the United Nations Commission on International Trade Law ("UNCITRAL") Working Group III on Transport Law ("the Working Group") met in Vienna from 16-20 September 2002. The Working Group continued an article-by-article reading of the draft preliminary instrument ("the draft text") on the Carriage of Goods by Sea that it had commenced at the 9th session. Over thirty countries actively participated in the session, with several more countries sending a delegation to observe the proceedings. In addition, there were representatives from the International Maritime Organization and the United Nations Conference on Trade and Development, as well as representatives from a number of inter-governmental and non-government organisations in attendance.

The draft text being considered proposes a new international instrument that will establish a liability regime for multimodal or door-to-door transport. The draft text was drafted principally as a maritime liability regime and then extended to cover door-to-door transport. The suitability and applicability of some principles of maritime law to other transport regimes has caused some concern with aspects of the draft text. These concerns are outlined below. Notwithstanding the concerns regarding some aspects of the draft text, there was general consensus that it was an excellent starting point for discussion. The general aims of the new instrument are to:

- end the multiplicity of regimes (ie the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the regional arrangements) by preparing a text which would receive widespread international support;
- reflect modern transport & shipping practices (eg e-commerce); and
- achieve a multimodal regime.

The draft text is lengthy (70 pages including commentary) and ambitious and covers issues such as: electronic communication; the period of responsibility; the obligations and liability of the carrier; the obligations and liability of the shipper; freight; and rights of suit. Some of these topics, such as freight, have never been comprehensively dealt with in an international treaty before.

In April 2002, at the first meeting of the Working Group where the draft text was considered, the Chairman identified 7 themes for the Working Group to particularly focus upon. These were: the sphere of application (draft Article 3); electronic communication (draft Articles 2, 8 and 12); the liability of the carrier (draft Articles 4, 5 and 6); the rights and obligations of parties to the contract of carriage (draft Articles 7, 9 and 10); the right of control (draft Article 11); the transfer of contractual rights (draft Article 12); and the judicial exercise of those rights emanating from the contract (draft Articles 13 and

14). To these the issue of the freedom of contract was also added. The commentary below reflects some of the concerns expressed by the Working Group during their discussions of these themes.

Scope of the instrument

The first issue in the Chairman's list was the scope of the instrument and whether it should attempt to be multimodal (door-to-door) or be simply port-to-port in nature. This issue is of critical importance to the overall instrument and proved to be somewhat controversial. Despite this controversy, the meeting was anxious not to repeat the disastrous 1980 UN Convention on International Multimodal Transport of Goods and end up with an unworkable instrument. Whilst the majority of States expressed their support for a multimodal regime, there remained a number of States who opposed a multimodal regime. To attempt to unite the Working Group, the Government of Canada had circulated a paper ("the Canadian proposal"), regarding the scope of application of the draft instrument, prior to the Vienna session. Contained in that paper were three options: (1) to continue working on the existing draft instrument, but to add a reservation that would enable contracting States to decide whether or not to implement the multimodal part (especially Article 4.2.1) and the relevant rules governing the carriage of goods preceding or subsequent to the carriage by sea; (2) to continue working on the existing draft instrument , including Article 4.2.1 but to insert "national law" after "international convention in Article 4.2.1(b); or (3) to revise the existing draft instrument to include a separate chapter each on common provisions, on carriage of goods by sea (port-to-port), on carriage of goods by sea and by other modes before or after the sea leg (door-to-door), and on final clauses and reservations, including a provision on express reservations for the door-to-door chapter.

The scope of the draft text was not substantially debated as a decision was taken not to discuss the Canadian proposal until the next session. The deferral of this issue meant that the Working Group were left to consider the existing door-to-door draft text. To assist in the consideration of this issue, the UNCITRAL Secretariat have agreed to circulate a paper on the scope of application of the draft instrument prior to the next meeting. This should facilitate discussion on this controversial topic. Realistically, however, it does not seem that the issue of whether the instrument should be port-to-port or multimodal will be solved quickly.

Those countries that favour a multimodal regime are concerned with the practical realities of international trade. For example, the Working Group were provided with some figures which indicated that in 2001, of the 16 million containers that were either imported or exported to the USA, around 12 million containers were done on a door-to-door basis. This represents close to 75% of the containers being moved under a multimodal contract. It was suggested that if the individual bills of lading were to be examined, an even greater proportion would be found to have been done on a multimodal basis. If those figures applied in other parts of the world, it could be concluded that the majority of international trade is done on a door-to-door basis. To those countries in favour of a multimodal regime, an instrument that only dealt with port-to-port liability would not reflect the real situation and would not apply to the majority of transported goods.

The contrary view is taken by countries who, either for their own domestic or constitutional reasons, would find it difficult to implement a multimodal convention and

by those countries who are already parties to a unimodal land transport convention (such as the Convention on the Contract for the International Carriage of Goods by Road and the Convention Concerning International Carriage by Rail which already included certain mandatory provisions). In addition to wishing to create a new law which did not conflict with these conventions, it was felt by some that maritime transport was typically more hazardous than other forms of transport. In recognition of the increased hazards, traditionally maritime liability has been more limited than for other forms of transport like air transport, road or rail. So to simply apply this lower level of liability to the other forms of transport was not seen as acceptable. The end result would be a weakening of the protection offered to shippers when their goods were in the custody of road, rail and possibly also air transport companies.

Notwithstanding the divisions between various States, the Working Group decided to concentrate on a maritime regime that had multimodal effect, as provided for in the draft text. It was felt that this approach took into account the reality that most transport was done on a door-to-door basis and therefore that most marine transport was either immediately preceded by immediately followed by a land transport leg. The practical advice was that containers are not usually checked at the beginning and end of the sea leg but rather at the agreed end point (usually on the customer's premises). Similarly, nearly all liner trade was structured as door-to-door and this was likely to increase (due to the way e-commerce was increasing).

Another issue was whether or not the transport segments preceding and/or following the maritime segment needed to be "international" in character. It was generally thought that the draft instrument should apply as soon as an element of internationality characterized the overall contract of carriage, irrespective of whether or not certain legs were purely domestic.

In summary, whilst the Working Group is currently working on a multimodal instrument, it is by no means certain that this will in fact be the end product of the work.

Electronic communications – Articles 2, 8 and 12 have not been comprehensively discussed by the Working Group as yet. During the preliminary general comments, it was observed that these articles needed to be consistent with the UNCITRAL Model Law on Electronic Commerce. Problems identified by some States included the different national laws on a bill of lading – where some covered both negotiable and non-negotiable instruments and others didn't. It is expected that this issue will be examined at the next session.

Liability of the carrier – this was a contentious issue and the fact that the draft Articles 4-6 reduced the carrier's responsibility in comparison with the Hamburg Rules was seen as an issue for those countries who have already ratified the Hamburg Rules. There was general consensus that in establishing the liability regime, it was important to keep the concept of "custody" that is found in other international instruments relating to other modes of transport. That is, that you are only liable for damage that occurs whilst you actually have custody of the goods.

The proposal to abolish the nautical fault defence from the carrier's list of exemptions from liability in draft Article 6.1.2(a) was favoured by the overwhelming majority of States. Although there were half a dozen or so States who vehemently opposed the

deletion of this provision from the draft text. The debate on this point alone consumed nearly two hours of precious meeting time. Although the ultimate decision to delete it from the text remained controversial.

A number of problems in draft Articles 4-6 were identified by various States. For example, concern was expressed that where a combination of events caused loss or damage to the goods, and where one of those causes was the unseaworthiness of the vessel, the current wording of Article 6.1.3 might unfairly benefit the carrier. There was also quite a deal of discussion on whether "compulsory pilotage" should be added as another basis for exempting the carrier from liability. So that where a vessel was obliged by national law to submit to compulsory pilotage, but was not allowed any say in who the pilot might be, it was felt by some that the carrier should not be held responsible if the vessel ran into something whilst following the "negligent" or even incompetent directions of the pilot. No agreement was reached on this provision.

The Working Group did not come close to reaching agreement on draft Articles 4-6 and the issue of the liability of the carrier will be one of the crucial issues to obtain agreement upon if the draft instrument is to be widely adopted.

Obligations of the carrier – Chapter 5 deals with the obligations of the carrier and proved to be an area of the draft text upon which there was little unanimity. As discussed above, there was quite strong support for abolishing the nautical fault defence and for imposing on the carrier a continuous obligation of due diligence. Although there were differing views on whether the duty should vary depending upon whether the ship was in port or at sea. A related concern was how this should work if there were a fire on board the ship. Once again, there was no consensus reached on this point. Whether the carrier should have a power to sacrifice the goods in certain circumstances was also a contentious issue. Some States claimed that it was required for safety reasons and others argued that it would simply be abused and would lead to the situation where the shipper would have paid freight but received no benefit.

Obligations of the shipper – The draft Articles in Chapter 7 regarding the obligations of the shipper were also somewhat controversial. Some delegations felt that the obligations were not in balance with those imposed on the carrier (ie they were felt to be too much in favour of the carrier whilst imposing unreasonable and strict liability on the shipper in some instances). For example under draft Article 7.6, a shipper can only escape liability if they can show that the loss/damage/injury caused by the goods was caused by events that a diligent shipper could not avoid. In contrast, the corresponding provision (Article 6.1.1) allowed the carrier to escape liability if it could show that there had been no fault on its part. This was thought by many to be unacceptable, particularly when it was considered that the carrier had the benefits of defences and limitations that are simply not available to the shipper. There were some specific problems with some of the other obligations. For instance, practice varied considerably as to whether or not the shipper or the carrier loaded the cargo. For bulk cargo often the shipper would but for containerised cargo it is often the reverse. It was felt that the text did not cater for all of these different practices.

The issue of whether the shipper should be held responsible for the acts or omissions of their employees, contractors, agents etc was also difficult to obtain agreement upon. There was one suggestion that whatever standard was adopted it should be the same for

the shipper and the carrier. This suggestion was directed at one of the overall aims, being to achieve a liability regime that fairly apportions the risk and favours neither the shipper nor the carrier unduly.

Freedom to contract – The issue of the freedom to contract is likely to be controversial but has not yet been fully discussed by the Working Group. The USA have prepared a paper which was circulated, but not discussed, at the Vienna session. It is probably accurate to say that those countries who were more in favour of including this principle in the draft instrument tended to be the carrier nations rather than the shipper nations. It is yet another issue for which a compromise will need to be found if the new instrument is to receive widespread support.

Other issues The Chairman's list of themes for the Working Group to focus upon included the topics the right of control (draft Article 11), the transfer of contractual rights (draft Article 12) and the judicial exercise of those rights emanating from the contract (draft Articles 13 and 14). None of these issues has been substantially examined by the Working Group as yet.

Once the Working Group commenced an article-by-article analysis of the text, it started to become apparent which provisions would create problems. For example, there is a definition of container in Article 1.4 and it was pointed out that this didn't suit many modern ships which were basically built to carry things as deck cargo. Some delegations observed that whilst anyone in the trade would know how the ships were configured and how they worked, they still didn't fit the definition. The definition of "performing party" perhaps caused the most division. There was general agreement that a definition needed to be there but enormous differences of opinion on how it might be drafted.

The Working Group also noted that the draft instrument didn't deal with the issues of jurisdiction and felt that this was an omission. Time limits to sue were generally supported as being kept short (1 year rather than the 2 years allowed under the Hamburg Rules). Although there were arguments in favour of a longer period in cases of wilful misconduct

Conclusion

The member and observer States of the Working Group appear to be highly motivated to develop a new international instrument that will modernise and harmonise the international law regarding the carriage of goods by sea. The draft text, which was prepared by the Comité Maritime International, enjoys wide support from participating States as a basis for discussion on such a new instrument. Despite this, the first two sessions where the Working Group analysed the text have already identified a number of concerns with some portions of the draft text and also there are some States who have not yet expressed their support for a multimodal regime. Accordingly, there will need to be a lot of goodwill, compromises and refinement of the draft text before a new instrument can be finalised that will receive wide support from the international community.