

**REPORT OF THE SECOND MEETING OF THE INTERNATIONAL
SUB-COMMITTEE ON ISSUES OF TRANSPORT LAW****THE BALTIC EXCHANGE,
LONDON 6TH AND 7TH APRIL 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. Gertjan van der Ziel (The Netherlands; member of the Working Group)
Prof. Avv. Stefano Zunarelli (Italy; member of the Working Group)
Barry Oland (Canada)
Uffe Lind Rasmussen (Denmark)
Prof. Tomotaka Fujita (Japan)
Karl-Johan Gombrii (Norway)
Francisco Goñi (Spain)
Anthony Diamond Q.C. (UK)
Vincent M. De Orchis (USA)
Chester D. Hooper (USA)
George F. Chandler, III (USA)
Kay Pysden (FIATA)
Viviane Schiavi (ICC)
Linda Howlett (International Chamber of Shipping)
Sara Burgess (International Group of P&I Clubs)
Hugh Hurst (International Group of P&I Clubs)
Christopher White (IUMI)

Mr. Beare called the meeting to order at 10:13 a.m. on Thursday, 8th April. He began by introducing Christopher White of IUMI and Viviane Schiavi of the ICC, who were attending on behalf of their respective

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organizations for the first time. **Mr. Beare** then circulated a letter from Dr. Le Garrec, who was unable to attend the meeting but who had comments for the International Sub-Committee's consideration.

The report of the International Sub-Committee's first meeting in January was approved as distributed, subject to individual corrections (which should be sent directly to the Rapporteur by mid-May).

Mr. Diamond indicated that he had some corrections to make.

Mr. Beare noted that the reports of each meeting will be published in the CMI Yearbook (as is customary on CMI projects). All of the delegates in Singapore will accordingly have a full record of the prior work on the subject, even if they have been unable to attend the International Sub-Committee's meetings.

Mr. von Ziegler commented on how important it is to have a track record of what has been discussed. It is also a way to prepare for future meetings.

Mr. Beare turned to the agenda paper for the present meeting. This time, the Working Group tried to present more concrete proposals than at the first meeting. We hope that the International Sub-Committee will review this paper and refine it, so that an outline of an instrument can begin to take shape by the next meeting in July. Every issue will remain open for the time being. Indeed, everything will be open to reconsideration in Singapore.

The next meeting has been tentatively scheduled for New York (hosted by **Mr. Hooper** at the offices of Haight Gardner Holland & Knight), on July 7th-8th, immediately after the UNCITRAL/CMI Colloquium (which will be held on July 6th at the United Nations Headquarters). The final pre-Singapore meeting is tentatively scheduled for mid-October, but the details are still to be arranged.

Mr. Beare explained that individual members of the Working Group had taken primary responsibility for preparing each of the sections of the agenda paper. He therefore turned the meeting over to **Prof. Sturley**, who had prepared the material for the first topic, "Description of the Goods in the Transport Document."

Prof. Sturley explained that the first section consisted of a series of fourteen propositions and explanatory commentary. These propositions were not intended to be draft provisions, or even to correspond to draft provisions. The hope is that each proposition isolates an issue for discussion so that the International Sub-Committee can reach tentative conclusions to permit the work to go forward.

Prof. Sturley summarized proposition 1.1 (which declares the principle that the carrier, after it receives the goods, must issue a transport document if the shipper requests one), and opened the subject for discussion.

Mr. Diamond wondered whether this was broad enough to accommodate electronic documents.

Prof. Sturley explained that there has been no attempt to draft definitions yet, but that his intent was to include electronic documents within proposition 1.1.

Mr. Chandler noted that the EDI Working Group will eventually review this group's work to ensure consistency with their efforts.

Mr. von Ziegler added that the EDI Working Group is “on hold” for the time being, waiting for us. It will resume work when we have material for them to discuss.

Mr. Chandler explained that, at the moment, electronic documents are just informational. No one has attempted to have “negotiable” electronic documents yet, but presumably commerce will move in that direction in due course.

Mr. Diamond expressed hesitation about requiring a carrier to issue anything that it may be unprepared to issue. Some carriers, particularly in some trades, have no capacity to issue transport documents.

Mr. Oland wondered if the existence of non-negotiable documents would mean that the new instrument would not apply in situations in which a non-negotiable document had been issued. He wanted to ensure that the issuance of a non-negotiable document did not become a device for avoiding mandatory rules.

Prof. Sturley explained that the International Sub-Committee must decide which rules should be mandatory, and the situations in which they should be mandatory, but noted his own view that any new convention should apply to both negotiable transport documents and non-negotiable transport documents. It may be appropriate to have somewhat different rules for negotiable and non-negotiable transport documents on some issues. But issuance of a non-negotiable document should not preclude the application of the new convention.

Prof. van der Ziel endorsed **Mr. Diamond’s** views. The right to receive a transport document must be agreed between the two parties. That is most equitable and efficient.

Mr. Oland had a problem with the notion of “equal bargaining power,” which he felt does not exist in practice. The Hague Rules and the Hague-Visby Rules give the shipper a right to demand a bill of lading, and that right should be preserved.

Mr. von Ziegler suggested that a shipper’s right to demand a transport document might lapse after a certain time, or that a carrier could charge more if a transport document were issued. Would that solve the problem?

Mr. Chandler saw a possibility for abuse if the carrier could avoid the regime by not issuing transport documents.

Mr. von Ziegler agreed with **Prof. Sturley** regarding the scope of the new instrument.

Mr. Rasmussen wondered why this issue would even be controversial if the new convention applies to all documents.

Prof. Gorton thought that the stumbling block was the use of the words “transport document.” Maybe we should use a different term.

Mr. Chandler noted that the shipper must get a receipt in any event. The issue here should be how the parties form a contract.

Mr. Beare cautioned against becoming too tied to the wording. We need to focus on the concept at the moment.

Prof. Sturley opened the discussion of proposition 1.2 (which focuses on the shipper’s entitlement, if any, to a negotiable transport document) with the

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observation that most of the issues had already been raised in the discussion of proposition 1.1. Alternative A declares the principle that the carrier must issue a negotiable transport document if the shipper demands one, but may issue a non-negotiable transport document if that is acceptable to the shipper. Alternative B, in contrast, declares the principle that the carrier and shipper may expressly or impliedly agree on the type of transport document that the carrier will issue.

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

Mr. Gombrii proposed that the International Sub-Committee accept the suggested combination of the two alternatives in which alternative B is the general rule but alternative A is the default rule in the absence of an express or implied agreement.

Mr. Rasmussen asked whether this combination would allow for a custom of the trade to be recognized as an implied agreement, and argued that it should.

Prof. Sturley turned to proposition 1.3, which declares the principle that a transport document must describe the apparent order and condition of the goods at the time the carrier receives them from the shipper. Although the courts in some countries have departed from this principle, it simply confirms the understanding that is clearly expressed in the *travaux préparatoires* of the Hague Rules and carried forward in subsequent international conventions.

Mr. Diamond responded that “the devil is in the details.” What is meant by “apparent?” What are “the goods”? For example, with containerized goods does the carrier need to look inside the container or is it sufficient to describe the container itself? A carrier should not be required to do more than is possible.

Mr. de Orchis asked if committee notes would accompany the draft.

Mr. Beare replied that he anticipated having an accompanying commentary. The length of the commentary might depend on the degree of the consensus achieved.

Mr. Chandler mentioned that the UNCITRAL method is consistent with the method here, with an active record of each meeting.

Mr. Beare added that the UNCITRAL report for this summer’s meeting certainly relies heavily on the past record.

Mr. von Ziegler felt that **Mr. Diamond** had identified two problems that we should try to solve in the text, and not leave to the commentary.

Prof. Sturley began the discussion of proposition 1.4, which declares the principle that a transport document must generally show the leading marks necessary for identification of the goods as furnished in writing by the shipper. The main issue for discussion was whether the shipper must furnish this information in writing before the carrier receives the goods, or whether it is sufficient to furnish the information before the carrier issues the transport document.

Mr. Chandler conceded that the shipper must furnish the leading marks before the carrier receives the goods.

Mr. Rasmussen agreed with **Mr. Chandler**. The carrier needs the marks in advance of receiving the goods.

Prof. Sturley turned to proposition 1.5, which declares the principle that a transport document must generally show the number of packages, the number of pieces, the quantity, and the weight as furnished in writing by the shipper. Two main issues require some discussion: First, must the transport document include all of the information furnished by the shipper (*e.g.* the number of pieces *and* the weight), or is it sufficient to include at least one of the items on the list (*e.g.*, the number of pieces *or* the weight)? Second, must the shipper furnish the information in writing before the carrier receives the goods, or is it sufficient to furnish the information before the carrier issues the transport document? (This second issue is substantially the same as the issue that we just resolved in our discussion of proposition 1.4.)

Mr. Oland argued that the carrier must give both the number and the weight if the shipper furnishes the information in writing. In some circumstances, the shipper may need to have both on the transport document.

Mr. Hooper agreed that the carrier must give whatever information the shipper furnishes, but added that the carrier should be entitled to qualify the information on the transport document, if appropriate, under the subsequent propositions (that have not yet been discussed).

Prof. Sturley, turning to the second main issue that he had raised, asked whether there was also a consensus here that the shipper must provide the information in advance (as we had agreed in our discussion of proposition 1.4). [No one present disagreed with this suggestion.]

Mr. Diamond, returning to the first issue, asked whether the shipper needs both the number of pieces *and* the weight. If document shows the number of packages, why is it necessary to include the weight? He expressed concern with placing too great a burden on the carrier.

Mr. Chandler explained that “quasi-bulk” cargoes are shipped in packages, but on a weight basis.

Mr. Rasmussen noted that the Hamburg Rules require both, but he felt that this was not always appropriate (*e.g.*, in the brick trade). The requirement should be to show the number of pieces and the weight, but not the “quantity” and the weight.

Mr. Diamond suggested that this issue only arises if the transport document is in the hands of a third party when the carrier is held liable for something that is not its fault. He saw why the carrier should give one piece of information or the other, but wondered why both were necessary.

Mr. Oland expressed concern that the carrier might not show the weight on the transport document, as this was important for purposes of calculating the limitation amount. The carrier should want to know the weight for safety, too.

Mr. Hooper agreed that the carrier will want to know the weight for safety purposes, and added that the subsequent propositions deal with **Mr. Diamond**'s concern.

Mr. de Orchis thought that the troubling issue was identifying the number of packages. He wondered whether the “package” would be the smallest countable unit.

The meeting adjourned for coffee at 11:30, and reconvened at 11:50.

Prof. Sturley turned to proposition 1.6, which notes an exception to the general principle of propositions 1.4 and 1.5. Under proposition 1.6, the carrier need not show the leading marks, or the number of packages or pieces, or the quantity or weight of the cargo, if the carrier has no reasonable means of checking the information furnished by the shipper.

This proposition carries forward the proviso to article 3(3) of the Hague Rules and article 16(1) of the Hamburg Rules. It also clarifies the meaning of “reasonable means of checking,” stating that a “reasonable means of checking” must be not only physically practical but also commercially reasonable, and giving the example that opening a sealed container or unloading a container to inspect the contents would not be commercially reasonable.

Proposition 1.6 differs from the Hague Rules and the Hamburg Rules by eliminating the language excusing the carrier from including the otherwise required information when there are reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods. The consensus of the International Sub-Committee at its first meeting appeared to be that when the carrier has reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods, the carrier is obligated to check the information if it has a reasonable means of doing so. Thus the carrier would be excused from including the otherwise required information only when there is no reasonable means of checking it. The reasonable suspicion exception is accordingly redundant.

Mr. Diamond noted that this proposition does not tell us what is “apparent.”

Mr. Oland complained that the regime is set up so that the carrier need only show “one container.” The carrier may say, “we cannot reasonably check the contents of the container.” But the container is functionally a part of the ship. The carrier could check the contents, for example, by sending a checker to observe loading, or by opening the container on the dock. The carrier does not want to do that. An artful drafter of a bill of lading will seek to avoid almost all liability. Where does that leave the consignee and its underwriter? Will limitation be based on one container?

Mr. Beare responded that a discussion of liability means a consideration of risk allocation. It is in everyone’s interest to allocate risk as efficiently as possible. In any event, liability will be on the agenda at the International Sub-Committee’s next meeting in New York.

Mr. Chandler argued that it would be unacceptable to permit a carrier to escape liability for one hundred packages by describing the cargo as “one container.”

Mr. Harrington replied that such a case would not arise in practice. A bill of lading showing “one container” is commercially unacceptable.

Mr. Rasmussen suggested that proposition 1.6 must be read in conjunction with proposition 1.8 (which permits a carrier to qualify the

description of the goods). Maybe the rule should be that the carrier must include the details furnished by the shipper, but may then qualify the description of the goods.

Mr. Diamond noted that containerized shipments only work when there is some record of the number of packages inside the container. The container should not be the basis for limitation, but the number of packages should not be conclusive evidence.

Mr. Beare asked whether the International Sub-Committee accepted **Mr. Rasmussen's** suggestion as the grounds for proceeding?

Mr. Oland commented that the agenda paper sets up a prima facie standard for determining whether there had been a reasonable means of checking.

Mr. Fujita agreed with **Mr. Oland**. He mentioned a hypothetical case in which there is a strange sound when the carrier moves a container. If the carrier has reason to suspect that something might be wrong, the carrier should check the goods.

Mr. Rasmussen agreed with the suggestion to do away with the "reasonable suspicion" exception.

Mr. Beare asked whether there was a consensus on this point. [No one present disagreed with the suggestion.]

Prof. Sturley asked whether there was a consensus on **Mr. Rasmussen's** suggestion to change the Hague Rules and the Hague-Visby Rules to follow practice, that is, to require the carrier to provide the particulars furnished by the shipper, even if that information is then qualified. [No one present disagreed with **Mr. Rasmussen's** suggestion.]

Prof. Sturley turned to proposition 1.7, which declares the principle that a transport document is generally prima facie evidence of the carrier's receipt of the goods as described therein, and is conclusive evidence in some situations. The troublesome issues for discussion were (1) the type of transport document that could constitute conclusive evidence in some situations, and (2) the situations in which an appropriate transport document would constitute conclusive evidence. On the first issue, it was generally accepted that a negotiable transport document could constitute conclusive evidence in some situations. It was less clear whether a nonnegotiable transport document could also constitute conclusive evidence in some situations. On the second issue, it was generally accepted that a transport document would constitute conclusive evidence when it was duly transferred to a third party acting in good faith. It was less clear whether a transport document would constitute conclusive evidence when a third party acting in good faith had paid value or otherwise altered its position in reliance on the description of the goods in the transport document.

Mr. Chandler, addressing the first issue, felt that either a negotiable or non-negotiable transport document could constitute conclusive evidence. Negotiability relates to the "document of title" function, and has nothing whatsoever to do with the receipt function.

Mr. Harrington asked whether we faced the question of who is claimant. The carrier should be able to prove the truth against the original shipper.

Mr. Hooper suggested that the issue is not negotiability but reliance. Furthermore, a carrier can protect itself with appropriate clauses in the transport document.

Mr. Diamond saw a link between two questions. With a non-negotiable document, it is harder to have a third party relying on the document. But if a third party is entitled to rely on a non-negotiable document, the carrier has enough other protection.

Mr. Beare proposed that there might be a presumption of reliance in cases of negotiable documents.

Mr. Diamond disagreed with that idea.

Mr. Chandler pointed out that the Uniform Customs and Practices for Documentary Credits and INCOTERMS already allow third parties to rely on nonnegotiable documents.

Mr. White felt that the transport document's evidence should be conclusive only in cases of reliance.

Ms. Pysden observed that the exception expressed in proposition 1.9 (which gives effect to qualifying clauses in transport documents) will limit the extent of otherwise conclusive evidence.

Prof. Sturley asked if there was a consensus for the proposition that negotiability does not matter, but that the conclusiveness of the evidence should depend on the extent of a third party's reliance.

Mr. von Ziegler asked if a document is not negotiable, how can a third party rely on it. He added that a sea waybill is only a receipt.

Mr. Rasmussen warned that the International Sub-Committee should be careful before extending a new regime to sea waybills. We do not apply estoppel to sea waybills, and there are good reasons for this rule. But this is a practical, not a legal, rationale.

Mr. Chandler posed a hypothetical: If a carrier issued a sea waybill for two pieces of damaged machinery, showing no damage on the document, could the consignee rely on the statement in the document that showed no damage?

Mr. Rasmussen replied that the consignee could not rely on the sea waybill.

Prof. van der Ziel agreed that he also had difficulty with reliance in this situation. There are many third-party holders who do not rely on a bill of lading. They rely on the purchase contract. This regime may extend and restrict the current system.

Mr. Chandler explained that under United States law, a lack of reliance would be a problem even with a negotiable bill of lading.

Mr. Rasmussen declared his support for the reliance principle, but would also require the transfer of a bill of lading.

[After extensive debate concerning the negotiability distinction; no consensus was reached, and the issue was noted for further discussion later.]

Prof. Sturley turned to proposition 1.8, which would permit the carrier to include a clause in the transport document to qualify a description that could have been omitted entirely under proposition 1.6. He suggested that the International Sub-Committee had fully discussed and resolved this issue in its discussion of proposition 1.6.

Ms. Pysden thought that it would be risky to list examples of permissible qualifying clauses.

[No one present disagreed with the suggestion, based on the prior discussion of proposition 1.6, to permit qualifying clauses.]

Prof. Sturley turned to proposition 1.9, which states the principle that the transport document will not constitute prima facie or conclusive evidence when a qualifying clause is “effective,” except to the extent that the description of the goods is not limited by the clause. **Prof. Sturley** explained that the exception meant simply that if only one part of a description is qualified, the qualification would not apply to other parts of the description. Suppose, for example, that the description in the transport document gave the number of packages and the weight of the cargo, and a qualifying clause applied only to the weight. Then the statement of the number of packages (which is not affected by a qualifying clause regarding the weight) would still constitute prima facie or conclusive evidence to the same extent as if the qualifying clause had not been included in the transport document. [No one present disagreed with this proposition.]

Prof. Sturley then turned to proposition 1.10, which states the principle that a qualifying clause with respect to non-containerized goods is effective whenever the carrier can show that it had no reasonable means of checking the shipper’s information that is subject to the clause.

Mr. Rasmussen thought that proposition 1.10 was superfluous.

Mr. Oland asked if a carrier could define itself out of the obligation to weigh the goods under proposition 1.10.

Prof. Sturley replied that proposition 1.10 established an objective standard that turned on whether the carrier has a reasonable means of checking the weight of the goods.

Mr. von Ziegler foresaw that any problems would be the same as under current law.

Mr. Koronka commented that the shipper’s and carrier’s weights never agree for bulk cargo. He suggested that the carrier might be required to list both weights on the transport document.

Mr. de Orchis asked where the burden of proof would be placed respecting the opportunity to inspect.

Mr. Diamond felt that it is risky to put the burden on the carrier, because it is always difficult for the carrier to carry the burden.

Prof. van der Ziel explained that in many charterparties, the carrier is obliged to use the shipper’s agent, who is entitled to issue bills of lading in accordance with mate’s receipts. Often the agent issues bills of lading with the “true weight” of the cargo, which is higher than that shown on the mate’s receipts.

Prof. Sturley turned to proposition 1.11, which states the principle that a qualifying clause with respect to containerized goods (except for a clause concerning the weight of the goods) is effective whenever (a) the carrier can show that it had no reasonable means of checking the information furnished by the shipper that is subject to the clause, and (b) the carrier delivers the container intact and undamaged with the seal intact and undamaged.

Mr. Rasmussen noted that requirement (b) is controversial. If a container is damaged, then the qualifying clause is ineffective. He wondered how damaged the container must be for this exception to apply.

Mr. Diamond agreed with **Mr. Rasmussen's** objection. He saw no logical connection between the prima facie value of the transport document and the existence of damage to the container.

Mr. Hooper proposed that the carrier should still be able to dispute the description in the transport document, but that it should constitute prima facie evidence.

[No one present disagreed with **Mr. Hooper's** solution.]

Prof. Sturley turned to proposition 1.12, which states the principle that a qualifying clause with respect to the weight of containerized goods is effective only if (a) the clause states explicitly — and accurately — that the carrier has not weighed the container, and (b) the carrier delivers the container intact and undamaged with the seal intact and undamaged.

Mr. Harrington noted that it is often impossible to get an accurate weight. For example, the container may be covered with ice and snow.

Mr. Diamond reiterated that requirement (b) was a problem in this proposition, too.

Prof. van der Ziel wondered what “explicitly” meant. Would it be enough to include a statement in the boilerplate clauses of the transport document?

Prof. Sturley replied that a pre-printed clause would be acceptable in theory, but it would not be effective to say simply “weight unknown,” or to include a clause declaring that the carrier had not weighed the container if in fact the container had been weighed.

Prof. Sturley turned to proposition 1.13, which states the principle that a carrier must include a statement of the weight of the container without qualification if the shipper and the carrier agreed in writing prior to the shipment that the container would be weighed and the weight would be recorded on the transport document. Proposition 1.13 also clarifies that, in the absence of such a prior agreement, the carrier may include an appropriate qualifying clause concerning the weight of the container without regard to whether the carrier had a reasonable means of weighing the container.

Mr. Diamond wondered whether this proposition might be too complicated.

Prof. Sturley turned to proposition 1.14, which states the principle that no qualifying clause will be effective if a person relying on the description of the goods in the transport document can show that the carrier did not act in good faith when issuing the transport document. Including a qualifying phrase that is known to be inaccurate or including a qualifying phrase when the description of the goods is known to be inaccurate would be examples of failing to act in good faith.

Mr. Harrington wondered whether this proposition might be too complicated.

Mr. Rasmussen commented that the Hamburg Rules distinguish general reservations from specific reservations: He did not read this proposition to say anything about specific reservations, such as “the plates were stained.”

Prof. van der Ziel had some difficulties with this proposition. He felt that the shipper should also be required to act in good faith.

Prof. Gorton suggested that it was not feasible to cover all of the possibilities in our draft. There are too many qualifications and exceptions. He asked if it would be better to say some rules apply in only certain contexts?

Mr. Beare proposed that we should try to deal with the general issues at this point. When representatives of the trade tell us that they have particular problems, then we will deal with them — perhaps by applying some rules only in a certain context.

He proposed that the International Sub-Committee appoint **Prof. Sturley** and **Prof. van der Ziel** to serve as a drafting committee, but postponed discussion of this proposal for the time being.

The meeting adjourned for lunch at 1:30, and reconvened at 2:20.

Mr. Beare invited **Prof. Zunarelli** to lead the discussion on the second topic in the agenda paper, “Transport Documents.”

Prof. Zunarelli began with topic 2.1, “Date on the bill of lading.” At the first meeting in January, the International Sub-Committee discussed the need to date the transport document. The consensus at the first meeting was that an undated transport document would still be valid. **Prof. Zunarelli** summarized the issues raised in the agenda paper.

Mr. Beare noted that the first issue is whether the transport document should be dated. He asked if there was a consensus that the transport document should have at least one date. [No one present disagreed with this suggestion.]

He then asked if there was a consensus that the transport document would be valid even without a date. [No one present disagreed with this suggestion.]

Finally, he noted that the Working Group had proposed that the date on the transport document will be presumed to be the date of completion of loading. He sought the views of the International Sub-Committee on this proposal.

Prof. van der Ziel replied that the answer depends on the type of transport document. A “shipped” bill of lading justifies this presumption, but not a “received for shipment” bill of lading.

Mr. de Orchis wondered why it would not be appropriate to give both dates.

Mr. Diamond suggested what he saw as a simple drafting solution to this problem: “Unless the document states that the date refers to the date of issue of the transport document, the date shall be presumed to be either the date of completion of loading or the date that the carrier receives the goods for shipment, depending on the nature of the document (that is, as a “shipped” or a “received for shipment” transport document).”

Mr. Beare, turning to section 2.1.2.3 of the agenda paper (“the consequences of the indication of a false date in the bill of lading”), suggested that a uniform solution appeared unlikely on this issue.

Prof. Zunarelli agreed that there is no uniformity on this point, and that it seems impossible to achieve a consensus.

Ms. Pysden thought that the consequences should depend on whether the false date is intentional, negligent, or simply mistaken.

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Mr. Diamond argued that we ought to try to draft something. It may turn out to be impossible, as it is a difficult area. He noted that when we get into fraudulent errors, we face tort law possibilities. Negligent misrepresentation could also lead to tort remedies.

Mr. Oland asked where would sanctions go.

Mr. Diamond replied that there might be an open-ended right to claim damages (without a right to limit liability) in the case of a fraudulent misrepresentation.

Mr. Oland asked whether this would effect a subsequent holder of the transport document.

Mr. Diamond replied that the subsequent holder may have a cause of action for the loss of the right to reject the documents.

Mr. de Orchis noted that the shipper should already know when the goods were delivered to the carrier, and thus should not have been deceived by an incorrect date.

Mr. Gombrii suggested that the International Sub-Committee should equally consider every error in the bill of lading.

Prof. Gorton wondered what sort of penalty we were discussing. Is this a question of liability rules, for example? Or are we discussing a criminal penalty?

Mr. Beare announced that the Working Group will revisit this issue, but sought the International Sub-Committee's further guidance.

Mr. Hooper suggested that the issuance of a letter of indemnity could be evidence of collusion between the carrier and the shipper.

Mr. Beare responded that this was not always the case. There may be a good faith commercial dispute justifying the issuance of a letter of indemnity.

Prof. Zunarelli suggested that if the carrier is aware of the falsity and takes a letter of indemnity as a result, then the right to limit liability should be lost.

Prof. van der Ziel reminded the International Sub-Committee that the time bar may also be an issue here.

Prof. Zunarelli, turning to section 2.2 ("Signature"), summarized article 23(a)(ii) of the Uniform Customs and Practices for Documentary Credits and article 14 of the Hamburg Rules. He noted that the principal issues here are (1) the effects of a transport document signed by a *falsus procurator* and (2) the acceptable means of signing the transport document.

Mr. Rasmussen declared that the first issue (*falsus procurator*) is much more difficult. There may be coercion, for example. We cannot deal with the issue piecemeal.

Mr. Goñi added that most bills of lading do not identify the vessel owner. The burden may fall on the wrong party.

Mr. Beare expressed his hesitancy to go deeply into the law of agency. Prof. Berlingieri's International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea addressed some of this.

Mr. Gombrii raised the choice of law issue.

Mr. Diamond responded that any law mentioned should be international.

Mr. de Orchis wondered whether the International Sub-Committee

should also address the presence or absence of the shipper's signature on the transport document. Does this impact New York Convention rights?

Mr. Beare, continuing to section 2.3 ("Identification of the carrier"), gave a general introduction to the problems addressed.

Mr. Rasmussen observed that in many cases it is very difficult to say who is in fact the contractual carrier. He felt that the issue had been more or less settled in Prof. Berlingieri's International Sub-Committee.

Mr. Beare reviewed the propositions expressed in Prof. Berlingieri's report.

Mr. Diamond announced that the British Maritime Law Association was comfortable with this formulation.

Mr. Beare asked what should happen if there is no identity of carrier clause in the transport document.

Prof. Zunarelli proposed reversing the approach. If the transport document is a document of title, then the name of the carrier must be listed on the document.

Mr. Rasmussen argued that we should not define who is the contracting carrier. If we adopt Prof. Berlingieri's International Sub-Committee's approach, we may be left with a registered owner who has no connection with the transaction. Usually it is not that difficult to identify who is the carrier.

Mr. Oland expressed his concern with losing the ability to sue the registered owner, noting that it is important to have rights against the ship *in rem*.

Prof. Zunarelli reiterated that the point is, "who is contracting carrier?" when the transport document does not specify the answer.

Mr. Rasmussen noted that the issue would not be that important if there is joint liability between the contracting carrier and the performing carrier.

Mr. von Ziegler stressed that this is a very annoying problem in practice. If the claimant starts with the registered owner, that should lead to the responsible party.

Prof. van der Ziel agreed that the International Sub-Committee should try to find a solution to this problem, which he felt could be solved. He hesitated to look to the registered owner, however. In this connection, he made two points. (1) In his view, the underlying problem is not with the ship but with the shipper. The shipper has dealt with another party, and should know the contracting party with which it has dealt. The claimant should start with the shipper rather than with the registered owner. (2) Carriers do not want the name of the ship in the transport document. An airbill does not list the number of the aircraft. In modern practice, there may be several vessels on single shipment. Should the name of the feeder vessel be on a bill of lading?

Mr. Oland responded by asking how the consignee can be expected to know who is the right shipowner if not from the bill of lading.

Mr. Beare announced that the Working Group will proceed to drafting on this basis, and leave the discussion there.

Mr. Gombrii, seeking clarification, asked if the next draft would retain the presumption of the registered owner.

Mr. Beare replied that the International Sub-Committee on Uniformity of

the Law of Carriage of Goods by Sea had left it there.

Prof. Zunarelli introduced section 2.3.2.2 (“the implications, for the purpose of the identification of the carrier, of a valid incorporation of a charter party’s terms”), which had been distributed as Addendum 1.

Mr. Diamond protested that the general principle of looking to the face of the transport document was preferable to this proposal, which was inconsistent. Furthermore, this would be unnecessary if we follow the approach taken by Prof. Berlingieri’s International Sub-Committee.

Mr. Chandler added that some of these situations arise only in the charterparty case (where no bill of lading is issued to a third party), and are thus outside the scope of our mandate.

Prof. van der Ziel argued that it would be inconsistent to have different answers to the problem depending on whether the original shipper or a third party holder of a transport document is asking the question.

Mr. Diamond observed that the shipper often makes the contract with a local agent and has no idea who will own the ship. Thus the whole issue may be completely artificial. The registered owner is thus a convenient default.

Mr. de Orchis proposed a rule that the accurate names of the carrier and the shipper should be on the transport document.

Mr. Beare remarked that there must still be a rule to apply if the transport document does not give the accurate names of the carrier and the shipper.

Mr. de Orchis agreed, and suggested that there might be consequences for misdescribing the identity of the carrier and the shipper, just as there are consequences for misdescribing the goods.

Mr. Chandler addressed some of the practical difficulties with this approach.

Mr. Gombrii stressed the need to distinguish whether we are seeking to hold the contracting carrier or the performing carrier liable.

Mr. Diamond observed that there could be problems with identifying the performing carrier, as well. He gave the example of a ship on which the goods are damaged being under a demise charter.

Mr. von Ziegler pointed out that existing conventions refer to the person employed by the contracting carrier, not to the person who is in possession of the goods when they are damaged.

Mr. Diamond argued that liability certainly needs to go more than one level down the line.

Mr. Rasmussen reported that, in the Danish system, the person who controls the ship is the performing carrier.

Mr. Beare, noting that this question will be on the July agenda and need not be further discussed here, closed the discussion of section 2.

The meeting adjourned for tea at 3:50, and reconvened at 4:10.

Mr. Beare opened the discussion of section 3 (“Freight”), observing that on this subject the rules would probably be non-mandatory. He invited **Prof. Gorton** to lead the discussion.

Prof. Gorton introduced the general topic; asked whether it should be included as part of the final project; and — if it should be covered — what issues should be included.

Mr. Diamond noted the fundamental difference between “opt-in” and “opt-out” rules. He felt that many of the issues in this section were interesting, but that they were not essential to uniformity. In his view, including them could jeopardize success of project.

Mr. Chandler posed the question whether this is an area that would be served by uniformity. He argued that it would. The meaning of a “freight pre-paid” bill of lading is one clear example of an issue where more uniformity would be valuable.

Prof. Gorton opened the discussion of section 3.2 (“When is freight earned/payable?”).

Mr. Hooper proposed the rule that freight is earned when the contract performed, but he would permit the parties to agree otherwise.

Mr. Chandler wondered whether freight should be earned on a house-to-house shipment on the issuance of an inland trucker’s receipt.

Mr. Diamond responded that this should be left entirely to national law.

Mr. Oland wondered if there are practical problems that need to be solved here.

Mr. Chandler replied that carriers issuing bills of lading based on assumptions accurate under their own laws may not know how problems will be resolved under the law of the place of delivery.

Mr. de Orchis reported that “freight collect” and “freight pre-paid” bills of lading raised the biggest problems here.

Mr. von Ziegler added that lien issues are important also here.

Mr. Diamond agreed that it would be important to address when third parties become liable to pay freight, and perhaps when original shippers are relieved of their liability.

Mr. Harrington noted that this issue may arise in conjunction with a general average discussion.

Ms. Howlett shared **Mr. von Ziegler**’s view that we should not abandon this issue too quickly.

Prof. Sturley expressed the view that there was interest in addressing these issues to the extent that they affect third parties.

Prof. Gorton opened the discussion of section 3.3 (“Loss of goods/repayment of prepaid freight”).

Mr. Hooper argued that freight should not be returned, but noted that the value of the freight is implicit in any damage recovery when the carrier is liable for cargo loss or damage.

Mr. Chandler felt that there should be some threshold that must be crossed before freight is earned. For example, the rule might be that the goods must be on board the vessel.

Mr. Oland contended that if something goes wrong with the shipment, the remedy should be in damages.

Mr. Diamond responded that damages are fine if the carrier is liable for the loss, but that the situation is different if the carrier is excused from liability (as, for example, in a force majeure situation).

Mr. Hooper added that the distinction between recovering freight and recovering damages was also relevant in cases involving limitation of liability.

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It is important to know whether the cargo claimant can recover the freight charges in addition to the limitation amount.

Prof. Gorton asked whether this was an issue to include in the project. He thought that perhaps there was a consensus to omit it.

Mr. Diamond agreed that the issue should be left to national law.

Mr. von Ziegler disagreed, arguing that we have an opportunity here to solve a real problem. The solution could be a model for other regimes.

Mr. Diamond observed that if the solution is non-mandatory, then states do not need to adopt it as part of a convention.

Mr. von Ziegler rejected this interpretation, declaring that even a non-mandatory solution is part of the convention, although the parties themselves can contract out of it.

Mr. Beare announced that we would leave this issue to the drafters at this point. Whether states must adopt any solution that we propose is still a long way down the road.

Mr. Diamond accepted the point that a solution could provide a useful precedent in some countries.

Prof. Gorton opened the discussion of section 3.5 (“Who is liable to pay the freight?”). In section 3.5.2, he argued that the shipper should remain liable to pay the freight, as under the English Bills of Lading Act. [No one present disagreed with this suggestion.]

Section 3.5.3 raises the issue whether the consignee should also be liable (if the transport document is not “freight pre-paid”).

Mr. Chandler argued that — if the transport document is not “freight pre-paid” — the consignee should also be liable. Under United States’ law, the carrier’s lien ensures that the consignee has an incentive to pay the freight. Our principal concern here should be to protect the consignee when there is a “freight pre-paid” transport document. And it is also appropriate to protect the nominal consignee who is not really a part of the transaction.

Prof. Zunarelli was troubled by the statement that the consignee has a duty to take delivery and pay freight even if he has not taken up the goods. The consignee assumes no liability without taking up the goods under the Italian system.

Mr. Beare wondered if that result would be any different under the British 1992 Carriage of Goods by Sea Act.

Mr. Chandler explained that, by his understanding of the 1992 Act, the consignee can be liable as the “holder” of a bill of lading — even without taking up the goods.

Mr. Beare asked if there was a consensus to draft something along the lines of the 1992 British Act. [No one present disagreed with this suggestion.]

Prof. Gorton turned to section 3.5.4 (“Intermediate bill of lading holders”). He suggested that there should be no reference to intermediate holders. [No one present disagreed with this suggestion.]

Prof. Gorton turned to section 3.5.5 (“The marking of the bill of lading”).

Mr. Beare commented that, if we agree regarding the basic duties, the issue here is how markings on the transport document change the basic duties.

Mr. Chandler proposed that we follow the definitions of the Uniform Customs and Practices for Documentary Credits.

Mr. von Ziegler took note of the following statement in the agenda paper:

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

In **Mr. von Ziegler’s** view, the real issue is how far to go with “should have been aware of.”

Prof. Gorton opened the discussion of section 3.6 (“Lien”).

Mr. von Ziegler observed that there are no contracts under which the carrier does not have at least a right of retention. It is important to cover this subject here because national laws differ so much. The carrier’s claim against the consignee may be worthless. The right of retention may be impractical. We do not need to call the carrier’s right against the goods a “lien,” which has different connotations in different legal systems. It would be better to spell out the carrier’s rights (for example, to sell the goods, retain the amount due the carrier, and turn over the excess to the party otherwise entitled to the goods).

Prof. Zunarelli agreed with **Mr. von Ziegler’s** suggestion.

Mr. Harrington also agreed. He suggested using the Canadian Shipping Act (which is based on the 1894 British Merchant Shipping Act) as a possible model.

Mr. Griggs warned that we must be careful about impinging on local law.

Mr. Chandler noted that many places have no well-developed local law.

Prof. van der Ziel commented that if we provide that the cesser clause is only valid when there is a lien, that provision cannot be non-mandatory.

Mr. von Ziegler pointed out that we need to consider other costs that might also be covered by a lien. For example, freight on other voyages might possibly be covered.

Prof. van der Ziel contended that the debt covered by the lien must relate to the particular shipment at issue. The amount due could still exceed the freight. For example, the cargo may be liable for a general average contribution.

Mr. Rasmussen agreed that the costs must arise out of the particular contract of carriage.

Prof. Zunarelli also agreed.

Mr. Chandler explained the distinction of a possessory lien under United States law.

Prof. Gorton opened the discussion of section 3.7 (“Demurrage, deadfreight and other charges”). The primary question is whether we should cover ancillary claims.

Mr. Chandler explained that in the United States, a carrier cannot enforce liability for other charges unless the bill of lading is appropriately claused. The same rule applied under the Uniform Customs and Practices for Documentary Credits.

Prof. Gorton asked if that rule would just cover demurrage.

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Mr. Beare asked about port charges and similar expenses.

Mr. Chandler replied that those would be acceptable if they were specified in the bill of lading.

Mr. Harrington noted that this International Sub-Committee should not address questions of general average, which were being addressed by another CMI Working Group.

Mr. Beare asked if there were any other points that we ought to discuss that we have not. [No new points were raised.] He then adjourned the meeting with the announcement that the International Sub-Committee would reconvene at 9:30 the following morning.

The meeting adjourned at 5:20 p.m. on Thursday, 6th April.

The meeting reconvened at 9:35 a.m. on Friday, 7th April.

Mr. Beare introduced section 6 of the agenda paper (“Before Loading and After Discharge”), which will be discussed first today in order to accommodate **Mr. Koronka**’s schedule. Prof. Berlingieri’s International Sub-Committee agreed that the scope of coverage of the Hague-Visby Rules is too narrow, and that the Hamburg Rules are also unsatisfactory. **Mr. Beare** invited **Mr. Koronka** to lead the discussion of section 6.

Mr. Koronka gave a general introduction to section 6. He noted that this topic was of particular concern in the container trade, where 20 percent of the costs of transportation are attributable to the sea leg of the journey and 80 percent of the costs are attributable to the times before loading and after discharge. Problems are compounded by the fact that transport documents often fail to specify the full agreement between the parties.

Turning to section 6.2 (“Port-to-port shipments”), **Mr. Koronka** raised the issue of identifying the subsidiary activities that the carrier has agreed to perform (such as stuffing or de-stuffing the container).

Mr. Chandler commented that the character of the transport document (negotiable or non-negotiable) is really irrelevant in this context. The important issue is what the carrier was agreed to do. The reference here should be to the contract of carriage rather than the transport document.

Mr. Koronka protested that “contract of carriage” is too narrow. The contract between the parties covers much more than carriage. For example, it may cover stuffing containers or warehousing the goods.

Mr. Chandler clarified that his point was to focus on the contract between the parties, and not on the documentation that they use to evidence that contract.

Prof. van der Ziel commented that the contract between the parties is one of result. The means of achieving the result are within carrier’s control to a considerable extent. The contract should not need to specify them all.

Prof. Gorton added that our final instrument should not specify what must be in the contract. The parties should be free to specify themselves what the carrier will do.

Mr. Koronka countered that some things should be specified in contract, such as whether the carrier acts as a principal or an agent.

Prof. Zunarelli noted that including the carrier's ancillary obligations in the transport document could have an impact on who is entitled to sue the carrier, whether the carrier can limit its liability, etc.

Mr. Harrington observed that this is a most confusing area, with confusing contractual provisions, different legal regimes, and similar problems. This International Sub-Committee could perform a real service if it could bring some order to the field.

Prof. van der Ziel noted that if the carrier has a tariff, then the tariff should cover these obligations.

Mr. Koronka suggested that this topic might be limited to the most fundamental ancillary issues. Stuffing the container, for example, is fundamental.

Mr. Chandler thought that most shippers do not care how the carrier handles these details.

Mr. Koronka, turning to section 6.2.2 ("Liability for subsidiary activities"), referred to the letter from Dr. Le Garrec, which **Mr. Beare** had distributed at the start of the meeting. **Mr. Koronka** described the letter as generally supportive, but as critical of his use of the term "port authority." He accepted this criticism, and agreed that it would have been preferable to use another term (such as "independent third party").

Mr. Koronka then raised the issue of extending liability inland.

Mr. Rasmussen agreed that extending liability inland was fine in theory, but argued that it should not be extended too far.

Mr. Koronka reminded the International Sub-Committee that we are now discussing port-to-port shipments. The contract should extend until "delivery," which may be outside of the port area. It is not possible to have delivery alongside. The point of delivery is within the carrier's agreement.

Mr. Oland asked **Mr. Koronka** if he anticipated breaking the topic into separate divisions, such as port-to-port and combined transport. He wondered if there might be different liability regimes for each.

Mr. Koronka replied that this was his intention.

Prof. van der Ziel pointed to the precedent of the Warsaw Convention's coverage of pick-up and delivery services. There are many practical deviations from the port-to-port model, such as the "port-to-port" shipment to Antwerp that in fact goes by sea to Rotterdam and then overland to Antwerp.

Mr. Chandler suggested that the title of the section should be "contractual responsibility" rather than "liability."

Mr. Koronka opened the discussion of section 6.3 ("Shipments where more than one mode of transport is contemplated") with section 6.3.1 ("Through bills of lading"). He explained that he distinguished "through transport" (where the carrier acts as an agent for part of the journey) from "combined transport" (where the carrier acts as the principal throughout). He noted that the law of agency is not uniform, and can be very confusing under even a single legal system. Under English law, it is often difficult to determine what an agent's liability may be. He suggested that the International Sub-Committee should specify at least the basic obligations. The carrier should have at least a minimum obligation in selecting an onward carrier on behalf of the merchant.

Mr. Chandler reported that, in many cases, the issuer of the transport document will not admit to being a “carrier.” Some freight forwarders will charge a large fee, and then arrange transportation for one-third that cost. He submitted that true agents do not jack up the price by 300%.

Ms. Pysden agreed that it is important for parties to specify the basis on which they are contracting, but noted that the government should not control the basis on which they contract. Traders have the right to act as either agent or principal. When things go wrong, they may not realize what they were doing. Under English law, agency status is a matter of fact. *Post hoc* characterizations are often the result of a lawyer’s attempts to minimize exposure. All we can do is to set up parameters to identify whether a person was acting as an agent or a principal.

Mr. Chandler insisted that some traders will deliberately seek to hide what they are doing, seeking the benefits of both forms of doing business. Honest ones will make clear what they are doing all along.

Mr. Beare announced that the Working Group will have to make further proposals for discussion at the next meeting.

Prof. Gorton asked whether it would be possible to work with presumptions?

Mr. Beare replied that, unless anyone disagrees, he thought that would be appropriate.

Prof. van der Ziel posed the hypothetical of a shipment from Rotterdam to Moscow, which could be handled in several ways if the carrier considers the transport from St. Petersburg to Moscow to be too dangerous to handle as the principal. One possibility would be to use a through bill of lading, with on-carriage from St. Petersburg to Moscow. Another possibility would be to contract for a port-to-port shipment with delivery in St. Petersburg and enter into a separate contract to arrange for separate carriage to Moscow.

Mr. Koronka declared that he did not wish to outlaw through bills of lading. He noted that **Prof. van der Ziel**’s two hypotheticals change the place where “delivery” will take place. His proposal would not cover the separate St. Petersburg to Moscow shipment.

Mr. Hurst mentioned a third option: a combined transport document where the carrier acts as the principal all the way to Moscow.

Prof. van der Ziel posed another hypothetical involving a shipment from Brussels to the United States. Under applicable conference rules, the shipper pays for the inland shipment to the nearest port at which conference vessels call, which would be Antwerp in this case. But the carrier in question calls at Rotterdam, not at Antwerp. The shipper thus pays for inland carriage from Brussels to Antwerp, but the container in fact goes from Brussels to Rotterdam – and the shipper gets a transport document showing shipment from Antwerp to the United States.

Mr. Beare summarized the discussion with the conclusion that our task is to set out some parameters by which we can identify the basis on which the carrier is contracting.

Mr. Koronka, turning to section 6.3.2 (“Competing identities of the carrier”), referred to the problem of identifying the carrier when there is a

feeder vessel. Continuing with section 6.3.3 (“Liberties”), he discussed the problem of relying on a liberty clause to justify a transshipment that could have been, but was not, noted on the face of the transport document.

Mr. Koronka moved on to section 6.4 (“Combined Transport Bills of Lading”), starting with section 6.4.1 (“Shipped clauses”). He noted the problem of a “shipped on board” bill of lading when the carrier in fact receives the goods well inland. He argued that the historic practice of requiring an “on board” bill of lading is outdated.

Mr. Chandler explained that time-sensitive shipments still require an on board bill of lading, and thus the “on board” date is important.

Mr. von Ziegler observed that shipping on an “FCA” basis makes the on board date irrelevant, although with a shipment on an “FOB” basis the on board date does count.

Mr. Chandler commented that this was the situation now. Often a “received for shipment” bill of lading is all that is required.

Prof. van der Ziel reported that he (representing a carrier) must often resist a shipper’s pressure to issue an “on board” bill of lading when the goods are still on a truck.

Mr. de Orchis noted that in some cases the “on board” notation is significant only to prove that the shipper no longer controls goods.

Mr. Chandler, **Mr. Harrington**, and **Mr. Hooper** all replied that sometimes the “on board” notation is significant for other reasons, and the shipper really does need to know on which ship the goods have been loaded.

Mr. Hooper argued that the parties to the transaction should be free to use whichever method best satisfies their needs.

Prof. Zunarelli explained that, under Italian law, the shipper may lose control of the goods well before they are shipped on board a vessel. A “received for shipment” bill of lading provides just as much security in that regard.

Mr. de Orchis referred to the problem of goods that are damaged before loading, with the result that no bill of lading had yet been issued (because the shipper wanted an “on board” bill of lading). Because no bill of lading had been issued, the shipper could sue the carrier in tort.

Mr. von Ziegler replied that the shipper can have a “received for shipment” bill of lading converted to an “on board” bill of lading after loading.

Mr. Chandler added that many carriers will not issue a bill of lading until the goods are on board the vessel.

Mr. Harrington reported that in Canada, which follows English law, the carrier benefits from the standard bill of lading terms if there was an intent to issue a bill of lading.

Prof. Sturley added that there were cases in the United States to the same effect.

Mr. von Ziegler observed that if the new instrument applies to all contracts of carriage, it will not matter whether transport documents have been issued. It will be necessary only to prove the contract under which the parties operated.

Mr. Koronka turned to section 6.4.2 (“Gaps between compulsory or

identifiable regimes”). He explained that under a “network” regime, liability is based on where the loss or damage occurred. If it is impossible to tell where the loss or damage occurred, then there is an overarching limit. Such a regime is fine when it works, but sometimes the different regimes do not line up to provide full coverage. He proposed that the incidental legs of the transport should be governed by an extension of the regime previously applying until delivery is effected to the carrier on the onward leg identified in the transport document.

Mr. Hooper agreed with the concept of applying the maritime liability regime to subsequent legs. He wondered whether we needed the network principle at all. He suggested it would make more sense to apply the new instrument throughout. This would avoid the problem of proving where the loss took place.

Mr. Rasmussen asked what was intended to be covered. Was the thought to extend the regime from container yard to container yard?

Mr. von Ziegler expressed his view that we should look to what the carrier has agreed to perform, from the time the shipper delivers the goods to the carrier until the carrier delivers them to the consignee.

Mr. Rasmussen replied that this would be his ideal solution, too. He would prefer to cover door to door. But he argued that we should do it on a network basis (for very good reasons that he would not discuss in view of the time constraints).

Mr. Beare confirmed that we need not discuss the network debate here.

Mr. Rasmussen summarized the conclusion that we need a uniform law for sea damages, but should use the network system for localized damages.

Mr. Harrington added that some maritime concepts could not apply in the land context, such as navigational fault.

Mr. Koronka agreed that most transport is now on a network basis, but there is still a problem with the gaps between the main stages of transport.

Mr. Oland asked if carriers want a uniform system of liability or if they preferred a network system.

Ms. Howlett reported that the International Chamber of Shipping does not have a firm view because the answer would depend on what the new regime would be. In the past, the ICS has favored the network system. But she agreed that there is a need to fill the gaps that **Mr. Koronka** has noted.

Prof. Zunarelli suggested that the real problem concerns limitation. If the International Sub-Committee can find a uniform liability regime, that would be very important.

Mr. Chandler thought that having a uniform system would be preferable to dealing with the problems of a network system. Carriers are often surprised to find how great their liability is under the network system.

Mr. Koronka noted that there was a consensus on the need to deal with gaps if the network system is preserved.

Prof. van der Ziel asked what would happen if, for example, the jurisdiction clause in a bill of lading conflicted with the mandatorily applicable CMR regime.

Mr. Koronka replied that we are discussing gaps now, which necessarily

means a time period when CMR does not apply.

Mr. von Ziegler, speaking as the Swiss delegate, suggested that cargo should have the option to proceed under a mandatory regime if it can prove that the regime applies, or to proceed under a new uniform regime. He hoped that ultimately the uniform regime would be more appealing for everyone.

Ms. Schiavi declared that the International Chamber of Commerce also supports **Mr. von Ziegler's** position.

Ms. Pysden replied that a carrier cannot insure itself if it does not know what regime will apply. If the carrier assumes this higher level of responsibility, there must be a *quid pro quo*.

Mr. von Ziegler countered that the same problem already exists under current law.

Mr. Hooper explained that many carriers do not want the network system because they want to keep their customers themselves. They do not want their customers to deal directly with their sub-contractors.

Mr. Beare announced that the Working Group will continue to work on this subject. We may note how to deal with the gap problem, but recognize that there will be no gaps if we can develop a uniform regime. He also stressed the need to receive input from industry, as the lawyers were running behind on these issues.

Ms. Schiavi promised to submit comments in writing on behalf of the International Chamber of Commerce.

The meeting adjourned for coffee at 11:20, and reconvened at 11:40.

Mr. Beare invited **Prof. van der Ziel** to lead the discussion of section 4 ("Delivery and Receipt of the Goods at Destination") of the agenda paper.

Prof. van der Ziel gave a general introduction of the subject and turned to section 4.2 ("Definition of Delivery"). He reported that the prevailing view at the first meeting of the International Sub-Committee was that "delivery" under a contract of carriage is primarily a contractual matter and not a two-sided act. He suggested two ways in which this principle might be worded. The first possibility:

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

An alternative possibility was as follows:

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

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Mr. Rasmussen preferred the first alternative, as the second seemed to require an “actual taking over of the goods.” He nevertheless objected that the first alternative went too far in imposing a legal requirement that the carrier give the consignee notice of arrival.

Mr. Beare asked whether, in drafting, **Prof. van der Ziel** planned to define “consignee.”

Prof. van der Ziel replied that he planned to define “consignee” as “the person entitled to take delivery of the goods” (without getting into the basis for entitlement).

He admitted that the legal obligation to notify the consignee is new, but noted that it relates to subsequent material. If the consignee has an obligation to take delivery, the carrier must provide notice.

Mr. Hooper read the first alternative as providing an option for the parties’ agreeing on the time of delivery. He wondered whether this would give rise to delay claims. Also, he wondered whether this covered delivery to a port authority when that is mandatory?

Mr. Koronka predicted that there would be disagreement about when the goods were at the disposal of the consignee. He found “at the disposal of the consignee” to be a vague term, with no time period specified. He suggested that the rule should permit a “reasonable period after notice.”

Prof. van der Ziel explained that he had not meant a notice that goods are now at the consignee’s disposal, but a notice of the ship’s estimated time of arrival.

Mr. Koronka found that solution fair enough in bulk trades, where the consignee must show up to meet the ship, but argued that the arrival of vessel is in fact irrelevant in container trades. Delivery takes place much later.

Prof. Gorton reminded the International Sub-Committee that this definition is also important in starting the time bar period.

Mr. Beare noted that we will need to return to this problem when we address liability issues.

Mr. Rasmussen disagreed with what he saw as the implications of **Mr. Koronka**’s comments. The consignee should not have the power to extend the liability of carrier indefinitely.

Mr. Koronka agreed that the consignee should not be permitted to extend the liability of carrier, but argued that there should be a reasonable opportunity for the consignee to collect the goods before there is an artificial “delivery.” The basic principle is that the carrier is responsible for the goods while they are within the carrier’s control.

Prof. van der Ziel explained that if the consignee does not appear to take the goods, the carrier’s basis of responsibility shifts. The carrier would no longer be responsible under the contract of carriage, but on some other basis.

Mr. Oland foresaw carriers’ defining “delivery” in the contract of carriage as the moment that the container hits the dock, even though the container will still be put in storage. He felt there is a need for greater certainty.

Mr. Beare suggested that **Prof. van der Ziel** proceed on the basis of alternative 1, perhaps preserving some of the second alternative in the commentary.

Prof. van der Ziel introduced the discussion of section 4.3 (“Time of Delivery and Discharge”). He proposed the following draft for discussion:

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

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

The bracketed language in the first paragraph raises the “FIO issue” — what is the effect of an FIO [free in and out] clause on the “delivery” definition. One view regards the FIO clause as determining the scope of the contract of carriage: It shortens the duration of the contract until a certain moment before discharge. The other view is that, whatever the intention of the parties, a carrier can never escape its mandatory responsibility for a proper discharge of the goods.

Ms. Pysden mentioned that in cases where goods are delivered to an authority acting on behalf of the consignee, the issue of notice becomes particularly important.

Mr. Rasmussen predicted that the FIO issue was the only controversial point here. He thought that the parties should be allowed to limit the scope of their agreement with an FIO clause.

Mr. Gombrii agreed with **Mr. Rasmussen**. He noted that the result may be that carrier who is negligent after constructive delivery but before discharge will lose the protection of the contract of carriage and the liability regime. He added that the draft should mention security for the carrier’s costs after delivery.

Mr. Chandler commented that the draft should not say that the contract is at an end upon delivery. It is only the obligations under the contract that end on delivery. Some clauses in the contract (such as the jurisdiction or arbitration clause) should continue in force even after the contract is fully performed.

Prof. van der Ziel introduced the discussion of section 4.4 (“Discharge of the carrier of his obligations under the contract of carriage”). He proposed the following draft:

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

Mr. Harrington asked how this proposal would work in the case where an ocean carrier delivers a container to a railroad for on-carriage.

Prof. van der Ziel replied that the answer would depend on the type of contract of carriage, port-to-port or combined transport.

Prof. van der Ziel then proceeded to the discussion of section 4.5

(“Relation with other contracts”). He gave two examples of the issues raised: an FOB seller’s receiving the documents, or the stevedore’s receiving an estimated time of arrival notice. He proposed the following draft:

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

He clarified that “any other person” would include consignees, FOB shippers, intermediate bill of lading holders, and actual carriers. The circle may be drawn wider so as to include, for example, Himalaya clause beneficiaries and possibly others.

Ms. Pysden foresaw a difficulty in that the parties will be unable to tell what other related contracts exist. A duty imposed here may cause a beach under another contract.

Mr. Chandler did not see what this new obligation would accomplish. He felt that it is too loose to be of any real help.

Mr. Rasmussen did see the purpose, but still thought that this draft is too imprecise to do any good. It would simply foster litigation.

Mr. Koronka recalled **Mr. Diamond**’s earlier observation that “the devil is in the details.”

Prof. van der Ziel explained that the proposal here is simply to give legal recognition to existing practice.

Mr. Beare observed that the support for this proposition is luke-warm at best, and asked **Prof. van der Ziel** if he could revise the language to address the concerns.

Mr. von Ziegler asked if we could identify the practical situations in which this proposal would apply, and see if we can solve those practical problems.

Prof. Gorton thought this seemed like an obligation to act in good faith generally. He felt that we must either be more specific or avoid creating new legal obligations.

Mr. Gombrii noted that under most legal systems there is a duty of loyalty under a contract, albeit with different names in different systems, and they are all a little different in operation.

Mr. de Orchis feared that this proposal would end up making the sea transport document subservient to ancillary contracts.

Prof. van der Ziel continued with the discussion of section 4.6 (“Obligation of the consignee to accept delivery of the goods”). He explained that he had sought to draft principles for this section together with the principles for sections 4.7 and 4.8, and that all of the drafting was included in section 4.9 of the agenda paper. The three paragraphs relevant here are as follows:

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

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

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

Mr. Rasmussen felt that it is marvelous idea that is expressed here. The concept is extremely useful, and we should proceed on this basis.

Prof. Zunarelli doubted the practicability of imposing a precise obligation on the consignee to accept delivery of the goods. The consignee is entitled to enforce the contract of carriage, but there is no basis in principle or practice to impose liability on the consignee.

Prof. van der Ziel explained that the consignee is entitled to delivery only after becoming a party to the contract, and once it has become a party it is also obliged to take delivery.

Prof. Zunarelli predicted that problems would arise in Italy from the broad definition of "consignee."

Mr. Chandler argued that the draft must clarify that the consignee is a party to the contract of carriage. Sometimes a company identified as the "consignee" is named in the bill of lading, but it is unaware of the contract, or the documents are still with the banks.

Prof. van der Ziel explained that if the consignee is not known (as, for example, in the case of an anonymous bill of lading holder), then the obligation to take delivery would shift back to the shipper. He added that with an electronic system, the carrier would know who is the consignee.

Mr. Chandler noted that with an electronic system, the consignee must "sign on," which provides a level of protection.

Mr. Koronka argued that this proposal undermines the entire bill of lading system. With an order bill of lading, the shipper is rarely the party to whom the carrier should look for instructions. It is unwise to weaken the value of the bill of lading by returning the control of the goods to the shipper who has already sold them in a documentary transaction.

Prof. van der Ziel responded that a bill of lading has multiple purposes, and one purpose is undermining the other.

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Mr. Koronka stressed the public policy reasons to maintain the value of the bill of lading.

Mr. von Ziegler suggested that commercial practice has undermined the traditional role of the bill of lading. The carrier should be relieved of liability if the consignee does not appear at the port of destination.

Mr. Chandler agreed that “the cat is already out of the bag.” The bill of lading no longer serves its traditional role in many situations.

Mr. Oland agreed with much of what **Mr. Koronka** said. He wondered what mischief this proposal was designed to solve. If the consignee does not appear, the carrier can leave the goods with the port and eventually they will be sold.

Mr. Rasmussen wondered how this proposal hurts consignees. It simply requires consignees to do what they have already contracted to do.

Mr. Koronka explained that sometimes consignees cannot take delivery of the goods because the documents are held by a bank. This proposal is pushing everyone into the waybill system, and that system is already available for parties who wish to use it.

Prof. Zunarelli agreed that there was a need to solve the carrier’s problem of the consignee’s failure to appear, but also agreed that we should not undermine the bill of lading system. He had a problem with third paragraph of the draft.

Mr. Gombrii expressed reservations with imposing an obligation on a consignee who may not be a party to the contract.

Prof. Zunarelli responded that this proposal only applies to the consignee who has acceded to the contract, which is done by requesting delivery. What it seems to say is that a party who requests delivery must take delivery.

Mr. de Orchis asked what alternatives the carrier has. When no one appears to take delivery, it seemed to him that the carrier must store the goods (perhaps indefinitely), abandon the goods, or take the shipper’s instructions.

Prof. van der Ziel observed that the biggest problems arise when the goods have a negative value. The issue then arises as to who should bear these costs.

Mr. Koronka felt comfortable imposing those costs on the shipper, but repeated that the shipper should not regain control over the goods when a third party holder has succeeded to the shipper’s title.

Mr. Oland viewed the mischief as arising after the contract of carriage had been completed. The problem does not seem great enough to justify this treatment.

Mr. Gombrii had no problem with a risk allocation that imposes costs on the shipper, but did have a problem with imposing new obligations on the consignee.

Ms. Pysden asked what would happen if the shipper is insolvent.

Mr. Beare responded that all we can do today is to define the parameters of the controversy, and he felt that we had done that.

He noted that the final topic in this section was delivery without production of the bill of lading in the discharge port. This is also very

controversial, and the arguments are similar to those we have already discussed. He assumed that we all see the parameters there, as well.

The meeting adjourned for lunch at 1:15, and reconvened at 2:20.

Mr. Beare invited **Mr. von Ziegler** to lead the discussion on the fifth topic in the agenda paper, “The Rights of Disposal and the Right to Give Instructions to the Carrier.”

Mr. von Ziegler quickly covered sections 5.1 (“Introduction”), 5.2 (“What rights of the disposal does one have?”), and 5.3 (“Who has the right of disposal?”). The first decision to be taken is in section 5.4 (“When and on what basis does the identity of the holder of such right change?”). The answer depends on the type of document. We will first address the sea waybill context.

Mr. Diamond noted that under the CMI Rules, there were very limited rights in a third party under a sea waybill.

Mr. von Ziegler commented that the CMI Rules offer one solution, which he described as a very common-law approach. The Continental approach, which is found in CMR and the Warsaw Convention, would give more rights to the consignee.

Mr. Chandler observed that an additional right that was not mentioned in the agenda paper is the splitting of a single bill of lading into multiple bills of lading.

Mr. de Orchis added that replacing a lost bill of lading was another such right.

Mr. Diamond saw the value in being able to transfer rights to the consignee more readily than is presently available. He proposed that the International Sub-Committee should start with the CMI Model Rules, and consider how to extend them.

Mr. von Ziegler suggested that the parties might have the option to extend the Rules by contract.

Mr. Diamond reported that many such clauses exist now, but one wonders how effective they are in the absence of any statutory authority. The new instrument that we hope to produce may give the necessary authority.

Prof. van der Ziel noted that a sea waybill is simply evidence of a contract between the carrier and the shipper. The carrier must sign an original, but it does not matter if the carrier signs one or ten copies. It is only evidence of a contract. The presumption is that the shipper has the right of disposal until (1) the consignee demands delivery, or (2) delivery takes place.

Mr. Diamond stressed that it is essential for the carrier to know to whom delivery must be made. The shipper cannot transfer that right to the consignee without notifying the carrier.

Prof. Zunarelli raised questions about the right of stoppage in transitu.

Mr. Chandler explained that instructions to the carrier cannot be given so late that carrier can no longer follow them.

Mr. Diamond warned that we are approaching a very obscure area of law. Stoppage in transitu is a peculiar right that is little understood in practice, and differs among countries. The right to change instructions is a different right.

Mr. Chandler agreed that many countries do not recognize these rights, or recognize them in very different forms.

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Mr. Diamond added that, in English law, stoppage in transitu is an issue of sale law that cuts across carriage law.

Mr. von Ziegler suggested that for sea waybills we draft along the lines of the CMI Rules, and then test examples of problems against that draft. He then turned the discussion from waybills to bills of lading.

Mr. Diamond felt that the possession of one bill of lading was enough to transfer rights (just as the transfer of one bill of lading is enough to transfer ownership)

Prof. Sturley countered that if the holder of a single bill of lading demands delivery, the others in the set “stand void.” But if the holder of one bill of lading changes the place of delivery, for example, the holders of other copies in the set still have their rights.

Mr. von Ziegler noted that, for electronic documents, the system works with a private key, so these difficulties would not arise.

The discussion proceeded to section 5.5 (“What proof of identity does the holder of the right have to produce in order to exercise his right?”) and section 5.6 (“What are the conditions the holder of the right of disposal has to meet when exercising its right of disposal?”).

Mr. Diamond saw no need to provide for the case where the parties, by mutual consent, renegotiate their contract.

Mr. von Ziegler explained that we must merely identify who has the right to negotiate changes without violating the original contract. There is no requirement that the carrier agree to a new contract.

Prof. Zunarelli mentioned that the draft should clearly distinguish between cases when the carrier must accept instructions and when the carrier may negotiate.

Mr. von Ziegler asked about a division of consignment, noting that the CMR does not permit instructions that result in a division of the consignment.

Prof. van der Ziel replied that the splitting of bills of lading is very common in practice.

Mr. von Ziegler asked whether the carrier must notify the holder when it is unable to carry out instructions.

Mr. Diamond thought that this was not a problem in the bill of lading context, and wondered whether there was any point in addressing the issue here. What would be added to existing law?

Mr. von Ziegler explained that there was no point in making a distinction among waybills, bills of lading, and electronic documents. The person who gave the instructions should simply know that the carrier refused to follow them.

Mr. Beare asked whether this would impose a duty on the carrier that would give a right to damages if it were breached.

Prof. van der Ziel thought that the burden on the carrier would be minimal. It is essentially the burden of answering the instructor’s question.

Mr. von Ziegler proceeded to section 5.7 (“Who is liable for eventual additional costs resulting from such instructions?”).

Mr. Chandler expressed concern about the lien that would be created, especially in the “freight pre-paid” situation.

Mr. Hooper responded that if the carrier is changing the bill of lading, the “freight pre-paid” notation could be removed, too.

Prof. Zunarelli agreed. If the lien is going to bind a third-party holder, it must be noted on the bill of lading.

Prof. Sturley proposed one solution, which would be to define “freight pre-paid” to mean that the carrier waives all liens.

Mr. von Ziegler proceeded to section 5.8 (“Against whom can the right of disposal be enforced?”). He noted that his own inclination was to permit instructions to be given only to the contractual carrier.

Mr. Chandler asked what would happen if the contractual carrier is bankrupt.

Mr. von Ziegler replied that this was a problem beyond our mandate. He proceeded to section 5.9 (“In what situations should the carrier seek instructions from the cargo interests; how will he be able to find the rightful “holder” of the right of disposal?”).

Mr. Diamond expressed the view that section 5.9 raises many problems.

Mr. von Ziegler concluded that we must table the issue as one for discussion unless someone has a solution. He wondered if we could entitle the carrier to demand a “notify party” to whom notices could be given.

Mr. Oland asked what the sanction would be if the shipper fails to name a “notify party.”

Mr. Rasmussen wondered in what context this issue will matter.

Mr. von Ziegler explained that he did not want to create new obligation for the carrier, but to give the carrier some assistance when instructions would be helpful.

Mr. Chandler observed that we have a solution for this problem in the case of dangerous goods. There is always a person listed for notification. That regime could be extended to all cargo.

Mr. Diamond added that there are situations where a carrier is obligated to contact the cargo owner. [He quoted from the British Maritime Law Association answer to the questionnaire.]

Mr. Beare concluded that the draftsmen have their work cut out for them. He reminded the International Sub-Committee that he had proposed yesterday that **Prof. van der Ziel** and **Prof. Sturley** be appointed to draft, and asked if there was a consensus in support of this proposal. [No one present disagreed with this proposal.]

Ms. Howlett asked when can the draft would be available.

Mr. Beare replied that the plan was to complete a preliminary draft by the end of May, along with a working paper for discussion of liability issues (based on the report of Prof. Berlingieri’s International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea).

Ms. Burgess asked when electronic commerce will be factored into process.

Mr. von Ziegler replied that the product of the July meeting will be referred to the EDI Working Group.

Ms. Schiavi volunteered that the International Chamber of Commerce is also very interested in being an active participant in that review.

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Mr. Hooper advised the International Sub-Committee that the American Bar Association is meeting in New York in early July, so that members should make their hotel reservations early.

Mr. Beare reminded the International Sub-Committee that the final meeting before Singapore would be held in mid-October, and was tentatively scheduled for the 16th and 17th. He asked if London would be an acceptable venue for this meeting. [There was no objection.]

Mr. de Orchis asked about the Toledo meeting.

Mr. Beare explained that the Toledo meeting was a colloquium that was co-sponsored by the Comité Maritime International and the Spanish Maritime Law Association. The International Sub-Committee would not meet in conjunction with that colloquium, but members were of course welcome to attend.

The meeting adjourned at 3:40 p.m.