

**REPORT OF THE FIRST MEETING OF THE INTERNATIONAL
SUB-COMMITTEE ON ISSUES OF TRANSPORT LAW****LONDON, 27TH AND 28TH JANUARY 2000**

Present: Patrick J.S. Griggs (President of the CMI)
Alexander von Ziegler (Secretary General of the CMI)
Stuart N. Beare (Chairman of the International Sub-Committee)
Prof. Michael F. Sturley (Rapporteur)
Prof. Lars Gorton (Sweden; member of the Working Group)
Sean Harrington (member of the Working Group)
Paul Koronka (member of the Working Group)
Prof. Gert Jan van der Ziel (The Netherlands; member of the Working Group)
Prof. Avv. Stefano Zunarelli (Italy; member of the Working Group)
Barry Oland (Canada)
Prof. Yuzhou Si (China)
Dihuang Song (China)
Uffe Lind Rasmussen (Denmark)
Pierre-Marie Rossignol (France)
Prof. Tomotaka Fujita (Japan)
Karl-Johan Gombrii (Norway)
Karoline Bohler (Norway)
José Maria Alcantara (Spain)
Anthony Diamond Q.C. (UK)
Vincent M. De Orchis (USA)
Chester D. Hooper (USA)
George F. Chandler, III (USA)
Jernej Sekolec (UNCITRAL; member of the Working Group)
Kay Pysden (FIATA)
Linda Howlett (International Chamber of Shipping)
Sara Burgess (International Group of P&I Clubs)
Hugh Hurst (International Group of P&I Clubs)
Søren Larsen (BIMCO)

Mr. Beare called the meeting to order at 10:25 a.m. on Thursday, 27th January.

Mr. Griggs described the general background of the present project. He explained that in June 1996, at the 29th session of UNCITRAL, in the context of the work on electronic data interchange, the Commission drew attention to the fact that “existing national laws and international conventions left significant gaps regarding issues, such as the functioning of the bill of lading and sea waybill, the relation of those transport documents to the rights and obligations between seller and buyer of the goods, and to the legal position of the entities that provide financing to a party to a contract of carriage.” At that meeting, the UNCITRAL secretariat was authorized to start gathering information in relation to those matters. The information obtained was to be analyzed and on the basis of the analysis the commission would then decide on the nature and scope of any future work that might be undertaken. The Comité Maritime International was one of the bodies designated to be consulted. Others included the ICC, IUMI, FIATA, and ICS.

Responding to that invitation, the CMI Executive Council set up an International Working Group under **Mr. Beare**’s chairmanship. The Working Group had its first meeting in London on May 11, 1998. It has met on several occasions since then. Its first task was to identify a number of issues related to the carriage of goods by sea, or carriage of goods generally, which were not already covered by existing international agreement, and where it was felt that some uniformity might be helpful to the industry. Based on a series of very detailed studies produced by individual members of the Working Group, a questionnaire was prepared and circulated to all national member associations of the CMI in April 1999. The response was encouraging. We had a number of detailed replies, and the material drawn from these responses will form a very firm basis upon which we can seek to build some sort of consensus and maybe a new convention or new set of rules.

The emphasis of UNCITRAL was on the review of areas of law governing the transportation of goods that had not previously been covered by international agreement. Liability for damage or loss of cargo is the subject of several international, numerous national, and many regional regimes. A reasonable criticism of the current project is that it does not appear to tackle issues of liability. But on the second page of **Mr. Griggs**’s September press release there is a reference to issues of liability.

Mr. Griggs explained that he gave notice that the CMI had been invited to prepare an agenda note for the UNCITRAL meeting that is due to take place in New York June/July 2000. The press release said that the agenda note would cover the progress that the CMI had made with the project covering issues embraced by the questionnaire. But it also gave notice that the CMI would invite the UNCITRAL delegates to agree that this present, broadly-based project, should be extended to include an updated liability regime that would be designed to compliment the terms of the proposed harmonizing instrument.

Mr. Griggs explained that he had been lead to believe that such a proposal may find favor with UNCITRAL and be endorsed, even though any new liability regime that arises from this exercise would not necessarily fit very

precisely with the model of the UNCITRAL Hamburg rules. However, as part of a new broadly-based harmonizing instrument, the feeling is that if the CMI could get some international support and recognition for a broadly-based convention, including a new liability regime, then there may be a package there that would prove attractive to national governments.

Mr. Griggs concluded his remarks by welcoming the International Sub-Committee members to its first meeting, noting the “enormous amount of hard work on this project” that **Mr. Beare** and the Working Group had already invested, and challenging the members to work equally hard. The prize would be substantial. This may be the last realistic opportunity to reestablish a uniform liability regime. But he felt confident that the tried and tested methods of the CMI, supported by its many national associations and the individuals such as the members of the International Sub-Committee, would be the best way to produce the first draft of a harmonizing instrument that could stand the test of time into the new millennium.

Mr. Beare invited **Mr. Sekolec** to address the International Sub-Committee.

Mr. Sekolec reported that UNCITRAL and its delegates were very pleased with the progress so far. UNCITRAL wants to ensure industry support, and will proceed if a consensus exists. The CMI will inform UNCITRAL at this summer’s meeting about the further progress that has been made, and on July 6th a colloquium at United Nations Headquarters in New York should help to focus the minds of the governments on this project.

Mr. Beare discussed his synopsis of responses to the questionnaire, and distributed a revised version that included two responses that had been received after the papers for the meeting had been circulated. He also discussed the introductory paper, which had been distributed in advance, that described the work to date. Finally, he noted the International Sub-Committee’s terms of reference, which are very challenging. To accomplish the task before Singapore will require a lot of hard work.

At this first meeting, it is proposed that the International Sub-Committee explore the six issues raised in the Working Group’s papers. The goal would be to identify areas of consensus so that the Working Group can develop concrete proposals to discuss at the next meeting. After the UNCITRAL meeting in July, the International Sub-Committee can move on to liability issues. The plan is to build on the work of Prof. Berlingieri’s International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea.

The first question to consider is whether this International Sub-Committee is prepared to proceed on the plan as outlined.

Mr. Chandler discussed the background of the current project, which grew out of the EDI Working Group. He stressed the need to have industry support for this to work, and referred to two books that might be helpful to the project: *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems*, edited by Prof. A.N. Yiannopoulos (Kluwer Law International 1995), and *Transfer of Ownership in International Trade*, edited by Alexander von Ziegler, Jette H. Ronøe, Charles Debattista, and Odile Plégat-Kerrault (Kluwer Law International, 1999).

Mr. Alcantara noted that it was a very wide project, and asked what the focus would be. He asked whether the International Sub-Committee would reexamine other sources of law, such as the Uniform Customs and Practices for Documentary Credits (ICC pub. no. 500) (“UCP 500”) and Incoterms.

Mr. Beare explained that the International Sub-Committee’s purpose, under the terms of reference, is to prepare the outline of an instrument to simplify transport law. Other sources of law, such as UCP 500 and Incoterms, will not be changed; we have no such mandate. But we must recognize the impact that these regimes have.

Mr. von Ziegler commented that **Mr. Chandler**’s intervention explains the focus of the work. The bill of lading is part of a larger transaction. We must be consistent with other sources of law, such as UCP 500 and Incoterms. Whether or not the result is “maritime” is a harder question. The terms of reference are not so specific. **Mr. von Ziegler**’s own view was that the central theme should be maritime, but we cannot be so limited. We have to go inland on both ends of the transaction.

Mr. Diamond suggested that if the project remain limited, it would be easier to go inland. As soon as we discuss liability, we need to know whether we are planning a new multi-modal convention.

Mr. von Ziegler observed that the industry has asked us to cover liability for the full time of the carrier’s custody of the cargo, but added that we are not foreseeing something like existing multimodal conventions. He characterized the project as “maritime plus” depending on the nature of contract.

Mr. Diamond replied that the International Sub-Committee would have to decide what type of approach is to be taken, *e.g.*, uniform regime or “networking.”

Mr. Beare returned to the question that he had earlier raised, and asked whether the International Sub-Committee agreed to proceed in the fashion that he had proposed.

Mr. Gombrii thought that it would be important to keep liability issues aside for the time being. It is easy to fall into liability discussions. We all have strong views. For now, we should focus on the six issues proposed by the Working Group. He was curious about the future pace, though. At the meeting in April, how detailed will the proposal be? What does UNCITRAL expect the International Sub-Committee to produce?

Mr. Beare replied that UNCITRAL does not expect a detailed report in June. We should discuss the issues as widely as possible in the next two days. We do not want a final draft of the proposal too quickly.

Mr. Diamond wondered what we should do with issues that overlap with liability issues.

Mr. Beare suggested that the answer to that question would depend on how liability is defined. The International Sub-Committee has been asked to look at the function of the bill of lading, and the first of the Working Group’s six issues looked at the receipt function of the bill of lading. Does that impinge on liability?

Mr. Alcantara added that all of these issues relate to the “document.”

Mr. Beare invited **Prof. Sturley** to lead the discussion on the Working Group's first issue.

Prof. Sturley distributed a working paper, titled "Working Paper on Inspection of the Goods and Description of the Goods in the Transport Document," which grew out of the questionnaire and the responses to the questionnaire on topic 1.2. Under virtually all of the existing conventions there is an obligation on the part of the carrier to describe the goods in the transport document, whatever that may be. This is found in article 3(3) of the Hague-Visby rules, article 15 of the Hamburg rules, and similar provisions in other regimes such as the Warsaw Convention and CMR.

The Working Paper suggests four principal issues that arise in this area and that ought to be discussed: (1) the circumstances under which a carrier would be justified in refusing to state the marks, number, quantity, or weight of the goods on the basis that there were reasonable grounds for suspecting that the information given by the shipper was inaccurate; (2) the circumstances under which a carrier would be justified in refusing to state the marks, number, quantity, or weight of the goods on the basis that there was no reasonable means of checking the information; (3) the meaning of the term "apparent"; (4) the legal effect of clauses such as "shipper's load and count," "said by shipper to contain," "particulars furnished by shipper," or "weight (etc.) unknown."

Before reaching these four issues, **Prof. Sturley** asked whether there is in fact widespread agreement on the carrier's basic obligation, recognized in all the conventions, to describe the goods. That goes to the very nature of the bill of lading as a receipt. Is there any need for discussion on this very basic issue?

[No one wished to discuss the issue.]

Prof. Sturley then turned to the four issues already mentioned. The first issue addresses the circumstances under which a carrier would be justified in refusing to state the marks, number, quantity, or weight of the goods on the basis that there were reasonable grounds for suspecting that the information given by the shipper was inaccurate. Reviewing the responses that the national member associations made to the questionnaire, there seems to be fairly substantial agreement on that issue. Because the Italian response seemed to be a little different from some of the others, **Prof. Sturley** invited **Prof. Zunarelli** to explain briefly the Italian position.

Prof. Zunarelli explained that according to Italian law, the carrier has a duty to check the nature, quantity, and condition of the cargo unless it is not reasonably possible according to the circumstances of each case. The carrier cannot simply refuse to insert the information provided by the shipper assuming that he has no reasonable possibility of checking. If he assumes to have such a lack of possibility of checking, he must insert a reservation on the bill of lading. And the attitude of the courts is that the burden of proving that lack of possibility of checking is on the carrier.

Mr. Diamond said that in England it is seldom necessary to consider whether the proviso to Article 3(3) applies. The balance of English authority is to the effect that the carrier is not bound by the requirement to issue a bill

of lading complying with the Rules unless the shipper demands one. If, therefore, the carrier issues the shipper a bill of lading that does not comply with the Rules (*e.g.*, it makes no representation regarding the weight of the goods) and the shipper does not complain, the rights of the parties will be governed by the actual terms of the bill of lading. It appears, therefore, that in English law a carrier may rely on a clause stating “weight unknown” unless there is evidence that the shipper objected to the clause and made a demand that the weight be shown.

Mr. de Orchis asked whether the carrier has a duty to insert any information concerning the cargo into the bill of lading beyond that provided by the shipper.

Mr. Alcantara endorsed **Prof. Zunarelli**'s explanation of the law.

Mr. Harrington raised the issue of the “shipped” bill of lading. In the multi-modal context, the first vehicle (on which the cargo has been “shipped”) may well be a train or a truck.

Prof. Sturley thought that the distinction between a received for shipment and a shipped bill of lading is not within this particular issue (except to the extent that there might be a different description of the goods, if, for example, the goods are damaged between the time the goods are loaded on the train and the time they are loaded on the vessel). The issue at the moment is whether there is a need to describe the goods when the carrier first receives them—be it at loading on the train or at loading on the vessel—and to what extent there is a need to describe the goods.

Mr. Chandler raised the issue of who originates the bill of lading. In container trades, it is usually the freight forwarders.

Prof. Zunarelli commented that the carrier is the person who issues bill of lading, regardless of who originates the bill of lading. If information is not furnished by the shipper, the carrier has no obligation. There is a second problem: If the shipper wishes the bill of lading to contain information concerning weight, and the carrier who issues the bill of lading has reasonable grounds to suspect that those figures are wrong, is it sufficient to say that those details come from the shipper? Or is it necessary for the carrier to check the information if possible.

Mr. Gombrii reported that under the Nordic legislation, the carrier must check the details.

Prof. Sturley asked what would happen if the carrier did have a reasonable means of checking, but chose not to check—instead issuing a bill of lading with a qualifying clause.

Mr. Gombrii replied that the shipper might then be able to force the carrier to issue the bill of lading without the qualifying clause.

Prof. Sturley observed that the shipper often prefers to have a bill of lading with a general qualifying clause (that might be ignored) rather than a specific clause that accurately describes the goods.

Mr. Hooper asked whether we are talking about refusing to issue the bill of lading or clausing the bill of lading? The carrier will not refuse to issue the bill of lading.

Mr. de Orchis suggested that the bill of lading serves two functions—

receipt and document of title. When it is a document of title, the description of the goods becomes more important.

Prof. Sturley explained that the *travaux préparatoires* of the original Hague Rules (where these obligations were first internationally accepted) show that there was no obligation for the carrier to issue a bill of lading if the shipper does not want one, but that once the shipper requests a bill of lading the obligation to describe the goods follows. Qualifying clauses were not permissible when the carrier was in fact in a position to check the information. This goes back, as **Mr. de Orchis** has suggested, to the protection of third parties (which was one of the principal rationales for the Hague Rules).

Mr. Chandler raised the choice-of-law issue. We frequently look to the law at the place of origin, but the effect is often determined at the place of destination.

Prof. Sturley turned to the third question, the meaning of “apparent.”

Mr. Alcantara argued that “apparent” is a subjective Anglo-Saxon concept. An alternative would be to look to what the “carrier could have inspected,” or what was “visible.”

Mr. Rasmussen replied that it was not enough to say that it was visually impossible to inspect the goods. The cargo may be something like African wood that the carrier lacks the expertise to describe. A distinction must be drawn between standard and specific reservations.

Mr. Dihuang proposed another example illustrating the difficulty. An experienced master of an oil tanker is supposed to be able to visually examine and check the cargo in his tanker, but in one case there were conflicting survey reports. One said the cargo was crude oil, the other said fuel oil.

Mr. von Ziegler noted that the term “apparent” is used in transport conventions for other purposes, such as the notice provision in article 3(3) of the Hague Rules. Under the German Code, if goods are pre-packed (including by a forwarder) there is a presumption that they are not “apparent.”

Mr. Diamond agreed that in English Law, the context matters. Under the Hague Rules and the Hague-Visby Rules, the “apparent order and condition” cases are clear. Only external order and condition are involved. And the court applies the test whether the master or chief officer having a reasonable degree of skill and expertise would regard the goods as being externally to all appearance in good condition.

Mr. Rasmussen suggested that other factors could also be relevant. Weather may be bad, harbor conditions may make inspection difficult, the cargo may need to be loaded quickly. In practice, it is hard to generalize.

Prof. Gorton explained that sometimes the issue raised a very practical question. At one time, masters claused bills of lading when they saw rust on steel cargo. Later, this type of rust was recognized as protecting the steel.

Prof. Zunarelli agreed that the captain was not a professional surveyor. Having said that, do we need precise approach?

Mr. Chandler explained that for steel shipments, the custom has evolved to put atmospheric rust on the bill of lading and establish the letter of credit requirements to take that into account. Shipping improved when proper

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notations were made. Full shipments of steel will have surveyors present, but container shipments are different. The International Sub-Committee should focus on liner service. Maybe the time has come to shift to something else, but the concept of “apparent good order and condition” is well-established.

Mr. Alcantara suggested the need to look to the burden of proof.

Prof. Sturley turned to the fourth question, the legal effect of qualifying clauses.

Mr. Hooper argued that qualifying clauses should be effective. The consignee can protect itself with letter of credit requirements. But **Mr. Hooper** agreed that the carrier should not be allowed to issue a bill of lading with a false description.

Mr. Chandler described the relevant provision in the proposed amendments to the United States Carriage of Goods by Sea Act. There had been long discussion about what to do when the weight is listed on the bill of lading.

Mr. de Orchis thought that it was important to return to the basics. The carrier should not be in the banking business. A carrier should not have to guarantee what it cannot verify.

Mr. Beare observed that questions about the carrier’s knowledge raise questions of constructive knowledge.

Mr. Diamond admitted that even under English law judges sometimes chip away at these clauses.

Prof. van der Ziel explained that carriers hardly ever inspect goods any more. Containers are never inspected. The impact of a qualifying clause boils down to whether the carrier has a duty to inspect. Without a duty, the clauses are not needed.

Mr. Chandler asked **Mr. Diamond** how English law would respond in the case of an empty container that was supposed to weigh 30 tons.

Mr. Diamond predicted that an English judge would probably override a “weight unknown” clause in that case, but “weight unknown” clauses are permitted if the weight is more or less correct.

Mr. Rasmussen agreed that it was hard to read article 3(3) of the Hague-Visby Rules to permit the carrier to act in bad faith.

Mr. Beare noted two suggestions that he had heard in the discussion: (1) There should be no duty to inspect closed packages. (2) The burden of proof was an essential topic.

The meeting adjourned for lunch at 12:45, and reconvened at 2:25.

Mr. Beare invited **Prof. Zunarelli** to lead the discussion on the Working Group’s second issue.

Prof. Zunarelli began with a general introduction in which he raised three broad questions. (1) Must the transport document be dated? If so, what date should be used? Possible answers to the second question include the date on which the transport document was issued, the date on which the carrier takes charge of the goods, and the date on which the goods are loaded on board the vessel. (2) What are the consequences of a false date on the transport document? There was no uniform response to this question. The answer could be liability per se. (3) What is meant by “signature?” More specifically, how

can documents be signed or authenticated? How can the signature, combined with other elements, identify the carrier?

Prof. Zunarelli opened the discussion on the first question asking what date should be used on the transport document.

Mr. Diamond noted that everyone agrees that there should be a date, but asked what is the sanction for failing to date the document. Would the bill of lading be void for all purposes? Should there be a large fine? If there is no sanction, carriers will not care what the obligation is.

Mr. Beare requested the views of the International Group of P&I Clubs.

Ms. Burgess noted the Group's concern with antedated bills of lading.

Mr. Gombrii suggested that the date of the completion of loading was the date that was most likely to be relevant to the parties. He suggested that the sanction should be the carrier's liability for all of the consequences of non-dating or misdating.

Mr. Beare mentioned that another sanction would be the loss of recourse to the P&I club.

Mr. Hooper thought that as a practical matter customers and the Uniform Customs and Practices for Documentary Credits would ensure that the transport document is dated. For multi-modal shipments, the most important date will be when the carrier took charge of the goods.

Mr. Diamond wondered if a shipowner would be entitled to limit liability.

Mr. Hooper suggested that including a false date would be a fundamental breach, and that the carrier should lose the right to limit liability.

Mr. Diamond countered that the loss of the right to limit liability should be tied to shipowner privity, and that the dating of transport documents was often handled by local agents.

Mr. Chandler observed that under the Pomerene Act, a fraudulent bill of lading permits a separate action for any resulting loss (*e.g.*, due to misdating). This is apart from the action that is subject to limitation.

Mr. Diamond noted that it was possible that the same result might be reached in English law.

Prof. Zunarelli suggested that there might be a presumption that the date shown on the transport document is the date that the goods were taken in charge by the carrier and loaded on board the ship. He wondered whether it would be appropriate to include in a future convention presumptions for the dating of the various activities done by the carrier: taking charge of the goods, putting the goods on board the vessel, and signature of the transport document. All three of these dates could become relevant for different purposes.

Mr. von Ziegler added that the Pomerene solution sounds extremely sensible. Perhaps there should be no obligation to date the transport document, but any date shown must be true. And there should be consequences for a false date.

Mr. Gombrii observed that bills of lading are almost always issued after loading. Perhaps the transport document should be dated and should show when the goods were loaded.

Mr. Chandler explained that under U.S. law every bill of lading must have a unique identifying number for purposes of customs, and must be dated.

He recalled that UCP 500 also required dating when the goods were on board (for an “on board” bill of lading). The carrier should date the transport document to protect itself.

Prof. Zunarelli believed that dating was generally required except in common law countries. Under Incoterms, the inclusion of the date on the bill of lading is expressly required.

Mr. von Ziegler agreed with **Mr. Gombrii** regarding the value of showing different dates (*e.g.*, the date of the document, the date of loading). Incoterms and UCP 500 do not govern the relationship before us, but they do tell the seller what documents need to be provided in order to perform the sales contract and receive payment from the banks.

When the transport document is issued well after receipt, one date will be the date of issue. Other dates will be factual statements that the carrier is guaranteeing. There should be stringent consequences for misdating the transport document.

Prof. Zunarelli noted that transport documents are dated anyway. But we are seeking international uniformity. Many countries currently require a bill of lading to be dated. Would it clarify or confuse the law to add dating requirements?

Mr. Hooper argued that we should avoid upsetting commercial practice. If there is a date on the transport document, it must be correct. But it would be inappropriate to require a date to reflect a particular fact.

Mr. Diamond suggested that if there is date, it should refer to the date that the goods are on board the vessel, or received for shipment, and not the date that the bill of lading is issued.

Prof. Zunarelli asked what the law should do if there is only one date on the transport document that does not specify what it represents.

Mr. Diamond proposed that it should be treated as the date that loading was completed.

Mr. de Orchis asked how we should treat the date in an on board bill of lading with multi-modal carriage.

Mr. Chandler replied that UCP 500 specifies that the on board date refers to the vessel named in the bill of lading.

Mr. von Ziegler explained that under Incoterms the parties in a multi-modal scheme should use a term such as FCA, thus making “on board” irrelevant.

Mr. Diamond observed that the date of issue of a bill of lading is not important. The date of receipt and the date of shipment are the important dates.

Prof. Zunarelli agreed, but noted that some national laws require the transport document to show the date of issue.

Turning to the next issue, which concerned the signature of the transport document, **Prof. Zunarelli** suggested that the International Sub-Committee’s point of reference could be UCP 500 and the Hamburg Rules. It is difficult to ignore UCP art. 23, which requires that the bill of lading be signed or otherwise authenticated by the carrier or a named agent on behalf of the carrier.

Mr. Hooper argued that UCP 500 goes too far in requiring the name of the master of the vessel.

Mr. Chandler noted that electronic documents will not have traditional signatures.

Prof. Zunarelli replied that the second part of this issue was the question, "What constitutes a signature?" Hamburg Rules art. 14.3 provides, "The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by an other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued." He also referred to UCP art. 20, which is similar.

Mr. Chandler suggested that the real issue is not what constitutes a signature, but ensuring that the proper party is bound by the signature. We need to ask whether we are dealing with a master's bill of lading, a charterer's bill of lading, or something else.

Prof. van der Ziel raised the practical problem in this regard of a bill of lading signed by an unauthorized person.

Prof. Zunarelli agreed that this is a big problem. The answer probably depends on national law regarding agency and false representation.

Mr. Chandler argued that this is a big problem that cannot be left to national laws.

Prof. van der Ziel agreed that this is an issue that should not be left to national laws. It goes to the value of a bill of lading as a document of title. He noted that Dutch law protects the interests of the bona fide purchaser rather than the carrier, even if the bill of lading was signed by an unauthorized person.

Mr. Chandler noted that the same problem arises in many contexts, *e.g.*, bank checks, insurance certificates. He argued that it might be necessary to distinguish the situation when the forger does not use the carrier's preprinted forms. When a carrier passes out reams of blank forms, it should be at risk.

Mr. Diamond thought that forged bills of lading may be outside of the International Sub-Committee's terms of reference. If it is within our terms, much more study was required.

Prof. Zunarelli turned to his last point, which was the question of the identity of the carrier. UCP 500 make express reference to the need to identify the carrier. The person who signs could specifically identify who is the carrier. Courts sometimes refer to the heading on a document. Sometimes the issue is whether the master signed the document. Sometimes the documents refer to the charterparty. Questions for consideration include: What happens when the criteria conflict or none of them apply? Should the International Sub-Committee supply guidelines in a new convention?

Mr. Diamond volunteered that the British MLA was happy with the guidelines suggested by Prof. Berlingieri's International Sub-Committee.

Mr. Rasmussen agreed that it was important to have predictability and certainty. There is a problem with making the registered owner of the vessel liable. The owner has nothing to do with trading. The bill of lading should carry the name of the contractual carrier.

Mr. Chandler agreed in principle. A master's bill of lading should be enough to bind the owner, but for a charterer's bill of lading there should be some requirement to ensure that the contractual carrier's name is on the bill of lading.

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Mr. Beare suggested that the International Sub-Committee might review the reports of Prof. Berlingieri's International Sub-Committee before the next meeting. He was reluctant to rerun the lengthy discussions on this subject here.

After a tea break, **Mr. Beare** invited **Prof. Gorton** to lead the discussion on the Working Group's third issue.

Prof. Gorton observed that the questionnaire contains a number of questions relating to freight issues. There are differences among the responses, but perhaps they are not so great. Perhaps there is a general legal principle that one typically pays upon performance. It is also necessary to consider this subject in conjunction with the sales contract, Incoterms, and the Uniform Customs and Practices for Documentary Credits. If there is a CIF contract, for example, that will be reflected in the freight payment clause and in the letter of credit requirements. The following basic questions arise:

1. When is freight payable?
2. When is freight earned?
3. What happens when there is late payment?
4. Who is liable for payment? (Is there a presumption that cargo pays the freight? Alternatively, what security do the goods provide for payment? And how long do liens last?)
5. What are the liabilities if the contract is never performed or only partly performed? We have questions of distance freight and dead freight. (We will not get into questions of demurrage.)

On the first two questions, the answers seem to be that freight is payable on delivery and earned on delivery. But if you have a contractual clause that freight is to be earned on loading, and payable in advance, it will be enforceable. If you pay late, you may have to pay interest – which no one seems to do in this business. There is no international convention on these questions. How far do we take this subject?

Mr. Chandler suggested that this third issue all goes back to question of who is the contractual carrier. Who can enforce payment if the contractual carrier is not identified in the transport document? Can the carrier show up later and demand payment?

Mr. Diamond added that the same concern exists under English law with regard to the shipper. The transport document is only evidence of the contract of carriage. The person named in the bill of lading as "shipper" may not be the true contractual party. In the first instance, only the contractual party is bound to pay freight. Of course, the carrier may have a right to claim the freight from a consignee or indorsee of the bill of lading and may also be able to exercise a lien over the goods for freight.

Mr. Chandler expressed the view that the British 1992 Carriage of Goods by Sea Act imposed direct liability to pay freight on a subsequent holder who claims the goods under the bill of lading.

Mr. Diamond confirmed this interpretation of the 1992 Act.

Prof. Gorton put the question to what extent these maritime principles should be expanded to other fields.

Mr. Chandler responded that methods of collection in other fields are very diverse.

Prof. Zunarelli agreed.

Mr. Diamond observed that under custom and usage in English law, a person who books space for goods on board a ship without disclosing the name of the principal incurs personal liability for the freight even when the carrier knows that he is acting as an agent on behalf of another. It would be unfortunate to produce a code that excluded the possibility of an agent's being liable based on custom and usage in a particular industry.

Mr. de Orchis reported that the same rule would apply in the United States. The first question here should be who is to be liable—just the shipper, just the consignee, both, and principals on whose behalf they act? Often an NVOCC (non-vessel-operating common carrier) is shown as the shipper, but the NVOCC is acting on someone else's behalf. But the carrier has no way of knowing who is the true owner of the goods.

Mr. Chandler suggested that it was also important to consider one further situation, when the principal has paid the freight forwarder who has then gone bankrupt.

Mr. Beare noted that the International Sub-Committee was not in the business of harmonizing an international code of bankruptcy.

Mr. Diamond responded that we nevertheless need to keep bankruptcy in mind, because that is the only time that many of these questions really matter.

Mr. von Ziegler mentioned that it may not even be necessary to deal with freight in the final instrument because it did not seem to be an area where many problems arose in practice.

Mr. Diamond suggested that, over and above those questions, there were "Bill of Lading Act" issues. For example, to what extent does the shipper remain liable for the freight when the bill of lading has been negotiated to a third party who is now the holder? If the shipper remains liable, does the consignee/indorsee also become liable?

Mr. Rasmussen expressed the view that it would unduly complicate our work if we were to consider bankruptcy law as well. Moreover, if we are drafting declaratory law, there is still room for customs and local variation (such as the custom and usage respected the freight forwarder's liability).

Mr. Oland was curious whether non-payment of freight is a major problem in view of the carrier's ability to protect itself with a lien.

Prof. van der Ziel responded that freight is a commercial matter, and in practice not many difficulties arise. That is because freight is the whole point of the carrier's exercise. We could refine the law by defining "freight prepaid" and "freight collect," and clarifying when a lien can be claimed. "Freight prepaid" should mean only that carrier cannot claim freight from the consignee, and does not exclude the shipper's liability if the carrier has extended credit. "Freight collect" should mean that the subsequent holders may have to pay. The carrier should not need to exercise a lien against the consignee with a transport document marked "freight prepaid."

Prof. Zunarelli agreed with **Prof. van der Ziel**, and suggested that some kind of clarification was needed in this area.

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Prof. Gorton noted that the discussion had touched upon security for freight. Who in the end should be liable for freight? This raises questions regarding contracted liens and cesser clauses.

Mr. Chandler reported that the cesser clause is not valid in the United States. The carrier's lien is valid, but it is a possessory lien that remains so long as the carrier has possession of the goods.

Mr. Rasmussen reported that in Scandinavia cesser clauses are valid, but are discouraged by non-mandatory law.

Mr. Diamond reported that under English law cesser clauses are valid in principle, but rarely seen in the bill of lading context. There is also a general principle that a cesser clause will not apply unless in the particular circumstances the carrier has an effective lien that it can exercise to recover the freight or other sum due to it. As a matter of common law, the carrier has a possessory lien for freight on the voyage in question, and for general average, but not for demurrage. There are also contractual and statutory liens.

Prof. Gorton asked whether it would cause a problem to put the right to a lien in an international convention.

Mr. Diamond believed that the carrier's lien for freight is common to most systems of law and goes back a long way.

Mr. von Ziegler agreed, but noted that in practice there are many differences among national rules regarding what a lien provides. For example, can the carrier pursue the goods after delivery? Can the carrier sell the goods to satisfy the lien? There is a real opportunity to provide some clarity in this field.

Mr. Diamond agreed that the legal nature of the lien varied tremendously in different countries.

Prof. Zunarelli volunteered that books have been written addressing these differences.

Mr. Oland added that the problems were much harder in federal countries than in unitary countries. In Canada, we have to face the question whether federal or provincial law governs the issue.

Prof. Gorton raised a number of related questions for the International Sub-Committee to consider: To what extent should the lien exist? When and how can it be exercised? Should the carrier be allowed to refuse to deliver the cargo? What can the carrier do when the cargo has been discharged? Does the carrier retain the lien? Or will it expire?

Mr. Chandler mentioned two issues: First, the question arises whether a maritime lien can be enforced in a multi-modal shipment after the goods have been trucked inland. Second, he argued for the need to maintain proportionality. If the carrier has a lien on the goods, cargo interests need to have a lien on the vessel to enforce liability for cargo damage.

Mr. von Ziegler proposed that the convention should apply from receipt to delivery (including inland carriage), and should say what the carrier can and must do without worrying about classification.

Mr. Diamond wondered whether it would be wiser to avoid dealing with liens. We must deal with the first two issues; this may be one we can avoid. The issue does not appear to have created great difficulty.

Mr. von Ziegler agreed that addressing this topic will be quite ambitious,

but UNCITRAL has included it in the terms of reference. This issue is important not just to carriers but also to banks and others who depend on the value of the bill of lading.

Mr. Beare noted both points of view, but suggested that the subject is within our brief for Singapore. Perhaps the International Sub-Committee will ultimately conclude to drop the subject, but it would be premature to do so now.

Prof. Gorton, turning to his final issue, asked how we should deal with “distance freight” or “proportionate freight” for partial performance.

Mr. Diamond mentioned the concept of freight *pro rata itineris* when freight is payable at destination but goods only reach, for example, a port of refuge. The conditions for awarding such freight are strict.

Mr. Oland asked whether there were already commercially acceptable definitions of “freight prepaid” and “freight collect.”

Prof. van der Ziel said that he was not aware of any generally accepted definitions in a convention, UCP 500, or similar source. There is a general feeling among commercial men what the terms mean, but the courts do not always accept it.

The meeting adjourned at 4:50 p.m. on Thursday, 27th January.

Mr. Beare reconvened the meeting on Friday morning, 28th January, at 9:35 a.m. He announced that the next meeting of the International Sub-Committee would be held in London (at a location to be announced) on 6-7 April. He then invited **Mr. Harrington** to lead the discussion on the Working Group’s fourth issue.

Mr. Harrington explained that item 3.1 of the questionnaire dealt with the liability of the shipper and successors in interest. The legal bases for rights and liabilities are distinct. At its simplest, the right of the shipper is very straight-forward: to have the contract of carriage performed. But the shipper will be selling goods, etc. The shipper is generally the contractual counterpart of the carrier, but not always. “Shipper” as defined in the Hamburg Rules includes suppliers. Problems have arisen about who has rights and how they are developed. Should the shipper always be entitled to sue? Many of the title to sue problems seem to be about avoiding liability.

Broadly speaking, there are generally four obligations of the shipper: (1) to ship identifiable cargo (this is an issue that came up yesterday); (2) to ship safe cargo; (3) to pay freight (which was also discussed yesterday); and (4) to take delivery (which will be discussed later today).

Shipping safe cargo is often a public law issue, but it often comes up in other contexts (*e.g.*, cargo that is not properly stowed comes loose and damages other cargo; oil leaks from used machinery). Generally, the shipper’s liability does not pass to third parties. The issue becomes identifying the duty that the shipper owes to fellow cargo. We also touched upon the duty to ship an appropriate cargo. Shippers of sophisticated chemicals (who know the cargo best) may cause damage to tanks, etc.

Mr. Diamond expressed surprise because issues of dangerous cargo were not in the questionnaire, but he supported the inclusion of dangerous cargo

provisions in a new convention. The British Maritime Law Association take the view that there should be an absolute liability not to ship dangerous cargo, not simply an obligation to use due care. Some cargoes turn out to be dangerous when neither party could have predicted it. These risks should be borne by the shipper.

Mr. Chandler noted a sharp contrast between UK and US law on this issue. Consignees would not be liable for dangerous cargo under US law. The US grain trade is upset about FOB shippers being held liable for discharge port demurrage when the FOB shipper had nothing to do with the charterparty.

Mr. Oland explained that Canada followed English law concerning strict liability for shippers of dangerous cargo, and asked to hear the civilian view.

Mr. Beare suggested that it would be preferable not to expand the current debate to cover general liability for dangerous cargo, which had been covered in Prof. Berlingieri's International Sub-Committee. The present focus should be on the rights and liabilities that pass with a transport document. Perhaps in the future we will have time to return to this issue.

Mr. Chandler proposed that the focus should be on privity of contract, which is the fundamental issue here. Before the 1992 Carriage of Goods by Sea Act, English law had recognized a very strict privity rule while US and civil law systems permitted third party beneficiaries. With the 1992 Act, English law now permits a third party beneficiary—but only if the third party assumes all of the original liabilities. We should decide which model to follow.

Mr. von Ziegler thought it would be helpful to distinguish the different categories with which we need to deal. For example, there are debts (*e.g.*, payment of freight), liabilities (arising from the breach of a duty), and affirmative obligations (*e.g.*, to take delivery). In civil law, we have third party beneficiaries but not liabilities.

Mr. Chandler suggested that there was no real substantive difference in result in the United States, even if the common law analysis would differ.

Prof. van der Ziel raised two points. The first involved the rights and liabilities that are transferred to the consignee. Under Dutch law, only those liabilities are transferred that the consignee ought to recognize from the document. The second issue involves liabilities imposed on a shipper. If we are imposing liability, we need a clear definition of who is a "shipper." **Prof. van der Ziel's** own view is that the contractual shipper is the party liable. Others may derive liability from the contractual shipper. A related issue is to whom the carrier should issue the bill of lading. For example, suppose the freight forwarder and the FOB seller both want the bill of lading. The carrier should seek instruction from the FOB buyer.

Mr. Diamond said that in English law it was not entirely clear whether all of the liabilities that the Hague Rules or the Hague Visby Rules impose on shippers are assumed by indorsees or consignees who become holders of the bill of lading and take delivery of the goods. Some difficult points are raised by the British 1992 Carriage of Goods by Sea Act: Does the consignee or indorsee become liable for damages for the shipment of a dangerous cargo? Does the consignee or indorsee become liable to indemnify the carrier for losses arising from the inaccuracy in the particulars of the goods? **Mr. Diamond** preferred to avoid discussing the effect of the 1992 Act but to

concentrate instead on the pragmatic question of what categories of liability ought to be imposed on a consignee or indorsee who takes delivery of the goods or who makes a claim in respect of the goods.

Prof. Gorton observed that Nordic law distinguishes the “sender” (who is the contracting party) and the “shipper” (who is the party delivering the cargo).

Mr. Alcantara declared that the consignee receives only an assignment of rights, never of liabilities. Under civil law, the consignee is never bound—even to pay the freight (which is handled by a lien on the goods). The consignee can be the plaintiff, but not the defendant.

Mr. von Ziegler expressed sympathy with **Mr. Diamond’s** views, but felt that we need to keep track of common and civil law backgrounds. It does seem to be clear how the results should come out in practice, and that should enable us to achieve a solution.

Prof. Zunarelli also agreed with **Mr. Diamond’s** suggestion to take a pragmatic approach. There are a series of duties on the shipper, some of which can be transferred to the consignee when he seeks delivery.

Mr. Fujita agreed. Some liability, such as freight, should be transferred. Liability for dangerous goods should never be transferred.

Mr. de Orchis also supported **Mr. Diamond’s** suggestion. We should be looking to public policy for reform, based on technological changes and commercial development, regardless of the civil or common law origin. There is definite need for the consignee to take on some liability. In some contexts, the shipper and the consignee are in a better position to work out between themselves how liability should be borne.

Mr. Dihuang suggested that the International Sub-Committee identify the obligations, and clarify who it is the actual shipper or the contractual shipper. Secondly, we should discuss the position of the bank that holds the bill of lading to finance the transaction.

Mr. Rasmussen agreed that the suggestion to distinguish the sender from the shipper is useful. As to the question of categories, he suggested that what was in the bill of lading was decisive. The rights and duties that flow from the bill of lading are the ones that pass to the consignee.

Mr. Alcantara argued that the law transfers only title to goods, never the duties. The consignee’s responsibilities flow from the ownership of the goods.

Mr. Chandler disagreed with **Mr. de Orchis’s** suggestion. The concept that the shipper and the consignee are better able to deal with risks has never been a basis for assigning legal liability. We want to ensure that the shipper and the carrier do not collude to impose liability on the consignee.

The issue of actual and contractual shippers is even more complex than has been suggested. At least in the United States, NVOCCs (non-vessel-owning common carriers) may be shippers but have had nothing to do with packing the goods. Sometimes they will consolidate in containers. Sometimes they will issue their own bills of lading for packed containers. Sometimes this happens on two or three levels. With slot charter arrangements, there is yet another layer of contracts. Identifying the real shipper who shipped or packed the goods may not be at all easy.

The problem of banks was raised in the EDI Working Group. It was particularly important there to know where the bank stood, and that essentially mirrored commercial practice. If, for instance, the bill of lading names the bank as the consignee, then the bank has certain responsibilities to take delivery. If the bank simply holds a bearer or order bill of lading (which does not name the bank), and the bank seeks delivery of the goods, then it takes all of the other problems that come with it as well. If the bank is not specifically mentioned on the bill of lading and never shows up to act as holder, then the carrier is not going to know who is the holder. But once the bank has been incautious enough, perhaps for security purposes, to add its name to the bill of lading, then it has to take on the responsibilities that flow from that.

Mr. Diamond saw three main practical problems. The first is how to deal with freight and demurrage. As a general rule, liabilities can not be assigned, but he saw three theories by which freight and demurrage should pass to a consignee who takes delivery of the goods: (a) by statute or convention, (b) when the carrier exercises a lien (which can be a problem if the carrier must maintain possession to retain the lien), and (c) under a theory of implied contract (as in the English case of *Brandt v. Liverpool*).

The second practical problem involves the obligation to take delivery of the cargo within a reasonable time. This causes problems because, when the obligation arises, the consignee has, by definition, not yet taken delivery. Under that circumstance, it is difficult to see a basis for imposing liability on the consignee.

The third practical problem involves the peculiar obligations of the shipper, such as those arising under articles 3(5), 4(3), 4(6) of the Hague Rules (furnishing particulars, general negligence, dangerous cargo). We should deal with these special categories pragmatically.

Prof. Zunarelli agreed with **Mr. Diamond's** approach, but felt that it was important to distinguish the bill of lading situation from that under a sea waybill or a charterparty.

Mr. Alcantara objected that the "three practical problems" are all based on English Law. In civil law countries, the lien is very different. An implied contract is unheard of in civil law.

Prof. Zunarelli agreed that "implied contract" is difficult to say in civil law, but explained that it was possible to have an implied acceptance of the terms of contract. It is possible to imply acceptance of a contract by a party's conduct.

Mr. Beare concluded that this was a core issue that needed to be addressed, and saw a consensus that we ought to take this further. **Mr. Harrington** is uniquely qualified to do so as one who bridges the common law/civil law gap. He invited further submissions in writing, preferably before 8th March.

The meeting adjourned for coffee at 11:10, and reconvened at 11:35.

Mr. Beare invited **Prof. van der Ziel** to lead the discussion on the Working Group's fifth issue.

Prof. van der Ziel, by way of background, explained that delivery generally marks the end of the carrier's responsibility, and the completion of its

obligations under the contract of carriage. Nevertheless, all the Hague Rules or the Hague-Visby Rules say about “delivery” is in article 3(6). As a Working Group, we have identified a few issues that may be worthwhile to address: (1) the definition of delivery; (2) the relationship between the delivery and a discharge of the cargo; (3) the discharge of the carrier’s obligations and the evidence thereof; (4) the duty of the consignee to take delivery; and (5) delivery without production of a bill of lading.

Returning to the first issue, the definition of “delivery,” the question arises whether it is a unilateral or bilateral act. The starting point should be that delivery is a contractual matter. The parties usually agree what should be regarded as a delivery. Some national jurisdictions, however, are not satisfied with simply putting the cargo at the free disposal of the consignee even if this may have been agreed in the contract of carriage. They also require a certain act of receipt by the consignee. Another issue is whether the carrier should be required to notify the consignee of the time when the goods are expected to arrive.

A hypothetical illustrates the second issue (the relation between delivery and discharge of the cargo): It may have been agreed under an FIO-type clause that delivery will take place as soon as the hatches are opened and the cargo can be taken away. That means that delivery might occur before discharge. There might be a presumption that the period after delivery before the goods are taken by the consignee is for the account of the consignee.

Mr. Hooper explained that in the United States, unilateral delivery is permitted. Often, the carrier follows the custom of the port. A distinction can be made when the carrier maintains some control over the goods (*e.g.*, the port authority will not permit delivery without the carrier’s order). But if the carrier has no further control, delivery is complete.

Mr. Diamond believed that some clarification would be extremely helpful on this issue, as English law is unclear. The carrier might be a bailee (even if he has completed delivery of the goods) if he still has possession. One rebels at extreme positions (*e.g.*, permitting the carrier to dump unclaimed goods into sea or requiring the carrier to store them forever), and a balanced solution would be preferable.

Mr. Rasmussen suggested that the parties could specify the time of delivery in the contract.

Mr. Harrington observed that this is a problem in Canada under the Hague-Visby Rules. Discharge and delivery are different. Clauses exonerating the carrier after the discharge of the goods have been upheld.

Mr. Alcantara explained that “delivery” in Spanish law requires the carrier to effect delivery. If the consignee cannot be found, the carrier must go to court and put the goods into the hands of the court bailiff.

Mr. von Ziegler suggested that it would be worthwhile to discuss whether the parties can agree that the carrier is free to leave the goods somewhere for the consignee to collect later. He thought that this might cause problems under article 3(8) of the Hague or Hague-Visby Rules.

Mr. Oland echoed the concerns regarding the need for certainty. He was also concerned by the prospect of leaving this question to contract, fearing that

boiler-plate clauses would impose liability on a consignee that had no ability to deal with the risks.

Prof. van der Ziel observed that the same problems exist under the Hamburg Rules. The Hamburg Rules do not address what happens when no one claims the goods.

Turning to the problem of delivery without surrender of the bill of lading, **Prof. van der Ziel** noted that bills of lading are often unavailable when the goods are ready for delivery. This is frequently caused by the structure of the trade involved, as when credit is extended for a longer period than the duration of the voyage (thus keeping the bill of lading in the seller's hands when the goods have already reached the buyer). This situation cries for a solution. The usual solution—the carrier's accepting a letter of indemnity—is no proper solution. An indemnity is as good as its issuer, but the carrier remains the primary responsible person to reimburse the purchase price to an unpaid seller. The carrier is not in the banking business, but in this situation becomes a guarantor. **Prof. van der Ziel** expressed his view that the trade should bear the consequences of the bill of lading's non-availability in the discharge port and not, as it is the current practice, that the carrier has the eventual responsibility.

Mr. Chandler thought that the problems that **Prof. van der Ziel** raised will generally arise in trades where the goods are carried under charterparties. Those problems should be addressed in the context of the charterparty itself. We do not need to solve them here. The problem in the liner context is completely different.

Mr. Diamond believed that **Prof. van der Ziel** had touched upon some of most important points that we need to address. As a preliminary matter, **Mr. Diamond** agreed that the carrier should be required to notify the consignee of the time when the goods are expected to arrive.

Delivery of the goods without production of the bill of lading is the key issue. The trouble is that one can easily see the problem but not a solution. Under English law, the bill of lading represents the goods, serving as a means of passing constructive possession of the goods. Because the contract is negotiable, the shipper never really knows into whose hands the bill of lading has passed. One would like to be sure that the carrier is free from liability if it delivers the goods on the instructions of its contractual counterpart, but the difficulty with **Prof. van der Ziel's** proposal is that one is not quite sure what is meant in this context by the contractual counterpart. Does he mean the original party to the bill of lading—the shipper? Someone else may be the holder of that bill; it is inherent in the concept of the bill of lading that somebody else may become the holder. The whole theory of a shipment governed by a bill of lading is that a bill of lading is, in a sense, the key to the warehouse. Without the bill of lading, one has no right to the goods. If you take away that concept, it is difficult to see what function the bill of lading still has as a document of title.

The theory, often matched in practice, is that banks and third parties can advance money on the security of the goods because they have possession of the bill of lading. We all have come across hundreds of cases where the banks have advanced money on the security of the bill of lading, the bills get held up

in the banking chain, the consignee makes a request for and receives the goods shortly before becoming insolvent, and then the bank sues the carrier. Who would one want to say in that situation is the contractual counterpart? One way of looking at it is that the bank is the contractual counterpart, but the bank has not given the instructions to deliver. Some solution to this problem would be welcomed.

The other point is what happens if the goods have already been discharged. We do have a principle that the bill of lading is exhausted once the goods have been delivered to the right person. But if the goods have been discharged to the wrong person it seems that the bill of lading is not exhausted as a document of title and therefore the consignee can deal with it fraudulently. It is very unfair for the ship owner to continue to be liable. But equally one must consider the situation from the position of the third party who has paid for the bill. This consignee may even get all three sets of the bill and everything may look as if it is perfectly in order. If one introduces a rule that once the goods have been discharged the bill of lading is exhausted as the document of title, then you put the innocent third party who has bought the bill in the position of considerable risk. The buyer paid for the bill in circumstances where everything seems perfectly in order, but can not enforce any rights against anyone because the transferor has gone into liquidation and is insolvent. It would be good to see some clarity in this situation. The situation is a difficult one, and logically one will get away from it only when we give up bills of lading and go over to waybills and electronic commerce.

Mr. Rasmussen agreed that the carrier should give some indication when the goods will be delivered. Delivery without production of the bill of lading is a very different problem, and **Mr. Rasmussen** agreed with much of what **Mr. Diamond** has said. Who is the contractual counterpart of the carrier? We need to think harder about the issue of indorsement after delivery. Under the Nordic codes it is clear: the indorsement passes on the rights that go with the bill of lading. No doubt the indorsee has a right to damages against the carrier. Can the indorsee also reclaim the goods from the person in possession?

Mr. Hooper agreed that this was a problem, and described a recent case with which he had been involved. Perhaps a solution might be a rule that the carrier was not obligated to honor a bill of lading that was more than, for example, six months old.

Mr. Alcantara disagreed, and expressed the view that no rule was necessary. "Delivery" must be a lawful delivery.

Prof. Zunarelli agreed with most of **Mr. Diamond's** views. It was his impression that a solution will be very difficult if the market requires documents having the characteristics of a bill of lading. If the market finds these problems too great, then it will find another solution (such as electronic commerce or sea waybills).

Mr. Chandler disagreed, saying that there are too many problems under the current system to let the market take care of it. One reason is the disharmony of national laws that should be harmonized. He suggested that a solution might be possible drawing on the US law distinction between a negotiable bill of lading and a straight bill of lading.

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Prof. Gorton wondered if it might be time to do away with negotiable bills of lading. Would the trading community accept that? In many trades, a negotiable bill of lading is unnecessary. In certain ports, the custom of the port does not require surrender of the bill of lading. Is it time to eliminate negotiability?

Mr. von Ziegler expressed sympathy with much of what has been said, even though it was conflicting, but thought it might be possible to reconcile some of the interests. The trade should be responsible for the risks created by the lack of a bill of lading at the place of destination. It would be an unreasonable burden to require the carrier to track down the holder of the bill of lading. Perhaps the shipper could instruct the carrier to deliver the goods to the notify party. This instruction will have to be put in to the document itself, and of course it would destroy the concept of the bill of lading as the key to the warehouse.

Mr. Hooper's suggestion that the carrier have no liability after a certain time period is most interesting. That would put a limit on the letters of indemnity. The main problem of letters of indemnity is not the actual risk taken. That is a commercial risk that a lot of people, including banks, take. The main problem is that you pile up those letters of indemnity and you do not know how to write them off in your books because they are still open obligations. Because there is a theory that misdelivery displaces the time bar, we can not solve the problem that way. It would make a lot of people happy to solve it this way.

Mr. Chandler mentioned that the Uniform Customs and Practices for Documentary Credits (ICC pub. no. 500) ("UCP 500") allows trade in waybills and straight documents. Theoretically, there is no reason a straight bill of lading could not be used even when the parties are financing or negotiating the document. That could be one solution if we eliminate the historical negotiable bill of lading. In fact, we have addressed these procedures for electronic bills of lading.

Mr. von Ziegler objected that there are still trades that rely on negotiable bills of lading.

Mr. Chandler replied that in actual practice, no one follows that anymore. No one knows what the documents really say.

Mr. Diamond observed that we would need a much clearer definition as to who is entitled to delivery under waybills and how the instructions can be changed. In particular, we need a much clearer definition of the circumstances in which the shipper can transfer the right to redirect the goods so that it is perfectly clear, as a matter of law, that once the bank is named as the person to whom the goods were to be delivered then the shipper could not alter the instructions.

Mr. Chandler replied that there is a very tight set of rules for electronic documents in the 1990 CMI rules.

Mr. Beare noted that those rules apply only by contract.

Mr. Chandler suggested that those same procedures could be used more widely.

Prof. van der Ziel proposed a typical hypothetical case that he felt well

presented the issues under discussion. An oil shipment is sold by a producer on an FOB basis to a buyer. Subsequently, there are a few more FOB sales before an FOB buyer chartered a vessel, and then sells the oil to further buyers on a CIF basis. The charterer is the contractual counterpart of the carrier, but the charterer instructs the carrier to issue the bill of lading to the first FOB seller, the producer of the oil, who is mentioned as the shipper in the bill of lading. The producer and not the charterer is thus able to indorse the bill of lading. The producer has sold the oil under a one-month credit, but the vessel's voyage takes only a week.

The problem is the structure of the trade. The trade wants to have the security of the bill of lading. The first FOB seller retains the bill of lading as security until he is paid a month later. The trade wants to take away one function of the bill of lading, (*i.e.*, the legitimization of its holder as the person entitled to the goods when they arrive at the discharge port) but retain another function (*i.e.*, negotiability), which is based on the function that has been taken away. That is the core of the problem. It is also why the waybill avenue is not a proper solution. It remains the fact that the voyage is shorter than the credit. Making a rule that the liability of the carrier ceases after a certain period of time is a solution to only a minor part of the problem.

The innocent third party's rights always prevail over the rights of the possessor of goods. But the "innocent third party" may not always be so innocent. A buyer knows the custom of the trade.

The meeting adjourned for lunch at 1:00, and reconvened at 2:25.

Mr. Chandler disagreed with **Prof. van der Ziel's** suggestion. He argued that most tanker bills of lading are not financed, and that one cannot generalize Brent practice to the Middle East or West Africa. In any event, these are all charterparty cases. Liner trades are different, which is where we need to concentrate and where most of problems arise. It is much easier to divert a couple of containers than a supertanker full of oil.

Mr. Beare invited **Mr. von Ziegler** to lead the discussion on the Working Group's sixth issue.

Mr. von Ziegler set out a number of questions for the International Subcommittee to consider:

1. What is typically the content and nature of the right of disposal?
 - Sometimes it is the right to ask the carrier to stop delivery of goods; this corresponds to the sales contract right of stoppage in transit.
 - Sometimes it is the right to change the place of delivery.
 - Sometimes (typically in the sea waybill context) it is the right to require delivery to someone other than the named consignee.
 - Sometimes it is the right to negotiate a change in the contract of carriage.
2. Who is the holder of these rights?
 - It starts with the contractual shipper, although this may change.
3. When and how may this right of disposal be transferred?
 - In answering this question, we may need to distinguish among the bill of lading, the sea waybill, and the electronic document.
4. What are the conditions to use the right of disposal?

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- They will not be the same as the conditions to enforce delivery.
 - We will need to face issues such as costs and indemnities.
 - How do we deal with the situation when it is impossible to follow the new instructions?
5. When does the right end?
 - The obvious answer is on delivery.
 6. What if the carrier wants to receive instructions but is unable to find the person entitled to give instructions?
 7. Is the carrier bound to follow instructions? Or is this just the start of contract negotiations? Is stoppage in transit exercising a right under the contract, or a renegotiation of the contract (to which the carrier must consent)?

Mr. von Ziegler invited comments on the first question.

Prof. van der Ziel noted that the contract of carriage is part of a whole series of transactions. A sales contract may be involved, an insurance contract, a financing contract, and so on. The right to give instructions primarily flows from needs based on the sales contract. The carrier should follow those instructions that flow from the parties' rights in the underlying sales contract. The seller *must* be able to stop goods in transit. On the other hand, there may be instructions that have nothing to do with the goods. Carriers should not be bound to follow such instructions, but should be subject to agreement with the carrier (including agreement as to the costs involved). In terms of who has the right to give instructions, it is either the shipper (for a waybill) or the holder of the full set of bills of lading (for a negotiable bill of lading).

Mr. von Ziegler asked how we should handle the case in which no transport document has been issued. Should the carrier follow the shipper's instructions until someone demands delivery?

Mr. de Orchis clarified that the shipper would be the party who made booking.

Mr. Diamond observed that under English law the shipper would not lose its rights until delivery has actually taken place.

Mr. von Ziegler explained that under civil law, a third party beneficiary such as the consignee can enforce the contract earlier. Once the consignee has requested delivery, the carrier cannot be refused based on new instructions from the shipper.

Prof. van der Ziel agreed with **Mr. Diamond**, despite his being from a civil law country. You need to distinguish between acquiring the right to claim the goods from controlling the goods. The consignee could be a non-paying buyer.

Prof. Zunarelli thought that the civil law position was well-summarized by **Mr. von Ziegler**. The rationale is that the seller is relieved of the obligation to deliver the goods upon delivery to the carrier. The buyer might already have paid for the goods. You must find an adequate way to protect both interests. Once the goods arrive at their destination and the consignee makes a demand for delivery, the shipper loses the right to control them.

Mr. von Ziegler suggested that **Prof. Zunarelli's** rationale was rather theoretical because he had a free on board transaction in mind (that being the

traditional sales contract under the civil law). That would mean that the buyer has control of the transportation anyway, and thus does not need a right of disposal.

The Vienna Sales Convention, article 71(2), permits the seller to stop the goods in transit even if the buyer has a document entitling him to obtain possession. Of course this only establishes rights between the seller and the buyer. But if we accept **Prof. van der Ziel's** suggestion that the right of disposal should mirror the sales contract, then this suggests that we should also accept the right of stoppage in transit.

A carrier coming into the port will need instructions from the consignee regarding, for example, which warehouse to use. So there will be sensible instructions from the consignee, but on very limited points. The consignee is not able to change the contract, or avoid stoppage in transit. But he certainly should provide information on how he wants the goods to be delivered. So maybe we need a differentiation here. Perhaps the civil law system can be abandoned, but we need to retain a flexible view of how we will draft that. In some circumstances, the carrier will be allowed to receive instruction from the consignee.

Moving to the other extreme, the bill of lading, we face different questions. When does shipper's right of disposal pass to the consignee? On transfer of one copy of the bill of lading?

Mr. de Orchis recalled that, in the questionnaire, one of the first questions was whether the sales and carriage contracts should mirror each other. The Maritime Law Association of the United States replied that there was no basis for having the two tied together. The carrier should not have to keep track of the sales contract. The problem may not be so bad in the straight bill of lading context, but when the bill of lading is negotiable there may be unknown third parties who have rights in the goods subjecting the carrier to unreasonable commercial risks if the shipper gives instructions.

Mr. von Ziegler replied that we must very clearly separate two things. One is the method by which this right is transferred. The other issue is how we ensure that the carrier is not doing something wrong in obeying the instructions. That raises the issue of the conditions that must be met when a holder of the bill of lading gives an instruction. The general rule is that the holder must have the full set of original bills of lading to give instructions. In that case, there is practically no danger of harming anybody else. There might be many sellers in this chain, but only one of them has the tools to stop the goods.

Mr. Chandler observed that in the commercial bill of lading there is a significant practice developed for "notify parties," but nowhere in any rules is the function of the notify party defined. Perhaps the function of the notify party should be the same as the consignee's on a straight bill of lading or sea waybill—the party to whom the carrier should give notice unless the carrier is informed otherwise.

Mr. von Ziegler agreed that there should be a greater role for the notify party. In the electronic context, the carrier always knows where the holder is, but with a paper bill of lading the carrier's best information is often the notify party.

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Mr. Diamond wondered how effective a model the CMI Rules would be in practice.

Mr. Alcantara expressed the view that **Mr. von Ziegler** is proceeding too quickly. He agreed that every copy of the bill of lading must be collected before instructions can be given. He doubted that the bill of lading holder could give instructions to the carrier in mid-voyage, or change the conditions of the voyage.

Mr. von Ziegler referred to his earlier explanation in which he distinguished cases where the holder's right is to give instructions that the carrier is bound to follow from cases where the holder's right is to negotiate with the carrier.

Prof. van der Ziel sought to clarify the position as to sea waybills. In the course of the drafting of the CMI Uniform Rules for Sea Waybills, 1999, a proposal to make the right of control transferable during the voyage was voted down. It was felt that the CMI should give a few rules for a simple non-negotiable maritime document and not for a document that could replace a bill of lading for all purposes. Thus the shipper could transfer the right of control to the consignee not later than the carrier's receipt of the goods. That was the system adopted after a lot of discussion.

Mr. von Ziegler predicted that we would need to discuss the issue again, now that we are taking a more global perspective. At the moment, however, we are just opening discussion on these topics.

Mr. von Ziegler referred back to his earlier questions, and focused the discussion on the sixth question: "What if the carrier wants to receive instructions but is unable to find the person entitled to give instructions?"

Mr. Chandler felt that this was too much an artificial question.

Prof. van der Ziel disagreed. The question is not artificial. The carrier may not know to whom to deliver, and must seek instructions from the shipper.

Mr. von Ziegler replied that the shipper may be long out of the chain.

Mr. Rossignol countered that this is not a problem for carrier, who can still look to shipper.

Mr. von Ziegler concluded that the remaining questions could be deferred until the next meeting of the International Sub-Committee.

Mr. Beare reminded the International Sub-Committee that the next meeting will be held 6-7 April, in London. Delegates wishing to make further contributions in writing on any of the topics should do so before the next Working Group meeting on 9-10 March.*

The meeting adjourned at 3:30.

* No further contributions or submissions were received before the next Working Group meeting.