

**REPORT OF THE THIRD MEETING OF THE INTERNATIONAL
SUB-COMMITTEE ON ISSUES OF TRANSPORT LAW****NEW YORK, 7TH AND 8TH JULY 2000**

Present: Patrick J.S. Griggs (President of the CMI)
Frank Wiswall (Vice-President 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 (Canada; member of the Working Group)
Paul Koronka (member of the Working Group)
Prof. Gert Jan van der Ziel (The Netherlands; member of the Working Group)
Prof. Avv. Stefano Zunarelli (member of the Working Group)
James Harb (Australia and New Zealand)
Prof. Yuzhuo Si (China)
Dihuang Song (China)
Liming Li (China)
Prof. Francesco Berlingieri (Italy)
Prof. Tomotaka Fujita (Japan)
Vincent de Brauw (The Netherlands)
Karl-Johan Gombrii (Norway)
Anthony Diamond Q.C. (UK)
Vincent M. De Orchis (USA)
Chester D. Hooper (USA)
George F. Chandler, III (USA)
Jernej Sekolec (UNCITRAL; member of the Working Group)
Kay Pysden (FIATA)
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)
Søren Larsen (BIMCO)
Andrew J. Garger (IUMI)
Stephen M. Miller (USA Department of State)

Mr. Beare called the meeting to order at 10:03 a.m. on Friday, 7th July. He referred to the draft report of the second meeting of the International Sub-

Report of the third meeting of the I-SC

Committee, which had been held in London, 6-7 April. The draft had been circulated in advance, and copies were also available at this meeting. **Mr. Beare** invited members to make any corrections or revisions that were necessary.

Mr. Diamond expressed his concern that the draft report noted in brackets at various points that there had been a consensus in support of a particular proposition. Although that may be right, it does not mean that people were by any means unanimous or that people may not have had reservations about a number of things. He wondered whether it was helpful to say there is a consensus in support of a point that had not been put to a vote. **Mr. Diamond** thought that it could lead to misunderstanding, and he would prefer that the record be amended. [No one present disagreed with this suggestion, and the draft report of the second meeting was approved subject to this amendment].

Mr. Beare reported that he had received a note from Professor Si on behalf of the China Maritime Law Association at the time of the second meeting. Unfortunately, this note arrived too late to be circulated to the International Sub-Committee then, but he had circulated it to the members of the Working Group after the meeting. The note has now been photocopied and is available at this meeting. The China Maritime Law Association has also submitted a note on the agenda paper for this meeting, which has also been photocopied and is available at this meeting along with the written paper that Professor Si presented at the UNCITRAL/CMI Colloquium yesterday.

Mr. Beare continued that he had received a note from the Maritime Law Association of Australia and New Zealand, principally relating to electronic commerce. This note has also been photocopied and is available at this meeting. Finally, this morning he received a submission from the International Group of P&I Clubs, which has also been photocopied and is now available.

Mr. Beare alerted the International Sub-Committee of the need to set the schedule for the next meeting, which would be held either 12-13 October or 16-17 October. **Mr. Harrington** noted that a meeting on 16-17 October may conflict with the IMO meeting, while **Mr. Wiswall** noted that a meeting on 12-13 October would conflict with the a meeting of the Joint International Working Group on Piracy. [A brief discussion of the relative merits of the two proposals followed.]

Mr. Beare reminded delegates that the Toledo Colloquium will be held 17-20 September, sponsored by the Spanish MLA and the CMI. **Mr. Griggs** has registration forms.

Mr. Beare informed the Sub-Committee that the Issues of Transport Law project was discussed in the General Assembly of UNCITRAL on Monday, 3 July. The meeting took note of the report prepared by the UNCITRAL Secretary General, copies of which are available. It notes that the work on which we have been proceeding really does involve some consideration of liability issues, and that fact was noted by the meeting. A number of the delegates expressed continuing support for this project quite strongly.

Mr. Sekolec confirmed **Mr. Beare's** report. He also commented on the colloquium held at the United Nations yesterday, 6 July, which was favorably received by the government delegates. The delegates are concerned, though,

that they not be presented with a finished product by a group (or groups) that does not have unanimous support within the industry.

Mr. Beare asked what should go forward from the CMI to UNCITRAL. If the resolution of the closing session in Singapore, for example, were to propose that the draft instrument considered at Singapore should be recommended to UNCITRAL as a basis for further work by UNCITRAL in conjunction with the CMI, would that sort of resolution be acceptable to UNCITRAL?

Mr. Sekolec replied that this would indeed be acceptable. He explained that as soon as there is a text of possible solutions, perhaps with alternatives and perhaps with some points still to be addressed, the UNCITRAL Secretariat would immediately proceed to put it into an official report by the U.N. Secretary General. It would be before UNCITRAL (in the six official languages) at the next Annual Session, which will start on 25 June 2001 in Vienna. He hoped that the CMI would be represented, because there the Secretariat would present the substance of the future work to the Commission. The Secretariat would then propose that UNCITRAL establish an Intergovernmental Working Group, which is a committee of the whole of UNCITRAL analogous to the CMI's International Sub-Committee. This Working Group would then deal with the subject and bring it to its mature form, ultimately returning to the intergovernmental forum to propose a diplomatic conference or some other appropriate action.

Mr. Beare thanked **Mr. Sekolec** for his explanation. He then turned to the agenda paper for this meeting. He noted that the first section, "General Issues Relating to Contracts of Carriage Where Sea Carriage Is Contemplated," had not been discussed in a structured way at the April meeting. It had only been put on the table for discussion at the last meeting.

Before starting the discussion on this topic, **Mr. Beare** made a brief comment from the chair. It has always been the objective of the CMI to achieve uniformity or harmonization of the law. As **President Griggs** explained at the UNCITRAL Colloquium, the CMI is *not* a law-reforming institute.

Mr. Beare then invited **Prof. Berlingieri** to speak, noting his contribution to the preparation of the second section of the current agenda paper ("Liability Regime") in his capacity as the chairman of the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea.

Prof. Berlingieri suggested that the International Sub-Committee should discuss the issues of section 1 before turning to liability issues. Whether we address issues of multimodal transport will affect liability issues. Although the original purpose had been to cover only carriage by sea, the comments at yesterday's UNCITRAL Colloquium suggest that the International Sub-Committee ought to give some consideration to the possibility and convenience of going beyond carriage by sea and considering the multimodal transport.

Mr. Beare explained that Alexander von Ziegler, as CMI Secretary General, construed the International Sub-Committee's terms of reference to cover carriage by sea plus ancillary services. He suggested that views should be taken and reported to the Executive Council, which could then expand the terms of reference at its next meeting in September.

Mr. Chandler recalled that the original request from UNCITRAL was to address carriage of goods that included carriage by sea. He thought it would be unrealistic to avoid covering multimodal issues today, when most liner service is “door to door.”

Prof. Gorton generally agreed. The project began with carriage by sea plus ancillary services, and that should remain the primary focus. He felt that broader coverage would be more practical, but was concerned that time constraints might preclude properly covering multimodal issues.

Mr. Sekolec reported that the Economic Commission for Europe is considering a project with full multimodal coverage. UNCITRAL was discouraging that work on the ground that UNCITRAL was already addressing multimodal issues in this project. These issues should be part of the program.

Prof. Gorton asked whether the goal was a new multimodal convention or a practical solution along the lines of the network principle.

Mr. Sekolec replied that it was too early to say yet. We should not prejudge the substance of the solution. We just have to make sure that the users and the service providers have practical solutions for warehouse-to-warehouse transport, whatever those solutions may be.

Mr. Diamond declared that the British Maritime Law Association welcomes the Working Group’s initiative in considering a possible future liability regime and whatever follows from it. It was nevertheless difficult to express specific views on the question without an opportunity for consultation. **Mr. Diamond**’s personal view was that it made no sense to negotiate a new convention that is exclusively maritime. It would run into all of the problems of Hamburg Rules. He suggested that the Working Group should produce a consultation paper.

Ms. Pysden observed that taking the project beyond the Hague Rules’ tackle-to-tackle limit naturally affects the freight forwarding industry. It also runs into many blurry lines. The CMI is well situated to address these problems, and other industry groups are looking to the CMI for leadership. There is no reason to shy away from multimodal issues.

Mr. Larsen agreed with **Prof. Gorton**’s and **Mr. Diamond**’s concerns regarding the time constraints. Multimodal transport is the predominant way of doing business today but unimodal business still exists. He suggested that we start with the unimodal regime, then see what we can add.

Prof. Zunarelli commented that almost all of the speakers at yesterday’s UNCITRAL Colloquium referred primarily to multimodal issues. That is the core of the problem. It is very difficult to draw a line here. His personal preference was to proceed, as **Mr. Sekolec** has suggested, on the assumption that the project will ultimately address multimodal problems.

Mr. de Brauw suggested that the project should start with carriage of goods by sea, keeping in mind that it may later be expanded to address multimodal problems.

Mr. Beare asked if it would be acceptable to proceed with the agenda paper on the understanding that the Working Group would consider how the project should be enlarged to address multimodal issues (subject to the Executive Council’s approval).

[No dissent was expressed.]

Mr. Beare invited **Prof. Berlingieri** to comment on section 1 of the agenda paper.

Prof. Berlingieri explained that he had a few comments. The title of section 1.3 refers to “more than one mode,” which suggests multimodal issues. But there can be a contract performed by more than one carrier, all of which operate by sea. In other words, there can be one mode with multiple carriers. This distinction should be made clear. It is also important to agree on the terminology. Terms such as “through carriage” and “combined transport” will not mean the same thing to everyone.

Mr. Diamond suggested that it would be good to encourage commercial parties to clarify their contracts of carriage so that it would be possible to tell what obligations were being assumed. He nevertheless feared that this would do no good. Commercial parties will probably not be influenced by what some body from afar tells them they should do by way of drawing up their contracts. There is no practical sanction that can be applied if the parties continue to produce unintelligible and incomplete documents.

Mr. Harrington explained that much of the litigation in Canada is on the import trade, where the plaintiff is the innocent purchaser of the cargo. Often the documents setting out the obligations that the carriers assume (such as supplying electricity to a refrigerated container, for example) refer to the carrier’s tariff, which is unavailable to the consignee. He wondered if the document that actually goes to the purchaser could include a specification of the activities for which the carrier is responsible.

Mr. Song asked whether the section on port-to-port shipments would include vessel-to-vessel operations, which have become very popular in the oil trade. Sometimes the vessel-to-vessel transfer takes place on the high seas, and not in a port.

Mr. Koronka replied that the answer would depend on how the transport document is drawn up.

Ms. Schiavi offered some general remarks on behalf of the ICC. She summarized the consultative process within the ICC. She then commended the CMI/UNCITRAL initiative, and noted that the ICC supports the development of voluntary business solutions, such as UCP 500 and Incoterms.

Mr. Chandler argued that much of the language in this section seems relevant only to charter party bills of lading. The focus here should be on liner bills of lading. The liner bill of lading always lays out the terms.

Mr. Koronka disagreed. There are many things that can be agreed between the parties that a third-party holder would like to know. Maybe the carrier stuffed the container; maybe it had nothing to do with it. That information should be on the transport document.

Mr. Diamond raised the distinction between legislation and guidelines for good practice. Of course it is good practice to prepare the documents clearly, but it is difficult to give that obligation any teeth with legislation.

Mr. Hooper asked if the goal is to permit the carrier to limit liability for only a part of the period from receipt to delivery.

Mr. Koronka replied that the goal is to define the carrier's contractual liabilities by defining what the carrier has agreed to do.

Prof. Zunarelli questioned the use of the word "must" in proposition 1.2.1, which declares: "Any document or other evidence of a contract contemplating the carriage of goods by sea where the carrier agrees to perform activities between the time of the receipt of the goods and the time of delivery in addition to those relating to the actual performance of the carriage itself, *must* specify those additional activities and the terms on which it has been agreed that those activities will be performed." What sanctions could there be if the transport document did not specify those additional activities? Presumably the contract would still be valid.

Mr. Diamond questioned the reference to "the actual performance of the carriage itself." The Hague Rules mention stowing, loading, handling, etc. Should the Rules mean that the carrier must perform all of the "actual performance"? In England, the Hague Rules are construed to require the carrier to do only so much of the carriage as the carrier agreed to perform.

Prof. van der Ziel added that the same issue arises in regard to performance by the shipper.

Mr. Koronka noted that the Maritime Law Association of Australia and New Zealand's submission raises a related issue with reference to controlling the temperatures in refrigerated containers.

Prof. Berlingieri submitted that there must be some responsibilities that the carrier cannot exclude from the contract.

Mr. De Orchis wondered what 1.2.1 is intended to accomplish. If the purpose is to let the parties know that before loading or after discharge they will be subject to a different liability regime than is specified in the transport document, that would be useful. On the other hand, it would be silly to require the carrier to specify all of the normal activities that are regularly performed as part of the service.

Mr. Beare invited comments on part 1.3.

Mr. Harrington noted that the issues addressed here could affect, for example, the subrogation rights of underwriters. He expressed concern that underwriters not raise objections at the end of the process.

Mr. Garger volunteered to pass along those concerns to IUMI so that it could provide its views at an early stage of the proceedings.

Mr. Diamond expressed reservations about 1.2.2 ("Responsibility for subsidiary activities").

Prof. van der Ziel assumed that 1.2.2 is intended to be similar to the Warsaw Convention's application to pick-up and delivery services.

Mr. Koronka confirmed that this is correct.

Mr. Diamond confessed that he had always been unclear when "pick-up and delivery" ends and when full multimodal transport begins. He suggested that these issues need careful attention. On 1.3.1, he saw merit in specifying the carrier's duties when acting as an agent. Too often, carriers seek to evade all liability because they are "agents".

The meeting adjourned for coffee at 11:15, and reconvened at 11:35.

Mr. Beare resumed the discussion of the agenda paper with 1.3.1.2

(“Identity of the carrier”). He noted that **Mr. Diamond** had suggested postponing this issue, and invited other comments.

Mr. Harrington explained that he had never liked the standard identity of carrier clause (which provides that the contract is with the ship owner, unless the ship has been chartered by demise, in which case the contract is with the demise charterer). In many jurisdictions, the demise charterer is not registered and there is no effective way for a subsequent holder of the bill of lading to know who is the contracting party.

Mr. de Brauw asked how broadly 1.3.1.2 is intended to apply.

Mr. Koronka explained that 1.3.1.2 is intended to address only the situation in which the transport document has a clause referring to “the owner of the ocean vessel” and there are two ocean vessels.

Prof. Berlingieri countered that this is not really an “identity of carrier” issue, but an “identity of ocean leg” issue. Perhaps the section should be renamed.

Mr. Hooper suggested that there should be a definition of “transshipment,” which is used in 1.3.1.3 (“Liberty Clauses”). The term is used in different ways.

Mr. Miller advised consulting with the shipping industry on this issue because transshipment is so common now.

Mr. Beare observed that the International Sub-Committee had anticipated the issues of 1.3.2 (“Combined Transport Bills of Lading”) in the multimodal context. He proceeded to 1.4 (“Issues common to all three types of carriage”).

Mr. de Brauw suggested that 1.4.1 (“Interchange receipts”) is impractical. A carrier will often be unaware of interchange receipts.

Mr. Koronka replied that this issue is also particularly relevant if we proceed with a network system. He added that the Maritime Law Association of Australia and New Zealand’s comments suggest a wider obligation on the carrier, going beyond interchange receipts. They seem to impose a more explicit obligation on the carrier to produce documentation in relation to refrigerated cargo.

Prof. van der Ziel noted that the same principles could apply for all sorts of documents, such as log books.

Mr. Beare turned to section 2, the Liability Regime. He explained that 2.1 is introductory. Although views might vary regarding the classification of other regimes, that would not be particularly relevant. The classifications are merely examples, illustrating perhaps different drafting techniques. The substantive discussion should begin with 2.2 (“Basis of liability”).

Ms. Schiavi reported that the ICC considered any recommendation of including an article to the effect of article 41 of CMR (*i.e.*, making the new transport convention “mandatory in both ways” and prohibiting any contractual derogation from the instrument) would constitute a restraint of trade.

Mr. Harrington expressed his personal view that presumed fault leads to litigation. He felt that a stricter liability regime would be preferable. In civil law terms, there should be an obligation of result.

Mr. Hooper noted that there had been a lot of jurisprudence over the years construing the Hague and Hague-Visby Rules. The Maritime Law Association of the United States would like to preserve as much of that as possible. It would be valuable to preserve the catalogue of defenses (article 4(2)) in order to give the courts some specificity.

Mr. Diamond suggested that this was all about risk allocation, which is a commercial question. Our personal views are irrelevant. These issues cannot be resolved until the diplomatic conference.

Mr. Beare countered that it was possible to identify the main contenders.

Mr. Diamond proposed that the main contenders range from CMR, which he described as almost strict liability with a force majeure exception, to the Hague-Visby Rules, which excuse the carrier for navigational fault. There are a lot of stages between these extremes.

Prof. Berlingieri argued that the focus on “presumed fault” was misleading. The real issue is the allocation of the burden of proof.

Prof. Gorton reported that there had been very little litigation in Scandinavia since the new codes (which are based on fault) came into force. He wondered if the concept of “fault” was any more complicated for the carriage of goods by sea than it was in other contexts.

Mr. Harrington argued that it is.

Mr. De Orchis felt that the real question was whether the industry has yet reached the position that it can virtually guarantee performance. He submitted that it has not. Carriage by sea is still an adventure.

Mr. Chandler observed that, in many ways, the Hague-Visby Rules do represent strict liability. The carrier has the possibility of escaping liability under article 4(2), but those defenses are often hard to prove. In the absence of a defense, the carrier is liable. Settlement is much easier in the maritime context because there is not an open-ended “reasonableness” standard.

Prof. Berlingieri explained that the concept of “strict liability” is a mystery for civil lawyers. He asked what was meant by “strict liability.”

The meeting adjourned for lunch at 12:15, and reconvened at 1:10.

Mr. Harrington, responding to **Prof. Berlingieri**’s question, referred to the paper submitted by the International Group of P&I Clubs. It described the Hague and Hague-Visby Rules as fault-based, which is an “obligation of means” in a civil law system. Insurance is an “obligation of guarantee”. “Strict liability,” even with some exceptions (such as force majeure), would be an “obligation of result”.

Mr. Diamond proposed four alternative approaches that could be practical:

- (1) Maintain the approach of the Hague and Hague-Visby Rules with the catalogue of exceptions, including negligent navigation and management.
- (2) Maintain the approach of the Hague and Hague-Visby Rules with the catalogue of exceptions except for negligent navigation and management.
- (3) Establish a regime based on whether the carrier used reasonable means to perform the carriage.

(4) Impose liability on the carrier unless it is able to show something akin to force majeure.

Mr. Diamond did not feel that anything stricter than possibility (4) would be practical.

Mr. Beare observed that only options (3) and (4) would require new drafting. Option (2) requires only the deletion of article 4(2)(a) of the Hague and Hague-Visby Rules.

Mr. Diamond suggested that option (3) could be modelled on article 4(2)(q) of the Hague and Hague-Visby Rules.

Prof. Gorton noted that option (4) is similar to the liability of the seller under the non-mandatory Vienna Sales Convention.

Mr. Beare asked whether the Working Group should prepare drafts based on options (3) and (4).

Prof. Zunarelli proposed that the drafting for option (4) should stay as close as possible to the language of CMR. This would give predictability to people in the trade.

Prof. Sturley wondered whether the interpretation of CMR has been consistent. If the courts have not construed CMR consistently, then using the CMR language will not promote predictability.

Prof. Berlingieri commented that options (1) and (2) always allow the consignee to prove the carrier's fault. The real point of the catalogue of exceptions is to allocate the burden of proof.

Mr. Diamond observed that the new U.S. COGSA proposal had introduced an interesting idea for dealing with the multiple causation problem, when the loss is caused in part by something for which the carrier is responsible and in part by an excepted peril.

Prof. Berlingieri added that the Hamburg Rules also address this problem.

Mr. Beare mentioned that this issue is raised in the agenda paper at 2.4.5.

Mr. Diamond assumed that different countries may approach this problem in different ways. It might therefore be valuable for the convention to clarify the result. He saw two possibilities: Under the new U.S. COGSA proposal, there is an apportionment. Alternatively, the carrier could be held fully liable whenever it is shown to be responsible for part of the loss unless it can prove the extent to which it should be exonerated.

Prof. Gorton reported that under the Scandinavian regimes the carrier is fully liable if its fault contributed even slightly to the loss. Apportionment would be an improvement.

Mr. Beare invited **Mr. Hooper** to comment on apportionment.

Mr. Hooper explained the pending U.S. COGSA proposal on this issue, which is based on the collision model. He saw apportionment as more equitable.

Mr. Beare reminded the delegates that the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea discussed in detail the carrier's obligation to use due diligence. Should this International Sub-Committee address whether that obligation is continuous?

Mr. Diamond thought that the issue would probably be of little practical importance if the exception for negligent management is abolished.

Prof. Berlingieri disagreed in part (but not in substance). To ensure uniform application, the final instrument should clarify that the obligation is continuous if it eliminates the negligent management exception. If the exception is retained, however, then the obligation should not continue past the commencement of the voyage.

Mr. Beare invited comments on 2.3.4.3 and 2.3.4.4 (the navigational fault exceptions).

Mr. Hooper favored the deletion of the navigational fault exception, but recognized that carriers should get something in return (such as extending “carrier” protection to slot charterers).

Mr. Diamond thought it was too early to be discussing trade-offs.

Mr. Beare thought it was too early to be discussing what the trade-offs might be.

Prof. Berlingieri asked whether **Mr. Diamond**’s option 3 would retain the obligation to make the ship seaworthy.

Mr. Diamond replied that when there was an obligation to use reasonable care throughout, then the obligation to exercise due diligence to provide a seaworthy vessel would be subsumed within the general obligation.

Prof. Berlingieri suggested that the identification of the class of people for whom a carrier is responsible (e.g., servants, agents) must be clarified.

Mr. Beare, continuing, noted that 2.4 (“Allocation of the burden of proof”) has already been discussed. He asked if the Working Group should prepare some carefully-worded text to discuss at the next meeting. **Mr. Beare** did not foresee a detailed discussion of the merits in October, but thought that the International Sub-Committee could ensure that the texts raise the issues without ambiguity.

Mr. De Orchis asked if all four options would still be on the table at Singapore.

Mr. Beare replied that they would. Everything will be subject to *de novo* review in Singapore. Continuing with the agenda paper, he noted that the rest of section 2 addresses issues that have been fully discussed in **Prof. Berlingieri**’s International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea. He proposed to cover the material quickly here, permitting the Working Group to draft some texts on the basis of earlier work. He invited comments on 2.5 (“Liability of the performing carrier”).

Prof. van der Ziel argued against imposing liability on “performing carriers.” The liability should be on the contracting carriers.

Mr. Diamond asked how **Prof. van der Ziel** would define the performing carrier’s liability?

Prof. Berlingieri wondered if it would be tort liability without limit.

Prof. Zunarelli contended that the definition of “performing carrier” should not be restricted (as in the Hamburg Rules) to a person to whom performance of the carriage has been entrusted by the contracting carrier.

Mr. Hooper thought it was difficult to define “performing carrier” without knowing how the multimodal issue will be resolved.

Mr. Griggs commented that “performing carrier” is defined in other

conventions, such as the Athens Convention. This instrument should probably be consistent.

Mr. De Orchis invited someone from a civil law system to explain what happens when the goods are damaged by the negligence of a person who is not in contractual privity with the owner.

Mr. Harrington replied that the person who damaged the goods could be sued in delict, but that a Himalaya clause would be a contract for benefit of a third party and thus offer contractual protection. He added that the U.S. Himalaya clause jurisprudence is almost civilian.

Prof. Berlingieri proposed that the International Sub-Committee should consider as a matter of principle whether performing carriers should receive the same treatment as the contracting carrier. Then the question is whether those who perform ancillary activities should also receive the same treatment.

Mr. Diamond responded that this might be affected by whether the final product is a multimodal convention.

Prof. Berlingieri disagreed. Ancillary activities arise even in port to port shipments.

Mr. Diamond argued that if the instrument does not cover those who perform ancillary services, their coverage will be left over to some future convention.

Prof. Berlingieri contended that, from a practical standpoint, the instrument ought to cover the entire ground.

Mr. Hooper agreed with **Mr. Diamond** that some future convention would apply if we left the issue unresolved. Accordingly, we should define “performing carrier” broadly, even if that causes problems with CMR.

Mr. de Brauw noted that CMR coverage is uncertain. Coverage here could also be uncertain, as a performing carrier will not know if the goods are carried under a bill of lading or a charter party.

Prof. Berlingieri responded that we are aiming rather at an exclusion than an inclusion. We cover everything except charter parties.

Prof. Gorton objected that we would not cover a stevedore’s work unless it was done in conjunction with a carriage by sea.

Prof. Berlingieri agreed, noting that the case has arisen in Italy. A stevedore unloaded a yacht, and the sea carriage was done. The consignee then asked the stevedore to put the yacht to sea. During that operation, the yacht was damaged. The Italian court held that this was not ancillary to sea carriage, which had already been completed.

Mr. Song asked if we are going to employ joint and several liability.

Mr. Beare reported that this was the consensus in the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea.

Mr. Diamond asked about indemnity actions between the stevedore and the contracting carrier. Should the instrument apply to that?

Prof. Sturley proposed that this should be left to the contract between them.

Mr. De Orchis asked whether the performing carrier’s liability would be limited to its own fault, or whether it would be jointly and severally liable for

the contracting carrier's fault—even after the performing carrier has fully performed.

Prof. Sturley proposed that the performing carrier would be liable for what happens on its watch, but not for what happens after the performing carrier has fully performed its own obligations.

Prof. Berlingieri noted that the relationship between the contracting carrier and the performing carrier would be based on a second contract of carriage, and thus governed by this instrument. But under this second contract of carriage, the original contracting carrier would be the shipper.

Mr. Gombrii asked whether the performing carrier's liability should be limited to the physical handling of goods. Suppose the performing carrier prepares documents relying on information from the contracting carrier.

Prof. Zunarelli thought that this may be too complicated an issue. Several speakers have asked for a simple regime.

Mr. Beare proceeded to 2.6 ("Delay"). 2.6.1 is introductory.

Mr. Harrington raised the problem of what happens if there are two aspects of cargo damage. For example, the cargo might arrive late and damaged.

Mr. Beare felt that the first issue is whether the carrier should be liable for the delay. The International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea reached the consensus that the convention should cover delay.

Prof. van der Ziel viewed the duration of the voyage as a commercial matter. Slow carriage is cheap, fast carriage is expensive. Shippers who want a guarantee should pay extra for it. A general provision is not helpful to specific cases.

Mr. Song agreed. There should be no liability for delay unless the parties agree to a specific time for delivery. When we discuss "delay," he wondered if we mean on a Hamburg Rules basis.

Mr. Beare replied that the discussion should not be limited to a Hamburg Rules basis.

Mr. Harrington reported that in Canada damages for delay are covered by the Hague Rules.

Prof. Berlingieri explained that the consensus of his International Sub-Committee was that physical damage caused by delay is covered by the Hague Rules. There was no consensus on whether economic loss (e.g., loss of market) caused by delay is covered by the Hague Rules. In liner services, we know whether there has been a delay because the schedules are published.

Prof. Zunarelli noted that if we do not address delay, then each nation will take its own approach. Some uniformity would be appreciated.

Mr. de Brauw felt that it is a matter of the calculation of damages that we are addressing here. Dutch law would not allow recovery of consequential damages, but would allow for physical damages to be covered.

Prof. van der Ziel clarified that his previous comment referred to consequential damages.

Mr. Diamond agreed that pure economic loss cases create special problems. Common law rules on remoteness of damages and foreseeability of damages are all part of the general law of damages.

Mr. Harrington posed the problem of Christmas trees that arrive on Boxing Day.

Mr. Diamond, responding to 2.6.3, expressed problems with goods deemed to be lost when everyone in fact knows where they are. He also discussed the problem of title to goods that are deemed to be lost, and suggested the deletion of 2.6.3 entirely.

Prof. van der Ziel agreed.

Mr. Song raised another issue. 2.6.3 gives the option to the consignee. Should the consignee be required to exercise that option within a reasonable time?

Mr. Harrington also disagreed with the substance of 2.6.3, but agreed that the issue must be raised for discussion.

Mr. Beare wondered if it would be sufficient to refer to the issue in the commentary.

[No dissent was expressed.]

Mr. Beare, proceeding to 2.6.4, asked what should the reference point be if provision is made for damages for delay. In the Hamburg Rules the limit is calculated by reference to the freight payable for the goods delayed (Article 6.1(b)).

Mr. Diamond responded that this question requires reference to the commercial interests. It is not a matter of drafting but of risk allocation.

Mr. Chandler objected that the Hamburg Rules can create an incentive for a carrier to use delay to reduce an otherwise applicable limitation amount.

Mr. de Brauw observed that delay is sometimes caused by overbooking, so a simple loss of freight is no real penalty.

Mr. De Orchis felt that there was still confusion over the distinction between physical damage caused by delay and economic loss caused by delay. Would a limit under 2.6.4 apply to physical damage?

Prof. Gorton noted that the parties can always agree to a higher limitation amount if time is of the essence.

Mr. Hooper agreed, and proposed that this should be left to contract. With “just in time” shipments, delay matters. The parties should address this in the contract. For most bill of lading shipments, delay is not so important. We should not legislate for delay.

Mr. Diamond asked what it would mean not to legislate for delay. Would the issue be left to national law? Would carriers be liable without limit?

Prof. van der Ziel reported that every bill of lading has a standard clause concerning delay. In the liner business, booked containers may not show up in time. Usually there is no penalty for this. Thus carriers overbook. Just as cargo pays no penalty for no-shows, the carrier should not pay when booked cargo must wait for the next ship due to overbooking.

Ms. Schiavi suggested that the section on liability must be simplified if the end result is to be a mandatory convention.

Mr. Diamond added that modern conventions address delay. A simple solution may in fact hurt cargo despite the appearance of helping cargo.

Mr. Beare proposed that, given the consensus of **Prof. Berlingieri’s** International Sub-Committee on Uniformity of the Law of Carriage of Goods

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by Sea, we should proceed to drafts (except on 2.6.3) unless there is a strong feeling to the contrary here.

[No dissent was expressed.]

Mr. Beare, turning to 2.7 (“Deviation”), asked if the Working Group should proceed on the basis expressed in the agenda paper.

[No dissent was expressed.]

The meeting adjourned for coffee at 3:05, and reconvened at 3:25.

Mr. Beare, turning to 2.8 (“Deck cargo”), asked if the Working Group should proceed on the basis expressed in the agenda paper.

Mr. Harrington asked if the expectation was that the parties could not contract out of the rules for deck carriage.

[Several delegates agreed that this was the expectation].

Prof. van der Ziel asked about customs of the trade. There is a custom in the timber trade that deck cargo is carried at the owner’s risk.

[No dissent was expressed to proceeding on the basis expressed in the agenda paper.]

Mr. Beare proceeded to 2.9 (“Limitation of liability”).

Mr. Song raised the issue of damages for delay mentioned in 2.9.2. In many cases, it would be easy to break the limit in delay cases (*e.g.*, when the carrier overbooks).

Mr. de Brauw thought this referred only to physical damages, not to consequential damages for delay.

Prof. Berlingieri explained that the intent was that the package-kilo limit would cover both physical and economic loss.

Mr. Diamond asked if this meant that cargo would not recover the freight-based limit as well.

Prof. Berlingieri replied that this was the intent of the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea. This International Sub-Committee may disagree.

Mr. de Brauw argued that the package-kilo limit should be calculated on the basis of the goods that are lost or damaged. For goods that are only late, the limit should be calculated for those goods.

Mr. Chandler contended that if there was to be a special rule for economic loss, we should express the rule in those terms. We need to make this clear.

Mr. Beare, turning to 2.10 (“Loss of the right to limit”), asked if the Working Group should proceed on the basis expressed in the agenda paper.

[No dissent was expressed to proceeding on the basis expressed in the agenda paper.]

Mr. Diamond added that it will be important to clarify, one way or the other, whether a personal act or omission of the carrier is required.

Mr. De Orchis raised the issue of whether performing carriers would lose their right to limit based on the contracting carrier’s personal fault.

Prof. Sturley explained that under the U.S. COGSA proposal, this issue was resolved by tying each carrier’s loss of the right to limit to that carrier’s own actions. Thus a performing carrier would lose the right to limit based on the contracting carrier’s actions.

Mr. Beare, observing that there was nothing to discuss on 2.11 (“Time Bar”), proceeded to 2.12 (“Liabilities of the Shipper”).

Mr. Song, noting that we have already introduced the concept of the performing carrier, asked if the shipper owes a duty to the performing carrier.

Prof. Zunarelli replied that if the performing carrier has the rights and duties of the contracting carrier, it should have the right to ask the shipper to perform properly.

Prof. Berlingieri disagreed with **Prof. Zunarelli**. The shipper’s duty is often one of description, and that duty is owed only to the contracting party.

Mr. Chandler disagreed with **Prof. Berlingieri**. The duty to describe hazardous cargo runs to everyone involved.

Mr. Diamond noted that 2.12.2 gives two alternatives for dangerous cargo, and suggested that drafting should proceed on both alternatives.

Mr. Beare concluded that the Working Group had a brief to proceed to drafting for the next meeting.

[No dissent was expressed to proceeding on that basis].

Mr. Beare opened the discussion of section 3, which now presents some drafts. They follow the propositions that were discussed at the last meeting and should give effect to what was agreed at that meeting. He invited **Prof. Sturley** to lead the discussion on section 3.

Prof. Sturley introduced section 3. He noted that the topics were discussed in general terms in January, and more specifically in April. He opened the discussion with section 3.1(a), which provides that “[a]fter the carrier receives the goods, the carrier must issue a transport document if the shipper requests one.”

Mr. Diamond suggested there was a need to define “transport document,” which appears so often in the draft.

Prof. Sturley explained the working definition that he had in mind for this section. He felt that “transport document” should not be too limited, which was a mistake made at The Hague. Transport documents will include bills of lading, sea waybills, electronic documents, and anything that serves one of the traditional bill of lading functions with respect to the goods.

Mr. Diamond then asked what a “negotiable transport document” was.

Prof. Sturley explained that it would include a negotiable bill of lading, but was also broad enough to include an electronic document that serves the function of a negotiable bill of lading (if technology develops to permit a transfer of rights through a process comparable to today’s negotiation of a paper bill of lading).

Mr. Song raised the issue of the distinction between the “shipper” and the “actual shipper.” Under an FOB contract, the buyer will be the contracting shipper but the seller delivers the goods to the carrier.

Prof. Zunarelli agreed that the definition of “shipper” is a problem. We need to face the distinction between the contracting shipper and the person who actually delivers the goods. He noted that we faced the same problem under the Convention on the Carriage of Dangerous Goods. **Prof. Zunarelli** also felt that the problem of “negotiable documents” could produce a very tricky discussion. The definition varies a lot from country to country. It is hard

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to foresee what will happen in the future. The Hague Rules have worked well on this issue. We should not interfere with concepts that are strongly linked to national systems.

Mr. Chandler explained that under U.S. law a dock receipt can be negotiable. The key issue in the United States is “to order” language. He also agreed that there was a need to distinguish the actual and contracting shippers. Finally, he observed that imports into the United States require a bill of lading to satisfy customs rules, so that a carrier may need to issue a bill of lading even if the shipper does not want one.

Prof. van der Ziel disagreed with **Prof. Sturley** on the definition of “transport document”. His view was that “any other negotiable transport document” does not include an electronic document because an electronic view is no document at all.

Mr. Diamond commented that this illustrates why it is important to have definitions now, so that we will all know what we are discussing.

Prof. van der Ziel explained that in his view, the definition of “negotiable transport document” turns on the carrier’s promise to deliver the cargo to the holder of the document. If the carrier promises to deliver to a person named by the shipper, then it is a non-negotiable document. Turning to the “shipper” definition, there is not only “contracting shipper” and “actual shipper,” but the “documentary shipper” whose name appears in the bill of lading. That is the person who can indorse the document. It is the first holder, and thus—in legal terms—more important than the “actual shipper” (who may be only a forwarder).

Prof. Sturley agreed that clarifying the “shipper” definition was important, and invited the International Sub-Committee to offer guidance on how section 3.1(b) should be revised in light of the distinctions that had been identified.

Prof. van der Ziel suggested that in the first sentence (“The *shipper* and the carrier may agree that the transport document will be non-negotiable.”) “the shipper” should be “the contracting shipper.” In the third sentence (“In the absence of such an agreement, the *shipper* is entitled to a negotiable bill of lading or other negotiable transport document.”) “the shipper” should be “the documentary shipper.”

Prof. Sturley agreed that it should be “the contracting shipper” in the first sentence. The agreement mentioned must be made in the contract of carriage, and it must be the parties to that contract who enter into an agreement there. Thus we have the contracting shipper and the contracting carrier in the first sentence.

In the third sentence, **Prof. Sturley**’s personal view (which he had not previously considered) was that it would be unworkable to require the carrier to issue the transport document to the “documentary shipper.” That may be a party with whom the carrier has not dealt. If the carrier knows who is entitled to be the documentary shipper, it is only because the actual shipper or the contracting shipper has given instructions. Furthermore, in many cases, the carrier will not even know the identity of the contracting shipper. In an FOB sale, the buyer will generally be the contracting shipper, but the seller will enter

into the contract with the carrier as the buyer's agent. Unless the seller notifies the carrier that it is acting as the buyer's agent, the carrier will not know that the buyer is the contracting shipper.

Prof. van der Ziel replied that in an FOB shipment, the carrier will know who is the contracting shipper because it will normally be a "freight collect" situation. A carrier will contact the FOB buyer to ensure that it will be liable for the freight before accepting a freight collect booking. Thus the carrier will be fully aware of the identity of the contracting shipper.

Prof. Sturley disagreed, noting that in many cases the FOB seller will pay the freight on the buyer's account. These will not be "freight collect" situations. The carrier will receive the freight from the actual shipper, not knowing that the actual shipper acts as agent for the contracting shipper (who is the FOB buyer).

Prof. van der Ziel observed that usually the carrier receives instructions regarding to whom the transport document should be issued and whose name should appear in the "shipper" box, and they may be different parties.

Prof. Sturley noted that this was not the problematic case that the third sentence of section 3.1(b) was required to resolve. That provision will apply, for example, when two people appear, each claiming to be the shipper entitled to a negotiable transport document, and the carrier has not received instructions. Perhaps the FOB seller and FOB buyer will both want a bill of lading.

Prof. van der Ziel replied that in these cases, the carrier should seek instructions from the contracting shipper.

Prof. Sturley responded that the carrier may not know who is the contracting shipper. How do we draft the third sentence?

Mr. Diamond suggested that the one entitled should be the other party to the contract of carriage.

Prof. Sturley complained that the other party to the contract was, by definition, the contracting shipper. If the carrier does not know the identity of the contracting shipper, then the other party to the contract is equally unknown.

Mr. Chandler noted that the FOB seller will need to receive the bill of lading in order to guarantee payment.

Prof. Sturley concluded that this would need to be drafted with "actual" and "contracting" in brackets before "shipper" in the third sentence. It can easily be drafted either way, and there are plausible arguments in favor of either solution. The International Sub-Committee would simply need to resolve the issue, or at least highlight it for further discussion.

Prof. Gorton asked whether "documentary" should also be included in brackets.

Prof. Sturley thought not, because there would not be a "documentary shipper" unless a transport document were issued, and the whole point of the third sentence is that the carrier has not issued a transport document.

Prof. Berlingieri, returning to the "transport document" definition, suggested that there might be language such as "document evidencing the receipt of the goods by the carrier."

Mr. Beare replied that he had understood this to be **Prof. Sturley's** working definition.

Prof. Gorton added that there should also be some recognition of the

obligation to deliver the goods at the stated destination. Otherwise a warehouse receipt could be a transport document.

Prof. van der Ziel agreed, and proposed that the transport document should evidence the contract of carriage, or at least the main elements of it.

Prof. Sturley agreed with **Prof. Gorton's** observation that a "transport document" required something more than a "storage document," but disagreed that the "transport document" must evidence the contract of carriage. In many cases, the contract is found in a completely separate document, such as a service contract or a charter party. Perhaps a working definition would be "a document evidencing the carrier's receipt of goods that the carrier has agreed to transport."

Prof. Berlingieri added that it might be "... has agreed to transport to the destination named in the document."

Prof. Sturley, turning to 3.1(c), noted that the introductory phrase "If the carrier issues a transport document, the transport document must—" was also used in 4.1(a). He explained that his plan was ultimately to combine in one place all of the things that the transport document was expected to contain. At the moment, 3.1(c)(i)-(iii) lists three of the things that will be on this list, and 4.1(a)(i)-(iii) lists three more things that the transport document must do. As we proceed in the project, more items will be added to the list.

Mr. Koronka suggested that some of the items we discussed this morning in section 1 would be added to the list.

Prof. Sturley explained that 3.1(c)(i), requiring the transport document to "describe the apparent order and condition of the goods at the time the carrier receives them from the shipper," simply codified what had been a non-controversial proposition at the last meeting.

Mr. Diamond argued that there was a need to have at least a general definition of "apparent order and condition."

Prof. Sturley agreed to draft a provisional definition.

Mr. Diamond suggested referring to texts such as *Scrutton on Charterparties* for guidance.

Prof. Sturley felt that there had been a consensus at the January meeting that we were only concerned with external order and condition. No one wanted the carrier to open sealed containers, for example.

Prof. Berlingieri wondered what was the difference between "order" and "condition."

Mr. Diamond suggested that if a crate was missing a plank, it might still be in good condition to protect the cargo on the voyage but it would not be in good order.

Mr. Chandler did not think there was any problem with misunderstanding of the meaning of "apparent order and condition," and it was important not to become too specific, lest the definition become an invitation to litigation.

Prof. Sturley accepted this suggestion.

Prof. Zunarelli observed that 3.1(c)(i) required the carrier to "describe the apparent order and condition of the goods at the time the carrier receives them from the shipper," while 3.3(a)(i) made the transport document "*prima*

facie evidence of the carrier's receipt of the goods as described in the transport document". But there was no provision for the *prima facie* effect of a transport document that failed to describe the apparent order and condition of the goods (in violation of 3.1(c)(i)). The document is still valid, but there is no description of the goods.

Mr. Diamond agreed that this should be corrected.

Prof. Sturley suggested that the solution should be included in 3.3. If the carrier fails to include the apparent order and condition of the goods, they could be deemed to have been in good order and condition.

Mr. Diamond suggested that the term "deemed" was now out of favor.

Mr. Chandler thought that the concept caused problems for civil law jurisdictions.

Prof. Sturley agreed to attempt a draft without using the term "deemed". He wanted to ensure, however, that the International Sub-Committee agreed on the substance.

[No dissent was expressed.]

Prof. Sturley continued to 3.1(c)(ii). The substance of the provision was discussed in detail in April, where the International Sub-Committee agreed that the carrier should include in the transport document whatever information the shipper furnished—protecting itself, if necessary, with a qualifying clause rather than by refusing to include the shipper's information.

Mr. Diamond argued that this could not be right if the carrier knew the shipper's information was incorrect. A qualifying clause would not be enough.

Prof. Sturley replied that under this draft, the qualifying clause must be accurate. Thus if the carrier in fact knew that the shipper's information was wrong, it would not be permitted to say "the carrier has had no opportunity to check the leading marks."

Mr. Diamond felt this would be commercially unacceptable.

Prof. Sturley explained that the Hague Rules permitted the carrier to omit information that the carrier had reasonable grounds for suspecting to be inaccurate, but that the International Sub-Committee had decided to remove this option. Perhaps the International Sub-Committee should reconsider this decision.

Prof. Berlingieri observed that 3.2 permits the carrier to include a qualifying clause when it has no reasonable means of checking the shipper's information, but not when the carrier has in fact checked the shipper's information and discovered the inaccuracy. That gap must be filled.

Mr. Beare suggested that **Mr. Diamond** produce a list of the issues that need to be resolved on this part for discussion tomorrow morning.

Mr. Harrington raised Barry Oland's concern regarding containerized cargo with a qualifying clause such as "said to contain" or "shipper's load, stow, and count." Mr. Oland wondered what was the value of that clause. Who has the burden of proof regarding that clause? The draft should clarify who has the burden of proof.

Mr. Diamond argued that the burden should not be on the carrier, which had no idea what was in the container, and which did its best to qualify the statement.

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Mr. Harrington reported the Canadian view that the carrier, having made a statement in the transport document regarding the goods, should bear the burden rather than the innocent consignee.

Mr. Hooper noted that the buyer and the seller both wanted the carrier to include the description of the goods for commercial purposes. The original intent of the Hague Rules was to allow the carrier to clause such a description that it was unable to verify. If the container is delivered undamaged with the seal intact, then the description should not constitute *prima facie* evidence of what was in the container. But if the container is damaged or the seal is breached, then the description is *prima facie* evidence, but the carrier may still dispute it (if the carrier can sustain the burden of proof that is now placed on it). **Mr. Hooper** thought that this is a practical solution, which was acceptable to the commercial interests in the United States.

Mr. Diamond felt that he could go along with that.

Mr. Harrington could not disagree with that, but would need to consult with the Canadian Maritime Law Association.

The meeting adjourned at 5:15 p.m. on Friday, 7th July 2000.

Mr. Beare reconvened the meeting at 9:05 a.m. on Saturday, 8th July 2000, and invited **Prof. Sturley** to resume the discussion where it had left off on the previous day.

Prof. Sturley reported that he had spent the evening reviewing the tapes of yesterday afternoon's discussion and his notes of the April meeting. He proposed changing the substance of the draft in response.

At the April meeting, the suggestion was made that the carrier should include in the transport document whatever description of the goods the shipper provides and would not have the option of omitting that description, even if the carrier is unable to verify its accuracy. But the suggestion was solely in the context of the carrier's not having a reasonable opportunity to verify its accuracy, rather than in the context of the carrier's not only having the opportunity but in fact checking the description and finding it to be inaccurate. **Prof. Sturley** thought we ought to distinguish those two cases. His suggestion was to adhere to the decision in April to require the carrier to include the information in the transport document that the shipper needs for commercial purposes, even if the carrier does not have a reasonable opportunity to verify it. The classic example, of course, would be the contents of the container. The carrier would not be allowed to say simply, "One container, such-and-such a number, no information about what is inside," because that is commercially infeasible. The carrier has to say, "One container said to contain [whatever the contents are supposed to be]," and then protect itself by qualifying that description with "shipper's description" or some other qualifying phrase that indicates the carrier does not *really* know what is inside the container (despite the transport document's description).

In the situation that **Mr. Diamond** raised yesterday, which was not really before the International Sub-Committee in April, the question is what happens when the carrier in fact does attempt to verify the shipper's description, and discovers that the shipper's description is inaccurate. In **Prof. Sturley's** view the correct answer would be that it is not enough to have some qualifying

phrase; the carrier needs to correct the transport document. Presumably at that point the shipper will say, "Oh, I am sorry; there has been some confusion," because presumably the shipper wants the correct leading marks on the transport document as well.

Prof. Sturley thought that the issue might become more problematic in 3.1(c)(iii), where the question is the number of packages. But here, of course, it is particularly important that the transport document be accurate. If the shipper arrives with nine containers and the draft transport document indicated ten containers, then the carrier should cross off the "10" and put in the "9". If the shipper arrives with 9,998 packages and a document saying 10,000 packages, then the carrier may be able to say, "10,000 packages, shipper's count," and we will not require the carrier to count them. But if the carrier *does* count them and discovers how many are really there, then the carrier should correct the transport document and put in the accurate information.

Prof. Sturley asked whether the International Sub-Committee agreed with this proposal, and asked if he should attempt in the next draft to give effect to that substance rather than the substance he had in mind when he drafted the current language.

Mr. Beare asked **Mr. Diamond** if that met his concerns.

Mr. Diamond agreed that this seems broadly acceptable, although it will still be necessary to see the details. We need to distinguish cases where the information is apparent or reasonably ascertainable from cases where the information is difficult or impossible to verify. There should be a duty on the carrier to put accurate information in the transport document when it is reasonably ascertainable. When the information is difficult to verify, then the carrier must include the shipper's information but is permitted to qualify it (and the transport document will not be *prima facie* evidence). When the goods are in a sealed container, the carrier should not need to show that shipper's information was difficult to verify. The carrier should be allowed to use the hallowed words "said to contain."

Prof. Si asked if the new draft would give examples of qualifying clauses.

Prof. Sturley replied that he did not think that would be a good idea. It can be dangerous to try to codify commercial practice. It may turn out that in particular circumstances, a particular qualification is appropriate that did not occur to the draftsmen. We do not want to suggest that that future qualification does not work. It may be helpful to give examples of qualifications that do work but only if it is sufficiently clear that these are simply examples and that other qualifications could also work.

Prof. Berlingieri asked whether the carrier could impose on the shipper a description with which the shipper disagrees.

Prof. van der Ziel raised concerns about the concept of a sealed container. In Europe, containers are usually delivered unsealed. The truck driver puts the carrier's seal on the container when he picks up seller-packed container. If possible, the trucker will seal the container in the presence of a shipper's representative. This is true for manufactured goods, at least. For agricultural products, the shipper is rarely present.

Mr. Chandler explained that often the carrier stuffs the container as part of the service. The phrase "as furnished in writing by" is no longer relevant, if it ever was. The shipper prepares the transport document. It would be better to

say “as they were said to be by the shipper.”

Prof. Zunarelli commented on the case where a container was stuffed and sealed by the shipper (agreeing that the carrier should be responsible for the description when the carrier stuffed the container). Suppose that the carrier’s representative is present at the time of stuffing. Does that change the result?

Prof. Sturley pointed out that under 3.2(a)(ii) the carrier is permitted to include the qualifying clause if the carrier can show that it had no reasonable means of checking the information furnished by the shipper. If the carrier has a representative present during the stuffing, then the carrier will be unable to show that it had no reasonable means of checking the information. The qualifying clause will be ineffective.

Prof. Zunarelli agreed with this approach.

Mr. Diamond disagreed with 3.2(a)(ii). It is ridiculous for the carrier to have to show that it had no reasonable means of checking in a routine containerized cargo case.

Prof. Sturley asked whether **Mr. Diamond** disagreed with the substance of 3.2(a)(ii) or just with the burden of proof. Would it be satisfactory if the burden were put on the shipper to show that the carrier did have a reasonable means of checking?

Mr. Diamond agreed that this would be satisfactory.

Mr. Chandler explained that, in reality, the carrier will know if it had an agent present. The consignee, in contrast, will have no idea whether the carrier’s agent was present. The carrier has better access to the information, and thus the burden should be on the carrier.

Prof. van der Ziel added that the transport document usually indicates whether the container was shipper-packed or carrier-packed.

Mr. Chandler countered that this was not true for documents prepared in some Southeast Asian countries.

Mr. Beare wondered if there should be alternative drafts here.

Prof. van der Ziel disagreed. Even in the cases raised by **Mr. Chandler**, what we have is a commercial allocation of responsibility.

Mr. Koronka agreed with **Mr. Chandler**. There are many cases from the Far East where documents do not reflect what actually happened.

Prof. Sturley suggested that the real issue is not who stuffed the container but whether the carrier had an agent present to observe the process. Even if the shipper stuffed the container, the carrier might have had a reasonable opportunity to inspect the contents.

Mr. Diamond disagreed, saying that the real issue should be whether the carrier’s agent was present as part of a tallying exercise. Often the carrier’s “agent” is a truck driver who is simply waiting, not tallying.

Mr. Koronka agreed.

Mr. Chandler suggested that there is no custom in the trade.

Mr. Beare suggested that the draftsmen had enough guidance, and that it was time to proceed.

Mr. Diamond added that he had prepared some notes on “apparent order and condition” to summarize the previous discussion.

Ms. Schiavi declared that the ICC supports the text as drafted. The ICC would not like to see this changed substantively.

Prof. Sturley thought this would not be a problem, as **Mr. Diamond’s**

comments for the most part are consistent with the draft.

Mr. Diamond noted that the qualifying clause should be valid even when a container is delivered that has been damaged, or the seal is broken.

Prof. van der Ziel agreed.

Prof. Sturley explained that the draft on sealed containers follows the commercial compromise that was worked out in the United States during the negotiations that produced the pending COGSA proposal. The International Sub-Committee is, of course, free to reject the compromise and seek a different solution.

Mr. Beare suggested that it was time to conclude this discussion, and asked **Prof. Sturley** if there were any remaining issues to discuss.

Prof. Sturley raised the issue of weighing containers.

Prof. Zunarelli expressed some doubts regarding the use of the term "agreed." Under the present draft, there must be an agreement between the carrier and the shipper in order to have the weight appear on the face of the bill of lading. This leads to the conclusion that even if weighing facilities are available at the port of shipment, and the shipper requires weights to be included on the bill of lading, if the carrier does not agree to that then it is not required to weigh the containers. **Prof. Zunarelli** would prefer to give the shipper a right to have the container weighed if facilities are available.

Prof. Sturley thought that a carrier will generally follow the shipper's request rather than refuse the shipment.

Mr. Chandler agreed that it should be by agreement, and that the carrier can charge extra for the service.

Prof. Zunarelli recognized the force of the argument, but wondered what would happen in a minor port where there is no competition.

Mr. Chandler predicted that those ports will not have the facilities anyway.

Mr. Diamond asked what happens with bulk goods, which generally are shipped by weight.

Mr. Hooper replied that for bulk goods, the custom of the trade has already been established. The real issue here is whether the consignee trusts the shipper, the carrier, or a third party.

Prof. Sturley explained that the draft does not distinguish weight from other aspects of the description of the goods for non-containerized cargo.

Prof. Berlingieri asked whether in 3.3(d) the acting in bad faith should relate to the description of the goods.

Mr. Beare invited **Prof. Zunarelli** to open the discussion of section 4, as this was the topic on which he had taken the lead at previous meetings.

Prof. Zunarelli felt that **Prof. Sturley's** draft accurately reflected the discussion in London. The only major difficulty is the case when neither the carrier nor the ship is sufficiently identified. We saw yesterday that 1.3.1.2 presents a similar problem in the context of through carriage.

Prof. van der Ziel saw a problem on this point. Under 4.1(a)(ii), the transport document must identify the carrier. Under 4.1(b), the issuer will be liable for the failure to identify the carrier. The issuer, however, is part of the problem, and an agent that issues a transport document on behalf of an untraceable carrier will not have any assets worth pursuing. The shipper should not be allowed to accept a transport document from an untraceable carrier.

Mr. Song agreed.

Mr. Harrington noted that the CONGEN Bill '94 does not identify the carrier, and it is not a "cheap" bill of lading. He wondered what happens if cargo sues the registered owner.

Prof. Gorton noted that 4.1(a) says that the transport document must state one of three dates. He wondered if it is enough to have a transport document that states only the issue date.

Mr. de Brauw proposed that the transport document should state (A) the date on which the carrier took possession of the goods *or* (B) the date on which the goods were loaded on board the vessel. In addition, the transport document should also state (C) the date on which the transport document was issued. Turning to 4.1(d), he added that many cargoes are covered by more than one bill of lading. For example, an NVOCC and an ocean carrier will both issue a bill of lading for the same cargo. There could be separate claims under each of these bills of lading.

Prof. Berlingieri, referring to **Mr. Harrington's** comment, explained that in the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea it was agreed that the time limit would run for the demise charterer from the time when the demise charterer accepted responsibility.

Mr. Diamond noted that 4.1(a)(ii) requires the identification of the "shipper." Usually the nominal shipper is an agent.

Mr. Koronka referred to **Mr. de Brauw's** point regarding 4.1(d). He suggested that making the registered owner the "carrier" works for port-to-port shipments, but not for combined transport cases.

Mr. Chandler agreed that with NVOCCs it can be very complicated, but there is always a contract or series of contracts. Even if an NVOCC disappears, it had a contract with the next party in line.

Mr. Koronka disagreed. The ocean carrier may have agreed to perform the sea leg, but will know nothing about the land portion.

Mr. de Brauw reiterated his concern about a carrier's exposure to double or triple liability.

Prof. Zunarelli suggested that the person issuing the transport document should know who is the contracting shipper or actual shipper, and should be able to list at least one of the two.

Mr. Koronka proposed that separate solutions may be needed for port-to-port and for combined transport situations.

Mr. Diamond agreed with **Mr. Koronka**.

Prof. Gorton agreed that there should be some identification of the shipper.

Prof. Berlingieri recalled that for the time being we are dealing only with port-to-port shipments for all of these issues.

Mr. Harrington argued that a carrier should only be bound by a transport document that it authorized.

Mr. Chandler explained that an NVOCC may be listed as the shipper on the ocean bill of lading. The ocean carrier is not bound to the original shipper on its bill of lading, although the ship may be bound *in rem*.

Prof. Berlingieri suggested that if the owner of a ship allows someone else to use the vessel then the owner should be responsible. Suppose a slot charterer issues a transport document, for example, and does not list its name.

The shipowner should be responsible for that.

Mr. Koronka had no problem in these circumstances, but warned that the general rule as drafted would apply to combined transport cases if we do not take care to exclude them.

Mr. de Brauw added that an *in rem* action against the vessel is a far cry from imposing personal liability on the owner.

The meeting adjourned for coffee at 10:30, and reconvened at 10:50.

Mr. Beare invited **Prof. Gorton** to lead the discussion of section 5.

Prof. Gorton reiterated that (except for the provisions on the cesser clause) section 5 would probably be non-mandatory. He then reviewed the highlights of the various provisions.

Mr. Chandler objected to 5.5(b), which declares that the consignee may be liable for the payment of the freight if a negotiable transport document contains the statement “freight collect” or wording of similar nature. This can cause problems if the consignee never agreed to be listed as the consignee. It should be the person taking delivery of the goods who may be liable.

Prof. Gorton explained that this is why the word “may” is included in the draft.

Mr. Harrington expressed some concerns about several clauses, starting with 5.2(b) (pro rata freight). The issue may not arise too often, because nearly all bills of lading say that freight is earned upon shipment. The fact that the vessel is closer to the destination does not necessarily mean transporting the goods the remaining distance is going to be cheaper than transporting them from the point of origin. On a shipment from the Mediterranean to the Eastern United States, if the ship ended up in the Azores it would probably be *more* expensive to move those goods from the Azores to the United States than from the original port of shipment in the Mediterranean.

With respect to 5.4(b) (cesser clause), **Mr. Harrington** wondered why the carrier should not be entitled to waive any personal claim against shipper.

Finally, with respect to 5.6(a) (right of retention), **Mr. Harrington** argued that whether or not the consignee is liable on a “freight pre-paid” bill of lading, there should at least be no lien on the goods.

Prof. Gorton asked whether 5.2(b) should be deleted.

Mr. Harrington supported this suggestion.

Prof. Zunarelli proposed requiring the shipper to pay for whatever benefit it received.

Mr. Harrington added that it would be a *quantum meruit* type of claim.

Prof. Berlingieri contended that the philosophy of distance freight should be based on the actual approach to the port of destination. If there is no approach to the port of destination because the goods are discharged in a place from which the cost of transportation to the port of destination or the length of the voyage is equal or even greater, there is no per-distance freight.

Changing the subject slightly, it seems that a general provision indicating which rules are mandatory would help.

Mr. Chandler saw no need for 5.2(b). The contract of carriage always provides for freight.

He also objected to 5.6(a)(ii) because it allows the goods to be held hostage for the shipper’s fault, and it is the innocent consignee who suffers.

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The carrier should be free to hold the transport document until the shipper pays, but once the shipper has the transport document, the carrier's remedy should be against shipper *in personam*.

Mr. Diamond raised three points. First, he thought that the *pro rata* freight provision is not of vital importance. It could be useful, though. Second, the "no set-off" rule in 5.3(b) should be clarified. "Thereafter" may be unduly limiting in a case in which freight is earned on delivery. Third, the cost of exercising liens should be considered. For example, the carrier should be allowed to add the cost of storage under 5.6.

Mr. de Brauw felt that 5.4(a) should clarify what freight the shipper is liable to pay. If the shipper is the charterer, for example, it should be liable for charter party freight, not bill of lading freight.

Prof. Gorton commented that 5.4(a) would not be mandatory, which should solve this problem.

Mr. Song raised two points. In practice, the carrier sometimes insists on payment of the freight in advance for a "freight prepaid" bill of lading. He wondered whether the carrier has the right to retain the bill of lading if both parties agree to issue a freight pre-paid bill of lading.

Second, he explained that China now has two conflicting laws on the carrier's right to lien the cargo. Under the Chinese Maritime Code, the right to lien on cargo is restricted to the goods of the debtor. But the new Contract Law permits the carrier to lien any cargo that has been carried on the vessel. Thus 5.6(a)(ii) should clarify whether the right to lien on cargo is restricted to the goods of the debtor.

Mr. Diamond proposed that the rule in 5.4(a) should be mandatory.

Prof. Zunarelli disagreed. For commercial reasons, the carrier could agree to look only to the consignee for payment.

Mr. Diamond explained that if the shipper is liable originally, then negotiation of the transport document should not defeat that liability. Of course, if shipper is not liable originally then the shipper will not be liable. The rule should be that negotiation does not defeat liability.

Ms. Pysden noted that it is well-established that the carrier has a right to its lien. It might be dangerous to get into much more detail or we will run into problems with well-developed law in various jurisdictions.

Mr. Beare invited **Prof. van der Ziel** to lead the discussion of section 6.

Prof. van der Ziel opened the discussion.

Mr. Diamond commented that 6.3 and 6.6 both deal with the problem that arises if the carrier wants to deliver the goods at the destination, but no one comes forward to take delivery. He wondered if the carrier can divest itself from responsibility. He doubted that 6.3 and 6.6 go far enough, and proposed that those provisions should have real teeth or be deleted.

Ms. Schiavi disagreed with **Mr. Diamond**, and promised to give comments in writing after consultation with ICC members.

Prof. Zunarelli expressed his opposition to any forced delivery to a consignee who has not consented, but supported a solution for relieving the carrier from liability as carrier in this context.

Mr. Hooper saw a need to modify 6.6 to permit the carrier to sell the goods before the storage charges become too great.

Prof. Berlingieri noted that 6.6 permits the carrier to take certain actions

but does not say anything about constructive delivery. There should be something more.

Mr. Chandler agreed that we should not beat around the bush. There are two concepts here that should be made explicit.

Prof. van der Ziel explained that he had deliberately not put in a constructive delivery provision, but added that the carrier should still be entitled to the benefit of its bill of lading provisions. He doubted that constructive delivery would be useful.

Mr. Chandler commented that much of the difficulty goes back to the assumption that there will be a consignee.

Prof. Zunarelli sympathized with **Mr. Chandler's** comments, but thought it was risky to go into too many details. Many states will have problems at the diplomatic conference if there are too many details here. The details for a forced sale can be left to national law.

Mr. Song observed that in many developing countries, it is difficult for the carrier to do anything except wait. Under Chinese Customs Law, the carrier is not permitted to sell the cargo if no one has claimed it.

Mr. Chandler recalled that one goal of the project is to provide uniform law where it does not exist now.

Mr. Diamond suggested that delivery of the goods without production of the bill of lading is the most difficult problem. Although 6.5.2 recognizes the problem, it does not solve it. One can sympathize with the carrier who is forced to become a guarantor. Any solution lies within very narrow limits.

Mr. Diamond could see prohibiting further negotiation of the bill of lading once the carrier has delivered the goods, but this could not defeat the rights of those who were committed before delivery to take up the bill of lading. This solution is unlikely to help carriers very often.

Mr. Hooper supported the suggestion in 6.5.2.6 that there be an age limit on a bill of lading. This idea may help to protect carriers. A bill of lading should be more time-sensitive than a stale check.

Mr. Chandler added that a subsequent holder must also take in good faith in order to assert rights under the transport document. He added that another problem arises when a bill of lading is not transferred quickly enough on a string sale, and the party in possession goes bankrupt.

Mr. Song asked whether 6.2(a) and 6.5(a)(ii) together mean that the carrier can deliver cargo to the consignee of a straight bill of lading without production of the bill of lading.

Prof. van der Ziel replied that they did.

Mr. Beare proceeded to section 7 ("Right of Control"). Alexander von Ziegler had previously led the discussion on this section, but he was not present at the meeting. **Mr. Beare** thus invited **Prof. van der Ziel** to lead the discussion as the responsible member of the drafting team.

Prof. van der Ziel explained that he had tried to put some logic into the conclusions of the previous sessions. He disagreed with the comments at the UNCITRAL Colloquium that the project should not cover this topic. The right of control is too important. He added that he had drawn a distinction between instructions within the contract and those outside the contract. Finally, he has drawn a distinction between instructions that must be followed and those that need not.

Mr. Chandler endorsed the need for some regulation in this area. He referred to Prof. Yiannopoulos's survey of about fifteen countries, *Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems* (Kluwer 1995), which shows great divergences on the law in this field.

Mr. Diamond agreed that provisions identifying the party entitled to give instructions are of great value, especially with waybills, electronic documents, and other non-negotiable documents. He did see some problems with the details. Calling a request a "right," for example, seems to be an improper usage. But this is certainly a subject that should be dealt with in this convention, perhaps in an even wider context. Thus far we have not addressed the rules associated with the transfer of bills of lading and related rights. We should face these issues, and this section on rights of control would fit within that larger discussion.

Mr. Hooper questioned 7.2(b), which requires all original transport documents to be surrendered when more than one original is issued. Although this rule makes a great deal of sense, it seems out of step with industry practice.

Mr. Chandler asked why three bills of lading are still issued. He wondered if we could put an end to the practice.

Prof. van der Ziel explained that the full set of bills of lading is required to have the right of instruction, but that only one is needed for delivery. He agreed that the practice of issuing three originals serves no purpose, and people have objected to it strongly over the years. It was one of the conclusions of the CMI Venice Colloquium in 1983 in respect of bills of lading.

Mr. Chandler reported that it also came up for discussion in conjunction with UCP 500. The banks echoed the same sentiment, but the practice continues.

Prof. Berlingieri commented that in some jurisdictions, a straight bill of lading is still a document of title and the carrier must demand the surrender of such a bill of lading before delivery to be safe. Thus new rules would be very helpful to bring more uniformity here.

Mr. Diamond asked whether the focus was on the nature of the bill of lading as a document of title or on issues covered by the U.S. Pomerene Act and the British 1992 COGSA.

Mr. Beare commented that the latter issue is within the International Subcommittee's terms of reference. He asked if anyone dissented from the Working Group's addressing these problems.

Mr. Chandler volunteered that it would be welcome.

[No dissent was expressed.]

Prof. Zunarelli felt that 7.2(a)(iii) could cause problems by its assumption that more than one person will have rights to give instructions.

Prof. van der Ziel explained that there are CMR countries in which the consignee has rights of control after the goods have arrived at the place of destination. This causes problems. The shipper will tell the carrier not to deliver the goods without obtaining approval from the bank, but instead to store the goods in the meantime. Consignees can override that instruction. This draft says that in case of such conflict, the right of the shipper must prevail.

Prof. Zunarelli accepted this solution. He suggested adding the phrase "according to the applicable law" so that it would be clear that the double right

to give instructions does not arise in this instrument but instead arises elsewhere.

Mr. Diamond saw the value in 7.2(a)(iii), but still felt that there must be cases in which the right passes to the consignee unconditionally and the shipper loses the right entirely.

Prof. van der Ziel explained that 7.2(a)(i) provides that result, along with 7.1(b) (which allows the parties to agree who has the right).

Mr. Diamond objected that 7.1(b) does not specify when the right is transferred.

Mr. Hooper raised a slight comment on 7.2, which refers to the attachment of goods in transit. Under U.S. law, it is not possible to attach goods moving under a negotiable bill of lading; a claimant must attach the bill of lading (which seems to make more sense).

Prof. van der Ziel explained that the commentary was only offering an example. If you cannot control goods under the contract of carriage, then you must seek other ways to regain control of the goods.

Mr. Beare concluded the discussion on the agenda paper, and summed up the conclusions of the meeting. He observed that the Working Group has a brief to do three things before the next meeting:

- (1) revise the drafts in light of the points raised here;
- (2) draft provisions on liability, preferably in the form of an outline of an instrument (which will reveal gaps); and
- (3) prepare a discussion paper on the multimodal concept for discussion in Singapore (subject to Executive Council approval).

Ms. Burgess asked when EDI issues would be considered.

Mr. Beare deferred this question until Alexander von Ziegler was present, as he was coordinating that aspect of the project.

Ms. Schiavi stressed how important this project would be to the ICC.

Mr. Beare noted that yesterday the International Sub-Committee discussed four options for proceeding with liability, but did not discuss them substantively. He urged the delegates to be prepared to discuss them substantively in October.

Ms. Pysden commented that the International Sub-Committee passed over the combined transport part of section 1 of the agenda paper because the multimodal issues are on hold. She asked if they will be on the agenda in October.

Mr. Beare replied that they would probably be on the agenda in Singapore.

Mr. Beare expressed the International Sub-Committee's thanks to **Mr. Hooper** for hosting the meeting, and **Mr. Hooper** responded by inviting the International Sub-Committee to return for a future meeting.

The meeting adjourned at 12:58 p.m.