

**DRAFT REPORT OF THE FOURTH MEETING  
OF THE INTERNATIONAL SUB-COMMITTEE ON  
ISSUES OF TRANSPORT LAW  
THE INTERNATIONAL CHAMBER OF SHIPPING, LONDON  
12th and 13th OCTOBER 2000**

Present: Alexander von Ziegler (Secretary General of the CMI)  
Stuart N. Beare (Chairman of the International Sub-Committee)  
Karl-Johan Gombrii (Vice Chairman)  
Prof. Michael F. Sturley (Rapporteur)  
Prof. Lars Gorton (Sweden; member of the Working Group)  
Sean Harrington (member of the Working Group)  
Paul Koronka (UK; member of the Working Group)  
Prof. Gertjan van der Ziel (The Netherlands; member of the Working Group)  
Mark A.M. Gauthier (Canada)  
Uffe Lind Rasmussen (Denmark)  
Prof. Francesco Berlingieri (Italy)  
Prof. Tomotaka Fujita (Japan)  
Vincent de Brauw (The Netherlands)  
José Maria Alcantara (Spain)  
Capt. C.F. Lüddeke (Switzerland)  
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)  
Viviane Schiavi (International Chamber of Commerce)  
Linda Howlett (International Chamber of Shipping)  
Sara Burgess (International Group of P&I Clubs)  
Hugh Hurst (International Group of P&I Clubs)  
Søren Larsen (BIMCO)

**Mr. Beare** called the meeting to order at 10:15 a.m. on Thursday, 12th October. The report of the third meeting (held in New York, 7th and 8th July 2000) was approved as circulated, subject to the Rapporteur's correction of

typographical errors. **Mr. Beare** asked members to notify the Rapporteur by 20th October of any typographical errors that they discover so that the report can go forward to publication for the Singapore Conference.

He then invited **Mr. von Ziegler** to explain how work will proceed after the Singapore Conference.

**Mr. von Ziegler**, on behalf of the President and the Executive Council, thanked the International Sub-Committee and the Working Group for their hard work and the speed with which they had proceeded. During 2001, we will all continue to work hard and quickly, but there will be a heavy focus on consultation and acceptance. The International Sub-Committee will meet less often but its members will work harder in their own countries, with a focus on consultation with the affected segments of the industry and acceptance of the project. Singapore will not be the end of the CMI process, but a step along the way. Issues that we have not yet addressed in sufficient detail include the multimodal issues, the extent to which the instrument should be mandatory, and the transferability of transport documents.

In May 2001, the International Sub-Committee will reconvene and a consultation paper will be distributed. Responses to this consultation paper probably will be due by October 2001.

The UNCITRAL General Assembly will meet in June 2001. We expect that UNCITRAL may arrange a consultation colloquium during the fall of 2001. By winter 2001-2002, there will be a major exercise (lasting perhaps a week) in conjunction with UNCITRAL to bring the project to a stage whereby the 2002 CMI Assembly can approve it.

**Mr. Beare** invited **Mr. Sekolec** to comment.

**Mr. Sekolec** approved of this approach. He explained that UNCITRAL has high expectations as a result of this cooperative effort with the CMI, and that UNCITRAL is therefore ready to move quickly if there appears to be a broad consensus.

**Mr. Chandler** asked when an UNCITRAL Working Group would be formed.

**Mr. Sekolec** reported that this would happen as soon as a first draft is ready. UNCITRAL would be ready in the fall of 2001, but this now seems premature. Probably 2002 would be a realistic prediction.

**Mr. Beare** announced that tomorrow the Working Group would be preparing an issues paper for Singapore. A report will be prepared during the Singapore Conference for approval by the Assembly.

Three papers will be distributed for Singapore in the CMI Yearbook: the outline instrument, the Working Group's multimodal issues paper, and the Working Group agenda paper.

**Mr. Sekolec** observed that consensus on one of the four liability options would be fine, but he predicted that some flexibility would need to be retained. Broader industry consultation may be required.

**Mr. Alcantara** felt that governments should be involved in the process soon. He suggested that national member associations should share the consultation paper with their governments.

**Mr. von Ziegler** clarified that this was already part of the plan. He added

that UNCITRAL would be seeking official comments on the consultation paper directly from governments.

**Ms. Schiavi** agreed with **Mr. Sekolec**'s comment that broader industry consultation was needed before a liability option could be agreed.

**Mr. Beare** turned to the Outline Instrument, and thanked the drafting team for all the hard work in its preparation. He noted that part one provided definitions.

**Mr. Chandler** found the examples at the end of 1.14 ("such as a waybill") and 1.13 ("such as a bill of lading") to be confusing, and suggested that they should be moved or deleted. In 1.18, further work was needed to cover the generation and storage of information. The EDI Committee might do this.

**Prof. van der Ziel** expressed his concern with 1.14 (the definition of "non-negotiable transport document").

**Prof. Sturley** explained that the definition of "non-negotiable transport document" was intended to cover every "transport document" that is not a "negotiable transport document." The three parts of the definition were expressed in the alternative, meaning that a transport document is "non-negotiable" if it satisfies any one of the three alternatives. A transport document that is prominently marked "non-negotiable" or "not negotiable" is "non-negotiable" because the "negotiable transport document" definition specifies that a negotiable transport document "is not prominently marked 'non-negotiable' or 'not negotiable.'" A transport document that states that the goods are to be delivered to a person named in the document is "non-negotiable" because the "negotiable transport document" definition specifies that a negotiable transport document "states that the goods are to be delivered to order, to bearer, or to order of any person named in the document" (which is different from stating that the goods are to be delivered to a person named in the document). Finally, a transport document that "otherwise fails to qualify as a negotiable transport document" is "non-negotiable" because a negotiable transport document necessarily qualifies as a negotiable transport document.

It would have been possible to have defined "non-negotiable transport document" with only the third part of the definition given in 1.14, *i.e.*, as "a transport document that fails to qualify as a negotiable transport document." The first two parts of 1.14 add nothing of substance to this definition; they merely illustrate the two most common ways that a transport document would fail to qualify as a negotiable transport document. In the next draft, the first two parts of 1.14 can be bracketed to flag this possible approach.

**Prof. Gorton** expressed his concern with 1.4 (the definition of "performing carrier").

**Ms. Schiavi** made some general comments on behalf of the International Chamber of Commerce (ICC). Although the ICC appreciated all of the hard work that has gone into this project, it would prefer more lead time to review the documents before meetings.

As a general rule, the ICC favored voluntary rules that businesses could use to meet their needs. She wondered if mandatory rules would add value.

She welcomed the "transport document" definition, which the Hague Rules and the Hague-Visby Rules did not have. She worried that the definition

of “transport document” was confusing, however, because it suggested that a non-negotiable transport document could be a document of title.

**Mr. Chandler** said that the Uniform Customs and Practices for Documentary Credits (ICC pub. no. 500) (“UCP 500”) also recognized that a non-negotiable transport document could be a document of title.

**Prof. Berlingieri** asked what a “document of title” was. He explained that the phrase had no meaning in civil law.

**Mr. Koronka** admitted that the term was ambiguous even in common law.

**Prof. Sturley** explained that 1.12(b) provided that every relevant document of title was a “transport document,” but did not provide that every “transport document” was a document of title.

[Several delegates expressed their individual views about documents of title.]

**Prof. Sturley** asked whether 1.12(b) is really necessary, or if every relevant document of title is also a receipt, and thus covered under the definition by 1.12(c).

**Mr. Beare** suggested that the Working Group had heard enough on this issue to proceed with further drafting.

**Mr. Rasmussen** asked whether this was intended to be a multi-modal instrument. As currently written, it covers shipments from door to door.

**Mr. Beare** replied that this issue would need to be discussed in Singapore, based on a paper that was being prepared.

**Mr. von Ziegler** explained that the Working Group had proceeded on the assumption of door-to-door coverage, but recognized that it had not done the background work for full multi-modal coverage. We drafted broadly, but may need to cut down the coverage.

**Mr. Beare** invited comments on 1.4 (the performing carrier definition).

**Mr. Rasmussen** thought the definition was difficult to follow. Were freight forwarders intended to be covered or excluded? It appears to follow the proposed amendments to the U.S. COGSA.

**Ms. Schiavi** agreed with **Mr. Rasmussen** and expressed particular concern with the exclusion.

**Prof. Sturley** explained that the intent of the “performing carrier” definition was to cover everyone who directly or indirectly performed (or was supposed to perform) any of the contracting carrier’s contractual obligations under the contract of carriage on behalf of the contracting carrier. Thus it was intended to cover the contracting carrier’s employees, servants, and agents; each of their employees, servants, and agents; and so on down the chain so long as anyone in the chain was performing any of the contracting carrier’s contractual obligations. The exclusion, which was FIATA’s suggestion, simply clarified that the shipper and the consignee (and their employees, servants, and agents) were not “performing carriers” even if they performed some of the tasks (such as loading or unloading the vessel) that might otherwise be part of the contracting carrier’s contractual obligations.

**Mr. Chandler** hoped that the exclusion would not be read so broadly as

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to exclude freight forwarders entirely if they did some work on behalf of the shipper. He also commented on the background of the proposed amendments to the U.S. COGSA.

**Mr. Rasmussen** agreed that **Mr. Chandler**'s suggestion to limit the exclusion was helpful, but he still worried that the definition was too broad. Does a shipyard that helps the carrier to provide a seaworthy vessel qualify?

**Mr. Beare** asked where **Mr. Rasmussen** would draw the line. Who should qualify as a performing carrier?

**Mr. von Ziegler** wondered if we should deal with the problem that arises here by including a statutory Himalaya provision directly instead of with this performing carrier definition. This proposal not only protects the carrier's agents but also adds new defendants.

**Ms. Howlett** observed that the International Chamber of Shipping was in the early stages of consultation, but she tended to agree with **Mr. von Ziegler**'s suggestion. The instrument should focus on the contracting carrier's liability.

**Mr. Hooper** explained that U.S. litigation illustrated the opposite problem. When a stevedore drops a container now, it is sued as a defendant anyway. The plaintiff hopes that the stevedore will be unable to take advantage of a Himalaya clause. Under this proposal, it would be unnecessary to sue the stevedore because no additional recovery (beyond what the contracting carrier must pay) would be available.

The meeting adjourned for coffee at 11:25, and reconvened at 11:45.

**Mr. Beare** opened the discussion on chapter 2 (scope of application), which generally gives effect to the discussion in **Prof. Berlingieri**'s International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea.

**Mr. De Orchis** noted that a shipment from New York to Houston by ship, then by land to Mexico, would be covered by 2.1. He wondered if that was intended.

**Ms. Schiavi** commented that the exclusion for charter parties in 2.3.1 was not necessary unless the instrument would be mandatory, which has not yet been decided (and which the ICC doubts would be a good idea). If the exclusion is to be retained, then a definition of "charter party" and "contract of affreightment" will be required.

**Mr. von Ziegler** suggested that it may be necessary to revisit this issue now that the application of the instrument does not depend on the existence of a bill of lading.

**Mr. Hooper** noted that a definition would be difficult. U.S. law now recognizes "service contracts," which are somewhat like charter parties but different in important respects.

**Prof. Sturley** added that a definition of "charter party" had been raised at the Hague Conference, but the attempt had been abandoned.

**Mr. Gombrii** observed that 2.4 (which is based on article 2.4 of the Hamburg Rules) appeared to include voyages that were excluded by 2.3.1 (which excludes charter parties, contracts of affreightment, and functionally equivalent similar agreements).

**Mr. Beare** invited **Mr. Koronka** to lead the discussion of chapter 3 (“Period of Responsibility”).

**Mr. Koronka** first noted that multi-modal issues needed to be resolved. In any event, regardless of how the multi-modal issues are resolved, the carrier may act as an agent for the shipper to arrange matters outside of the contract of carriage. This is the issue that chapter 3 addresses.

**Mr. Harrington** observed that this draft could create problems under Canadian practice. Carriers often get a better rate from the railroads than the cargo owners do, but that better rate requires the carrier to be named as the contracting party on the documents and the railroad assumes a reduced level of liability.

**Mr. Rasmussen** wondered if there was some overlap with chapter 9 (“Delivery to the Consignee”). He was concerned that 3.3 (specifying the carrier’s duties when it acts as an agent of the shipper in contracting out certain specified parts of the carriage to a third party) imposed too much unnecessary detail.

**Mr. Chandler** agreed that there was too much here that was too complex. In 3.3(a) (which requires the carrier to “conclude a contract with [the] third party on the terms which are usual for the particular mode of transport or which are [compulsorily] applicable to the part of the carriage that is contracted out”), “usual” is too broad. Perhaps “customary” would be more appropriate.

**Prof. Berlingieri** reiterated the need to consider whether some provisions should be non-mandatory. If this provision were non-mandatory, it would be less objectionable.

**Mr. Hooper** asked whether the contracting carrier should be allowed to delegate responsibility for some of its obligations without retaining liability. He noted 3.2 (which (a) permits the contract of carriage to impose responsibility on the shipper or the consignee for certain activities during the carrier’s period of responsibility and (b) allows the carrier, acting as an agent of the shipper, to contract out certain specified parts of the carriage to a third party). Under this proposal, the carrier seems able to avoid responsibility for non-delegable duties.

**Mr. Rasmussen** did not see this as an issue of delegation but of the scope of the contract. The carrier agrees to carry from A to B, but then acts as the forwarder to arrange carriage from B to C.

**Mr. Koronka** agreed that this would be true under 3.3, but 3.2 is different. The problems in 3.3 involve an area in which it would be helpful to have some further guidance.

**Mr. Sekolec** noted that this is a subject on which further discussion will be necessary when the project proceeds. It would be preferable at the moment to leave options open for further discussion.

**Mr. Chandler** suggested that much broader consultation would be necessary on this issue, in particular. It is not yet an issue that the U.S. Maritime Law Association has faced in its COGSA amendment project.

**Prof. Berlingieri** wondered if we can agree on some aspects of this issue, such as transshipment. Can we agree that the first carrier’s liability terminates

on transshipment only if agreed with the shipper and the first carrier exercises reasonable care?

**Mr. De Orchis** agreed that the narrow transshipment issue would not be controversial, but that broader issues were problematic. The current draft could cover an NVOCC (non-vessel-operating common carrier).

**Prof. van der Ziel** raised the transshipment question that arises when the ocean carrier arranges land coverage.

**Mr. De Orchis** added that the result would depend in part on which liability option is selected.

**Mr. Beare** invited **Mr. Hooper** to return to 3.2(a).

**Mr. Hooper** saw a potential problem if carriers could avoid responsibility for damage caused in circumstances under which a consignee would expect the carrier to be responsible.

**Mr. Harrington** agreed with **Mr. Hooper**.

**Mr. Gombrii** noted that if 3.2(a) were deleted, then the definition of “charter party” would be even more significant.

**Mr. Alcantara** asked if it would help to list the activities that were contemplated by 3.3.

**Mr. Koronka** replied that the list was endless, and that it would be impossible to anticipate everything about which the parties might agree.

**Mr. Beare** proposed that chapters 4 (“Obligations of the Carrier”) and 5 (“Liability of the Carrier”) should be considered together. In New York, the International Sub-Committee had a paper on this topic but no drafts. At the New York meeting, four liability options were suggested. We now have drafts for two of the four; the other two required no drafting yet.

**Mr. Chandler** suggested that 4.1 (specifying the basic obligation of the carrier) should clarify that delivery may be made to a person acting on behalf of the consignee, and need not be made to the consignee itself.

**Prof. Berlingieri** mentioned that the definition of “carrier” is relevant throughout the draft. The instrument should either define “carrier” to mean the contracting carrier, or specify “contracting carrier” when that is intended.

**Mr. Harrington** wondered if it would be easier to use “carrier” to mean the contracting carrier, and then refer to “performing carriers” as agents, servants, etc.

**Prof. Sturley** saw this as a possible way to draft, but felt that the substantive result did not depend on the terminology. The substantive rule and the terminology were separate issues.

**Mr. von Ziegler** hoped that the problems under CMR would not be imported into this instrument. He argued for maintaining the distinction between contract and tort actions.

**Mr. Chandler** argued that those who benefit from a provision should also be responsible under it.

**Mr. Harrington** and **Mr. Koronka** discussed the Canadian and English Himalaya clause jurisprudence, mentioning various possibilities that had been recognized by the courts (including sub-bailment on terms).

**Mr. Alcantara** questioned why 4.2 was necessary. If the carrier delivered the goods “in the condition in which they were received . . . from the

consignor” as required by 4.1, then 4.2 adds nothing.

**Mr. von Ziegler** argued that both provisions were necessary. 4.1 did not impose an “obligation of result” because the carrier could claim the benefit of exemptions. 4.2 is necessary to impose an obligation on the carrier to take due care of the cargo.

**Mr. Beare** encouraged discussion of chapter 5 (“Liability of the Carrier”).

**Ms. Schiavi** suggested that the ICC would prefer liability option 2 (based on the current Hague-Visby regime without the navigational fault exemption).

**Ms. Howlett** felt that liability option 1 (based on the current Hague-Visby regime) was preferable. In any event, she feared that the presentation of the paper suggested that option 1 and option 4 (requiring the carrier to exercise “utmost care of the goods”) would be struck out. Option 1 is the status quo, and she argued that the burden should be on those who seek change to justify why change is necessary.

**Mr. Beare** assured her that the paper was not intended to advocate any solution. He also reminded her that the status quo in some jurisdictions is the Hamburg Rules.

**Mr. de Brauw** proposed that if no one supports option 3 (requiring the carrier to exercise “reasonable care of the goods”) and option 4, they could be excluded from the draft before Singapore.

**Mr. Koronka** announced that the British Maritime Law Association is not yet ready to exclude any option from consideration.

**Mr. von Ziegler** thought that it should be clear that all four liability options will have proponents, and thus all four should be included in the paper for Singapore. Perhaps the paper should make clear that some options have a longer history than others.

**Mr. Harrington** agreed that all four options should be retained. Option 2 may be in the lead here, but all four should be discussed.

**Mr. Rasmussen** suggested a fifth option, which would be the Hague-Visby Rules with a reverse burden of proof, liability for delay, and joint liability for contacting and performing carriers. He did not see that any of the other options covered this combination.

**Mr. Gombrii** felt that all four options leave open questions regarding delay, etc. In any event, he would retain all four options for discussion in Singapore.

**Mr. Larsen** announced that BIMCO agrees with the International Chamber of Shipping in preferring option 1. Moreover, option 4 is “not on” for BIMCO. In any event, the International Sub-Committee should not go to Singapore without presenting a choice. It would be a mistake to offer four choices. It would appear that work in **Prof. Berlingieri’s** International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea was wasted.

**Ms. Schiavi** countered that it would make sense to go to Singapore with four options because other industries still need to be consulted.

**Prof. Berlingieri** agreed with **Mr. Larsen** that the CMI has worked on this subject for years, and should not ignore the past work. But in fairness to future participants, the other options also need to be presented. This is particularly so

now because we are considering partial multi-modal coverage. Options 1 and 2 should be stressed, but options 3 and 4 should also be mentioned.

**Mr. von Ziegler** agreed. Option 1 is current practice while option 2 was supported by the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea.

**Mr. de Brauw** proposed that the first question should be whether we want a general regime or more specific rules (as in the Hague-Visby regime). If the preference is for more specific rules, is there any need to change the Hague-Visby Rules?

**Mr. Beare** suggested that this might be a possible approach for discussing the issue in Singapore.

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

**Mr. Beare** outlined his sense of the meeting regarding chapter 5. This part of the paper should summarize the views of the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea, point out that new considerations had entered the debate, record the approach suggested by **Mr. de Brauw**, and refer to the four options (perhaps with the fifth option suggested by **Mr. Rasmussen**).

**Mr. de Brauw** said his idea was to start with the general question, the answer to which might preclude half of the options. He would start with options 3 and 4, reaching options 1 and 2 only if options 3 and 4 are rejected.

**Prof. Berlingieri** objected that if the paper were to start with options 3 and 4, it would ignore what the CMI has already done.

**Mr. von Ziegler** noted that option 3 and its commentary clarify that a detailed approach is possible. On the other hand, a general rule can be based on the Hague Rules.

**Prof. Berlingieri** recalled the majority view that the catalogue under article 4(2) of the Hague Rules served a useful purpose in many jurisdictions and did no harm elsewhere, so there was a clear majority to retain the catalogue.

**Mr. Rasmussen** felt that whether the liability regime is abstract or concrete is an important issue. Denmark has a strong preference for concrete rules, which provide predictability. This was the view in the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea. He saw no need to revisit this issue.

**Mr. Gombrii** saw the difference between options 2 and 3 more as technique than substance. He reiterated that the paper for Singapore should keep all four options.

**Mr. De Orchis** reported that **Mr. Sekolec** (who was not then present) had expressed his disappointment that the CMI might be returning to the Hague-Visby Rules.

**Mr. von Ziegler** commented that the CMI does not need to please UNCITRAL, but explained that UNCITRAL is concerned that the Hague-Visby approach will not please the world. If the Singapore paper presents only one option, it will require a very strong justification.

**Prof. Berlingieri** supported **Mr. Beare's** summary of the sense of the meeting.

**Mr. Beare** asked if the International Sub-Committee agreed to redrafting the paper along the lines suggested, taking into account the comments just made.

[No dissent was expressed.]

**Mr. Beare** sought views on the next topic in chapter 5, Allocation of Damages.

**Mr. Hooper** supported the alternative mentioned in the commentary based on the U.S. proposal.

**Mr. Harrington** thought that in most jurisdictions the burden was on the carrier to prove the extent to which it was not liable.

**Mr. Rasmussen** agreed with **Mr. Harrington**. The U.S. COGSA proposal seems slightly artificial with its 50-50 allocation. But he also agreed with **Mr. Hooper** that the carrier should not be required to prove the extent of causation.

**Mr. De Orchis** argued that the proposal as currently drafted is pointless because the carrier can never carry the burden. If the burden on the carrier is not diluted, the provision accomplishes nothing.

**Mr. Beare** asked if the Working Group should proceed on the basis proposed, taking account of **Mr. Rasmussen's** and **Mr. De Orchis's** comments.

[No dissent was expressed.]

**Mr. Rasmussen** objected that 5.2.1 (which specified the liability of performing carriers) permitted a performing carrier to be sued on a maritime basis. Under a network approach, each carrier would be liable under its own system. This is a fundamental choice that needs to be addressed. Perhaps the draft should express alternatives. The draft of 5.2 already pre-supposes the answer to the multi-modal question, and the sub-issue.

**Mr. Beare** replied that **Mr. Rasmussen** had framed an important question that should be addressed in conjunction with the multi-modal paper. He asked whether the International Sub-Committee agreed.

[No dissent was expressed.]

**Mr. de Brauw** asked if the declared value would be binding on the performing carrier. This issue could also be addressed under 5.7. He viewed the declaration of value as a form of insurance that the shipper takes out with the contracting carrier.

**Mr. Beare** asked if there was general agreement that liability is joint and several, but only up to limits.

**Mr. Koronka** returned to the question of how value declarations should be treated.

**Mr. Harrington** asked why a performing carrier should be in a better position than the contracting carrier on whose contract the performing carrier seeks to rely. That seems bizarre.

**Mr. de Brauw** found the contrary position bizarre. Why should the performing carrier be subject to a higher declared value of which it was unaware?

**Mr. Chandler** reported that the U.S. stevedore and terminal operators

preferred the certainty of the statutory limit rather than being subject to higher or lower limits agreed by the contracting carrier. He argued that the contracting carrier's agreements should not bind other carriers, who do not benefit from the extra freight that the contracting carrier has collected.

**Prof. Gorton** asked if it was clear that recourse is possible only under the contract, and not in tort. He suggested that it should be.

**Mr. Chandler** agreed, adding that this is why it is important to have a broad definition of performing carrier.

**Prof. van der Ziel** noted that the Hamburg Rules limited the ability to sue in tort (outside of contract).

**Mr. Chandler** added that the U.S. COGSA proposal also limited the ability to sue in tort.

**Mr. Beare** opened the discussion on 5.3 ("Subcontractors, servants, and agents").

**Mr. Chandler** argued that 5.3.4 (which specifies that "the aggregate liability of the contracting carrier and performing carriers will not exceed the overall limits of liability") needed to clarify the position when a higher value had been declared.

**Prof. Gorton** referred to 5.2.2 (which imposes joint and several liability on the contracting carrier and performing carriers, up to the overall limits of liability). He felt that it was important to clarify that there is one limit, as is clear in 5.3.4.

**Mr. Beare** opened the discussion of 5.4 ("Delay").

**Ms. Howlett** reported that the International Chamber of Shipping did not believe that there should be liability for delay.

**Prof. van der Ziel** asked if there should be liability for delay if the carrier expressly agreed to the time limits.

**Ms. Howlett** agreed that such a regime would be acceptable.

**Mr. Chandler** pointed out that the clause as drafted benefits ship owners by limiting their liability for delay to situations in which there has been an express agreement.

**Mr. Harrington** reported that Canadian law already imposed liability for delay under the Hague-Visby Rules.

**Mr. von Ziegler** contended that there was a need to address delay explicitly. If delay is outside the international regime, then it will be left to national law.

**Mr. Chandler** reported on a U.S. case in which the court held that COGSA did not cover delay, and thus the carrier was liable without limitation.

**Prof. Gorton** asked what would happen if there was no express agreement but there was an unreasonable delay that the carrier could not explain.

**Mr. Chandler** replied that there would be no liability under the current proposal.

**Mr. Alcantara** asked what was the point of drafting a rule that was so divorced from commercial practice. We all recognize that no time limits are agreed in practice.

**Prof. van der Ziel** admitted that transport documents usually do not

reflect agreed time limits, but 5.4.1 (which defines when delay in delivery occurs) would include an oral agreement by the carrier's booking agent that the ship would arrive by a certain time. Also, contracts of affreightment may include maximum transit times.

**Mr. Hooper** proposed revising the draft to say "agreed in writing." He argued that the parties should also agree on the amount of the damages.

**Prof. Berlingieri** asked about an unreasonable deviation causing a delay.

**Mr. Chandler** felt that the deviation should break the limits on delay damages if the carrier knew that damage would result.

**Prof. Sturley** pointed out that, as drafted, 5.8.1 and 5.8.2 (which govern the loss of the right to limit liability) require only that the carrier knew "that such . . . delay would probably result."

**Prof. Berlingieri** observed that in case of a delay caused by unreasonable deviation, there would be no breach of 5.4.1 in the absence of an agreement, but there would be a breach under 5.5(b) (which defines an unreasonable deviation as a breach of the carrier's obligations). What are the consequences of this breach?

**Mr. von Ziegler** posed the hypothetical of a carrier that breaches the duty to provide a seaworthy vessel, and delay results. There are indeed many breaches that can cause delay. We need to address the broader damages question: will a carrier be liable for economic loss?

**Mr. Gombrii** added that the problems are aggravated by including both economic loss and physical loss together under 5.4.2 (which establishes the rules for limiting liability in cases of delay).

**Mr. Rasmussen** suggested that this discussion illustrated the need for a fifth option in chapter 5. It is crucial to decide whether there is a strict or a broad approach for delay, but the issue cannot be addressed in isolation.

**Captain Lüddecke** suggested that the limits under the Hamburg Rules were so low in cases of delay that it was not worth discussing the substantive rule unless the limits were significantly raised.

**Prof. van der Ziel** replied that when a ship's engines break down with 4000 containers on board, and the vessel owner would be liable for the entire freight for the voyage (or twice that), then the damages would be substantial.

**Mr. Chandler** could not accept a requirement that the agreement must be in writing. He also argued that the limit should apply only to economic loss (not to physical loss).

**Ms. Schiavi** announced that the ICC would not support a requirement that the agreement must be in writing.

**Mr. De Orchis** posed a hypothetical in which a cargo of coffee comes in three weeks late. He asked if the economic loss was the change in the market value during the three weeks or the loss suffered by the consignee's failure to have the coffee when agreed.

**Mr. Beare** asked whether the Working Group should proceed on the basis discussed.

[No dissent was expressed.]

**Mr. Beare** proceeded to 5.5 ("Deviation"), which he hoped was not controversial.

**Mr. Hooper** asked if the intent was that a deviation as such would not

break the limits, but a deviation that satisfied the requirements in 5.8 (“Loss of the right to limit liability”) would.

**Prof. Sturley** replied that this was the intent.

**Mr. Beare** observed that 5.6 (“Deck Cargo”) was more difficult to draft than anticipated.

**Mr. Chandler** contended that the rule should be limited in the container context to ships that have been fitted to carry containers.

**Mr. Hooper** added that flat racks and open tops should not be on deck.

**Prof. Sturley** confessed that he had originally misinterpreted the current draft because the United States has approached the question of deck carriage from an entirely different perspective. He feared that the U.S. delegation may be suffering under the same preconceptions that had disadvantaged his understanding.

He explained that in the United States the only special rule that is commonly discussed for deck cargo is a rule to protect the carrier from the harsh consequences of the “quasi-deviation” doctrine, *i.e.*, a rule that permits the carrier to stow cargo on deck without losing the benefit of the package limitation if it is lost or damaged. Such a rule is typically justified on the grounds that the cargo in question must be or customarily is carried on deck, and the typical example of a cargo requiring such a special rule is a container on a container ship. As a result, when a U.S. cargo lawyer sees a special rule for deck cargo, he or she assumes that it is this type of rule.

As 5.6.2 makes clear, however, this is not the type of rule that is commonly discussed in the United States. Most significantly, 5.6 does not protect the carrier from the “quasi-deviation” doctrine but from any liability at all for “the special risks” associated with deck carriage. Moreover, 5.6 does not offer any special protection to carriers who stow containers on the deck of a container ship — although that is the most common scenario for the application of the special rule in the United States.

**Prof. Sturley** suggested that a short coffee break at this point might give delegates an opportunity to study 5.6 more carefully, and thus speed the discussion of the subject after the break.

The meeting adjourned for coffee at 3:55, and reconvened at 4:15.

**Mr. Chandler** proposed that it would be sufficient to say that deck cargo is covered by the instrument and leave the general rules to apply. If the cargo needs to be on deck, then the carrier satisfies its duties by stowing it there. If the carrier stows cargo on deck that should not be there, it is in breach of the duty to properly care for the cargo. If the carrier does so knowingly, then it loses the benefit of limitation.

**Mr. Harrington** asked how the instrument would deal with the special risks of deck carriage, such as wetting.

**Mr. Chandler** replied that the general care and custody rules would govern.

**Prof. Gorton** asked if simplifying the draft would lead to deck cargo’s being treated differently in different jurisdictions.

**Mr. Hooper** suggested that the carrier should be allowed to protect itself

from the special risks of deck carriage with an appropriate clause in the transport document.

**Mr. De Orchis** wondered if the transport document should still note deck carriage to satisfy other needs, such as insurance.

**Mr. Rasmussen** would hesitate to shorten the proposal so dramatically.

**Prof. Sturley** noted that just as the catalogue of defenses under article 4(2) of the Hague Rules could be helpful (rather than relying on a general rule), so the specific rule here could be helpful (rather than relying on a general rule). He suggested retaining the longer provision but noting that it may be unnecessary — thus flagging the issue for future discussion.

[Several specific drafting corrections were suggested and noted by the draftsmen.]

**Mr. Beare** proceeded to 5.7 (“Limitation of liability”).

**Mr. Harrington** noted that the draft mentioned “loss of or damage to the goods” but not “in connection with” the goods (which is also mentioned in the Hague and Hague-Visby Rules). This may mean that carriers lose the limits for consequential damages. Was this deliberate? If not, he preferred the Hague-Visby language.

**Prof. van der Ziel** had no objection to restoring the Hague-Visby language.

**Mr. Chandler** thought that, in view of changes in the world monetary situation, the SDR was on the way out. He suggested that someone should look into this issue.

**Mr. Beare** proposed that a small study group of one or two could examine this at the appropriate time.

**Mr. Rasmussen** objected to 5.7.1(ii), the proposed special limit for containers. He predicted that it would complicate settlements.

**Prof. Sturley** and **Mr. Chandler** reported on the unsuccessful attempt to include a per container limit in the proposed amendments to the U.S. COGSA.

**Prof. van der Ziel** explained that he had based 5.7.1(ii) on the draft CMNI Convention, which has since been changed substantially.

**Ms. Howlett** agreed with **Mr. Rasmussen** that there should be no special limit for containers.

**Prof. van der Ziel** agreed that the final version of the CMNI Convention would not be a good idea.

**Mr. von Ziegler** added that the draft has a very broad definition of container in chapter 1, and this made it important to be careful. For example, the “container” definition covers trailers.

**Mr. Beare** asked if it was agreed to omit 5.7.1(ii).

[No dissent was expressed.]

**Mr. Alcantara** asked if there should be a provision governing the amendment of the limitation amounts.

**Mr. Beare** noted that the issue was raised in the commentary.

**Mr. von Ziegler** suggested that it would be preferable to draft a new provision, and not simply copy previous provisions (which were ambiguous).

**Mr. Beare** turned to 5.8 (“Loss of the right to limit liability”).

**Ms. Schiavi** mentioned 5.8.1 (which governs a carrier’s own loss of the

right to limit liability). She thought that this was the appropriate place to include the provision regarding joint and several liability to the extent of the limits on liability (which is now in 5.2.2 and 5.3.4).

**Mr. Alcantara** asked if a reference to the ISM code would be appropriate.

**Mr. Beare** asked if anyone else supported this idea.

[No one else supported the suggestion.]

**Mr. von Ziegler** suggested that 5.8.1 was a departure from the Hague-Visby Rules.

**Prof. Berlingieri** recalled the earlier discussion concerning the impact of a value declaration. Is it a new limit binding all carriers or is it binding only on the contracting carrier?

**Mr. de Brauw** also asked whether a value declaration was equivalent to a new limit that could be broken under 5.8, or an agreed valuation that was binding on both parties.

**Mr. Chandler** asked whether one carrier's reckless act defeated the limit for all carriers.

**Prof. Sturley** replied that the intent of the draft was that each carrier controlled its own fate. Thus one carrier lost the right to limit liability when it was guilty of the specified conduct, but this loss of the right to limit liability did not affect the rights of innocent carriers who were working on behalf of the guilty carrier (*e.g.*, the guilty carrier's employees, servants, and agents) or the rights of innocent carriers on whose behalf the guilty carrier was working (*e.g.*, the guilty carrier's employer, master, or principal). As a general rule, one carrier's misconduct could not be imputed to another under doctrines such as *respondeat superior*. The one exception was that a corporate carrier, who could only act through its agents, would be responsible for the misconduct of those who were sufficiently senior in the corporate hierarchy that their misconduct constituted the misconduct of the corporation itself.

**Prof. Sturley** explained that proposed amendments to the U.S. COGSA were drafted somewhat more strictly because strict drafting was considered necessary for the U.S. courts to give effect to the intent of the provision.

**Mr. Koronka** asked if this meant a "personal" act, corresponding to fault or privity.

**Prof. Berlingieri** suggested that "personal" was a term used in the Limitation Convention, and it would make sense to use it here if the same meaning is intended.

**Ms. Schiavi** agreed that "personal" should be used.

**Mr. De Orchis** asked what "personal" meant.

**Mr. von Ziegler** explained that the meaning was the same as "fault or privity" in the United States. Furthermore, it had to be the fault of someone who is the carrier's "alter ego."

**Prof. Sturley** proposed that, if the International Sub-Committee agreed regarding the substance of the idea, then the draftsmen could produce a text for discussion at Singapore.

[No dissent was expressed.]

**Mr. Chandler** asked if "delay" in the final clause is correct. Or is it necessary to show that the carrier knew that such loss or damage would result?

**Mr. Beare**, proceeding to 5.9 (“Notice of loss, damage or delay”), explained that this draft was based on the work of **Prof. Berlingieri**’s International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea.

**Prof. van der Ziel** noted that draft used “deemed prima facie,” but he now felt that “rebuttable presumption” would be better drafting.

**Prof. Berlingieri** challenged the need for 5.9. The consignee already has the burden of proving loss or damage. This provision originated in the Hague Rules to reverse the prior rule that barred all rights if the consignee failed to give timely notice.

**Mr. Chandler** agreed that the clause had little meaning in modern container practice.

**Mr. von Ziegler** suggested that the clause was still needed to preempt inconsistent national law. Also it may help to give notice to performing carriers.

**Mr. De Orchis** agreed that the “prima facie” aspect of the provision makes little sense, but the carrier should be put on notice that problems exist. Otherwise, it will not know to save documents, conduct an investigation, etc.

**Mr. Chandler** added that the provision also helps to facilitate a joint survey.

**Prof. Gorton** suggested drafting 5.9.1 (which corresponds to the notice of loss provision in the Hague and Hague-Visby Rules) to tie in with chapter 4.

**Mr. Beare**, turning to chapter 6 (“Obligations of the Shipper”), explained that this draft was based on the discussion in **Prof. Berlingieri**’s International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea.

**Mr. Alcantara** thought that the draft appeared to be unbalanced, with very little imposed on the carrier and a much longer list of duties imposed on the shipper.

**Ms. Schiavi** requested that the duties in 6.2 (which are duties on the shipper to provide information to the contracting carrier) should be subject to the carrier’s duty to check the information provided by the shipper.

**Prof. van der Ziel** responded that this is not in line with the current practice in many trades and would cause substantial increases in freight rates.

**Mr. Chandler** thought that the drafting was unreasonable. In 6.2.2 (which permits but does not require a carrier to verify the information provided by the shipper), the carrier cannot turn a blind eye to things that it should know. In 6.1 (which imposes duties on the shipper regarding the condition of the goods and their packaging on delivery to the carrier), it is unrealistic to expect the shipper to know all the details about how the goods will be carried that the first mate should know.

**Mr. Koronka** noted that the obligations on the shipper to guarantee that the goods will not cause damage to other property goes well beyond the Hague-Visby Rules, which tie liability to knowledge.

**Prof. van der Ziel** explained that it had not been the intention of the draft to require the shipper’s guarantee, but to say that the condition of the goods will not cause damage.

**Mr. Chandler** found it acceptable to say that the goods should be properly packed in the container, but too broad to say that the goods will not cause damage to another party.

**Prof. Berlingieri** mentioned a case in which machinery was shipped from Bangkok to the United States. Hooks had been replaced, and the new hooks were inadequate for lifting the machinery. The shipper should be liable. This case illustrates why the inclusion of “loading, handling, stowage” is appropriate in 6.1.

**Mr. Chandler** noted that the commentary is better than the draft.

**Mr. Beare** proceeded to 6.2 (which imposes duties on the shipper to provide information to the contracting carrier).

**Mr. Hooper** noted that compliance with the IDMG Code is not always enough. The codes are often out-of-date. The shipper should be required to use its special knowledge regarding the cargo to give better information to the carrier.

**Mr. Koronka** responded that there is a careful balance here. The shipper knows about its own cargo, but does not know about carriage by sea. What is the carrier’s responsibility? The shipper should accurately describe the goods so that the carrier can decide how to carry the goods.

**Ms. Schiavi** strongly supported that view.

**Mr. Harrington** asked what should happen if the goods are misdescribed to avoid paying taxes.

**Mr. Koronka** answered that misdescription should result in the death penalty! The carrier may be fined for carrying misdescribed goods.

**Mr. Beare** proceeded to 6.3 (which imposes liability on the shipper for losses or damage caused by the goods).

**Mr. Koronka** expressed the view that this provision is also too Draconian.

**Mr. Alcantara** argued that the shipper should be allowed to limit its liability, just as the carrier can.

**Mr. Rasmussen** observed that he had made a point about the carrier’s right to discharge dangerous goods that is not included here. He asked if that had been intentional.

**Prof. van der Ziel** explained that he had omitted it from this chapter because such a provision belongs elsewhere. It does not directly effect the shipper’s liability.

**Mr. Chandler** agreed that the shipper should be allowed to limit liability. He suggested that the shipper should also have a catalogue of exceptions comparable to article 4(2) of the Hague Rules.

**Ms. Schiavi** expressed the belief that the whole section is too one-sided.

**Mr. Koronka** contended that it should be enough that the shipper has accurately described the goods. Does the shipper have a duty to inquire regarding the coating on the carrier’s tanks?

**Mr. Rasmussen** responded that the Hague and Hague-Visby Rules already refer to “all damages” in article 4(6).

**Mr. Beare** suggested that the International Sub-Committee should revisit chapter 6 briefly in the morning, allowing the draftsman an opportunity to re-think the draft overnight in response to today’s comments.

**Ms. Schiavi** explained that she would not attend tomorrow, but wished to make two comments: (1) She was uncomfortable with 8.6(a)(ii) (which

permits the carrier to retain the goods until the shipper's obligations to the carrier have been paid) and wished to reserve the right to object within two weeks; and (2) she found 12.1 (which seeks to identify who has rights against the contracting carrier) difficult to understand, and did not see why it was necessary.

**Mr. Chandler** noted that he also had problems with 8.6 (which specifies when the carrier may retain the goods until certain payments are made).

The meeting adjourned at 6:10 p.m. on Thursday, 12th October 2000.

**Mr. Beare** reconvened the meeting at 9:05 a.m. on Friday, 13th October, and invited **Prof. van der Ziel**, now that he had had an opportunity for further reflection, to comment on chapter 6.

**Prof. van der Ziel** expressed surprise at the reaction to chapter 6, but he assured the International Sub-Committee that he would draft according to its wishes. He commented that we are living in an information age, and that carriers and shippers must be able to rely on the information furnished to each other. Carriers lack the personnel to check the information furnished by the shipper. He commented further on the safety concerns that make it particularly important for the carrier to have complete and accurate information. It is also particularly important that a container or trailer be properly stowed and secured by the shipper. In this connection, he reported that the Dutch shipping authorities feel strongly that the shipper's liability rules must be clearly expressed.

**Prof. Gorton** noted the work done on this subject in Sweden.

**Mr. Chandler** agreed that shippers should be responsible for the damage caused by their fault in appropriate cases. The problem with this draft is that the burden on shippers is disproportionate. Shippers are often not in a position to know the forces to which the cargo will be subject. Even if the shipper follows the carrier's guidelines, that may be inadequate.

**Mr. Hooper** raised the final clause of 6.1 (which requires a shipper of containerized cargo to stow, lash, and secure the goods so "that they will not cause damage to other property, including the container."). He suggested that this clause should be deleted.

**Mr. Diamond** felt that strict liability would be appropriate for bulk cargo even if it was not for the container trade. If an oil cargo causes damage, the shipper should be liable without fault and without limitation.

**Mr. von Ziegler** suggested that when cargo requires more than the usual level of care, then the requirements of 6.2 make sense.

**Mr. De Orchis** reported that he was currently handling three cases in which cargo caused not simply damage to other property, but also personal injuries. That possibility should be addressed.

**Prof. Berlingieri** referred to the general principle of cooperation between the shipper and the carrier.

**Mr. Rasmussen** noted the distinction between dangerous goods and ordinary goods, which this draft did not follow. He proposed returning to the traditional distinction.

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**Mr. Beare** proposed that chapter 6 should be re-drafted, starting with commentary that sets out the difficulties and concluding with a more tentative draft.

**Mr. Chandler** agreed with **Mr. Rasmussen**, subject to the caveat that the British view regarding dangerous goods (*i.e.*, any goods that cause damage) is too broad.

**Mr. von Ziegler** suggested highlighting issues such as time bar and jurisdiction in context of the shipper's liability.

**Mr. Beare** turned to chapter 7 ("Transport Documents").

**Mr. Diamond** wondered if the structure was appropriate. He questioned the definition of "negotiable transport document." He was unhappy with the timing under 7.2.1(c) (which requires the transport document to "show the number of packages, the number of pieces, the quantity, and the weight as furnished in writing by the consignor before a carrier receives the goods"). He found 7.2.2 (defining "apparent order and condition of the goods") to be satisfactory, however, and he was pleased to see it. He saw potential problems with 7.3.1 ("Circumstances Under Which a Carrier May Qualify the Description of the Goods in the Transport Document") and asked whether this referred to standard clauses or special clauses added at the time the goods are received. Special clauses are often unacceptable to shippers because they may render transport document unclear. For containerized goods, it is an improvement to have the requirement refer to "closed" rather than "sealed" containers, but that is still not enough. This section should be drafted in more general terms to deal with principles rather than details. There should be more attention to bulk cargo and LCL (less than container loads) rather than FCL (full container loads).

**Mr. Chandler** asked what **Mr. Diamond** meant by general principles.

**Mr. Diamond** replied that there is the general duty on the carrier to ascertain whether the shipper's particulars are accurate to the extent it can reasonably do so, and must say whether particulars are accurate, inaccurate, or unverifiable. There should be a *prima facie* presumption that the carrier cannot verify the contents of the container.

**Mr. Chandler** countered that the issue of open or closed doors is not relevant. Establishing the chain of custody is the important issue. When seals change or disappear, the carrier should explain what happened. LCL shipments are generally stowed in the container by the carrier; it is equivalent to non-container cargo.

**Mr. Rasmussen** found the new draft to be an improvement over the draft discussed in July. In 7.2.1 ("Required Contents of the Transport Document"), the carrier should be required to list the quantity or the weight of the goods, not both. He thought this had been agreed at previous meeting. 7.2.3(a) (which lists the consequences of omitting the required contents of the transport document) seems to be a new liability rule. He found it to be a novel suggestion, and very different than the traditional estoppel approach.

**Mr. Hooper** explained that the U.S. courts do not honor "shipper's load and count" clauses, so the U.S. proposal needed to work out a compromise specifying when such clauses should be honored.

**Mr. Alcantara** noted that transport documents are generally prepared by the shipper. Perhaps this material should be considered in conjunction with chapter 6.

**Mr. De Orchis** agreed with **Mr. Rasmussen's** criticism of 7.2.3(a), suggesting that the carrier should at least have a defense if the shipper's inaccurate information caused the problem.

**Mr. Chandler** wondered what damages there might be in such a situation.

**Mr. Diamond** posed a hypothetical under which the shipper was unable to tender the transport document because of a dispute between the shipper and the carrier regarding the description of the goods. He felt strict liability was inappropriate in such a case.

**Mr. Chandler** agreed that strict liability was unnecessary.

**Prof. Gorton** asked whether the good faith requirement in 7.3.6 was appropriate for a convention.

**Mr. Chandler** mentioned that an alternative would be to require the carrier to act reasonably.

**Prof. van der Ziel** recalled **Prof. Berlingieri's** suggestion of a general requirement that the shipper and the carrier cooperate. The carrier and the shipper should each be responsible for the accuracy of the information that they provide, and should be liable to the consignee. When the problem is the identity of the carrier, it makes no sense to hold the issuer liable. It should be the duty of the shipper to ensure that it does not accept an unclear transport document. 7.3.5(b) (which limits when qualifying clauses are effective for containerized shipments) makes no sense; it is precisely when the container has been opened that the carrier needs the benefit of the clause. A carrier is presumed to have no opportunity to inspect the contents of a closed container, and that presumption should remain intact even when the container has been opened during the carriage. Furthermore, "closed" container should be revised to read "shipper-packed" container. Without exception, he argued, shipper-packed containers are indicated as "FCL" shipments on the bill of lading.

**Prof. Berlingieri** proposed to delete the second sentence of 7.2.3(a) (which imposes liability on the issuer of a transport document for damages caused by the omission of some of the required contents of a transport document). The consequences of the omission of the required information are already dealt with elsewhere. The sentence creates more problems than it would solve.

**Mr. Chandler** explained that usually the transport document is completed by the shipper or the shipper's freight forwarder. If details are missing, it would be because the carrier deleted it. **Prof. van der Ziel's** first point is thus well taken. But he disagreed with **Prof. van der Ziel's** objection to 7.3.5(b). If the container has been opened, the carrier should have to prove what happened.

**Mr. Alcantara** reported that the Spanish Maritime Law Association is satisfied with chapter 7 as far as it goes, but felt that it still needs work on the details. He agreed with **Prof. Gorton** that the 7.3.6 good faith requirement should be deleted. He also did not support a general requirement of cooperation.

**Prof. Fujita** noted that in the second sentence of 7.2.3(a), “holder” would not apply for a non-negotiable transport document. Perhaps the draft should be revised to recognize the person relying on a non-negotiable transport document.

**Mr. Beare** noted that no one had commented on the date and signature provisions.

**Mr. de Brauw** recalled the problems with 7.4.2 (which specifies when the registered owner of a vessel is liable under transport documents with ambiguous signatures). These problems are already reflected in the commentary.

**Mr. Rasmussen** reiterated his views, which had previously been expressed, regarding the inappropriateness of imposing liability on the registered owner.

**Captain Lüddeke** agreed with **Prof. Berlingieri’s** proposal to delete 7.2.3(a)’s second sentence.

**Mr. Beare** explained that the paper going forward to Singapore would be free-standing, without reference to prior agenda papers.

**Mr. Alcantara** suggested that “demise” was ambiguous in 7.4.2; he preferred “bareboat.”

**Mr. Beare** proposed jumping ahead to chapter 11 (“Transfer of Rights”), noting that we would return to discuss disputed provisions in chapters 8 and 9. He invited **Prof. van der Ziel** to lead the discussion.

**Prof. van der Ziel** explained that this was a tentative first effort to address a subject that has not yet been addressed in other conventions. He had drafted only a few sections, recognizing that more would need to be done. 11.3 (which addresses the rights of a person who becomes the holder of a transport document after delivery of the goods) is taken from the British Carriage of Goods by Sea Act of 1992, but does not go so far. He recognized that it may nevertheless be controversial.

**Mr. Beare** noted that the subject had been discussed in January, but drafting had been postponed.

**Mr. Chandler** suggested that the 1992 British Carriage of Goods by Sea Act was highly artificial, dealing with the problems created by English law’s failure to recognize third party beneficiaries. He did not find it a useful model for an international convention. He particularly objected to the sins of the shipper being visited upon the innocent consignee in the last sentence of 12.1 (which authorizes the carrier “to exercise all [its] rights and immunities under the contract of carriage towards [an assignee]”).

**Prof. Gorton** recalled the previous day’s discussion of documents of title and negotiability. Under Swedish law, the ownership of the goods and the document may be separated. These issues need to be considered here.

**Mr. Diamond** began with the thought that it would be helpful to include these topics in a convention with the hope of achieving some uniformity. Problems arise as soon as liabilities are discussed. The instrument should not transfer pure liabilities, but it is acceptable to transfer “conditional rights” (that is, rights with liabilities attached to them). Not all liabilities should be transferred, but some should. The draft will need to address which liabilities

should be transferred. 11.3 is not so simple as it looks. The real problems arise when the carrier has delivered the goods to the wrong person, and 11.3 addresses the case in which the carrier has delivered the goods to the right person. This clause is fine so far as it goes, but it needs to address the real problems.

**Mr. Alcantara** noted that 11.3 also needs to deal with the situation in which the transport document is issued to a named person who sells the cargo during transit.

**Prof. Berlingieri** commented that the legal theory of negotiable instruments is very difficult, and varies from jurisdiction to jurisdiction. The International Sub-Committee should try to seek the common denominator; otherwise we trespass on fundamental issues of national law.

**Mr. Chandler** objected that the mandate for this project is to attempt to overcome these disparities. It may be impossible to go too deeply into national law, but it is important to seek uniformity when it affects international trade.

**Mr. von Ziegler** agreed with both **Prof. Berlingieri** and **Mr. Chandler**. We should seek solutions to problems when they are necessary for international trade.

**Mr. Diamond** cautioned that it would appear odd to override national law governing the transfer of rights but leave to national law the issue of a consignee's liabilities.

**Captain Lüddecke** questioned "other arrangements" in 11.3.

**Mr. Chandler** agreed with **Mr. Diamond** that there are liabilities that are tied to the cargo (such as demurrage and freight), but these are very different from the faults of the shipper. Inadequate packing, for example, already gives the carrier a defense to the consignee's claim. It should not also impose liability on consignee.

**Prof. van der Ziel** endorsed **Mr. von Ziegler's** point that we should follow both **Prof. Berlingieri's** and **Mr. Chandler's** suggestions. He particularly noted the need to establish concepts that will apply in the future under electronic commerce.

**Mr. Beare** suggested that those thoughts should be expressed in a new preamble to chapter 11.

**Mr. von Ziegler** suggested that the same concept should also apply to chapters 9 and 10.

**Mr. Diamond** noted that the 1992 British Carriage of Goods by Sea Act does have provisions relevant to waybills. Perhaps that subject needs to be addressed here, too. If the shipper instructs the carrier to deliver the goods under the waybill to a third party, the third party should have a cause of action for the carrier's failure to deliver.

**Mr. Harrington** mentioned 11.5 (which permits carriers to recover expenses from the holder of a transport document in certain circumstances). He questioned the application of this provision to intermediate holders.

**Prof. van der Ziel** explained that 11.5 only deals with costs incurred by the carrier outside the contract of carriage, *i.e.*, when the carrier acts as a *negotiorum gestor*.

**Prof. Gorton** wondered how far the project should go. Does it make sense to address rights of stoppage in transit, or rights in bankruptcy?

**Prof. Berlingieri** gave the example of imposing liability on a subsequent holder who never requests delivery of the goods. He predicted that many countries would be unable to accept such a rule.

The meeting adjourned for coffee at 11:00, and reconvened at 11:20.

**Prof. van der Ziel** felt that 11.3 was a very narrow provision that applied only when delivery had been made to a true owner, but the transport document had not been indorsed to that person.

**Mr. Chandler** suggested that this explanation should be made explicit in the commentary.

**Mr. de Brauw** asked how the good faith buyer of a bill of lading would know whether delivery had already been made.

**Prof. Berlingieri** asked if 11.3 applied to the improper delivery of goods to a person who was not entitled to delivery.

**Prof. van der Ziel** replied that it did not. Responding to **Mr. de Brauw's** question, he suggested that buyers in such situations were generally well aware of the risks.

**Mr. Beare** encouraged **Prof. van der Ziel** to revise the draft with these points in mind, noting the reservations that had been expressed.

**Mr. Sekolec** reported that the UNCITRAL Working Group on Arbitration would meet next month, 20th November to 1st December, and was considering suggestions to relax the rules regarding agreements to arbitrate. Some countries have already relaxed the rule requiring two signatures or an exchange of messages. These are issues of particular relevance for bills of lading, which generally do not have two signatures. The extent to which the consignee is bound, and if so when, is also important. He encouraged the CMI to participate in this work.

**Mr. Beare** opened the discussion of chapter 8 (“Freight”).

**Mr. Chandler** suggested that 8.2(a) (which specifies when freight is earned) should not permit freight to be earned before the voyage is commenced.

**Mr. de Brauw** posed the hypothetical of a ship sailing to the loading port to collect cargo. Even if the ship sinks at the pier, the carrier has incurred substantial expenses.

**Mr. Chandler** responded that this was a charter party situation, in which the contracting parties can do as they wish. In the liner context, concerns are different.

**Captain Lüddecke** responded that even in the liner context, when the carrier stores the container in a yard it has already begun earning freight.

**Mr. Rasmussen** asked if this provision was intended to be limited to maritime contexts.

**Mr. Diamond** suggested that the question of when freight is earned could be left to national law.

**Mr. Alcantara** referred to 8.2(b) (which provides that “no freight will become due for any goods which are lost before the freight is earned” in the absence of a contrary agreement). He suggested that this was inaccurate in cases in which the carrier accepts liability for the goods. If the carrier accepts liability, it should be entitled to freight.

**Mr. Diamond** suggested that the draft should address the case in which some goods were lost and some were delivered. Under English law, pro rata freight would be due.

**Prof. van der Ziel** replied that this is what he had intended in 8.2(b) with the statement that “no freight will become due for any goods which are lost before the freight is earned.” This statement would not apply to those goods in a shipment that were not lost.

**Mr. Gombrii** wondered if 8.2(b) covered a claim for damages when the goods are not tendered.

**Mr. De Orchis** acknowledged **Mr. Chandler**’s comment about freight not becoming due before the commencement of the voyage, but stressed that different concerns apply in the multi-modal context. When goods travel across the country by rail but are lost before being loaded on the vessel, the carrier should still be entitled to freight.

**Mr. Diamond** suggested that further attention should be paid to the issue of freight due on delivery.

**Ms. Howlett** reported that the International Chamber of Shipping and BIMCO are concerned that it may be inappropriate to include chapter 8 at all. They are unaware of any need for these provisions.

**Mr. von Ziegler** suggested that this chapter may be non-mandatory. It could be very beneficial to carriers, and particularly relevant to enforcing a right of retention.

**Mr. De Orchis** suggested that 1.15 (the “freight” definition) should be broader to clarify that all of the carrier’s charges are included.

**Mr. Chandler** argued that 8.6(a)(ii) (which permits the carrier to retain the goods until the shipper’s obligations to the carrier have been paid) was an invitation to fraud. If a carrier issues a freight pre-paid bill of lading, it should not be allowed to collect freight from the consignee.

**Mr. von Ziegler** agreed that the carrier should not be allowed to exercise a lien on a freight pre-paid transport document.

**Mr. Diamond** added that the lien should not be broader than the consignee’s obligation in any event.

**Mr. Alcantara** asked if the lien could be exercised on board, or only on shore.

**Prof. van der Ziel** replied that the draft did not address this question. If local law does not permit the lien to be exercised on board, then the carrier must hold the goods in a warehouse and not deliver them to the consignee in order to claim the lien.

**Prof. Berlingieri** noted the need to clarify which provisions are mandatory.

**Mr. Diamond** submitted that the word “non-mandatory” could be used in two senses. It could mean that the parties may contract out of a provision that is a part of the convention. Or it could mean that ratifying states have an option not to ratify the particular provision in question. He assumed that the draftsman intended the former sense, but this should be clear.

**Mr. Rasmussen** noted that mandatory could be “one way” (as in article 3(8) of the Hague Rules), which would mean that one party was bound by a

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provision but the other party could waive it, or “two way” (as in CMR), which would mean that both parties are bound by the provision.

**Mr. Chandler** felt that 8.6(a)(i) (which permits the carrier to retain the goods until freight, demurrage, and damages for detention have been paid) was too broad in its inclusion of “all other costs incurred by the carrier in relation to the goods.”

**Captain Lüddeke** asked how the carrier could retain the goods to secure the payment of freight if freight is not earned until delivery under 8.1.

**Mr. Harrington** thought that the carrier generally could not lien the cargo for the payment of demurrage.

**Mr. Chandler** suggested that the draft only applied when the transport document provided for a lien.

**Mr. Diamond** recalled his earlier comment that the lien should not be wider than the consignee’s obligation.

**Prof. Fujita** asked why a “no set-off” rule was imposed. The rule makes sense when an obligation is not quantified, but it need not be a general rule.

**Mr. Beare** opened the discussion of chapter 9 (“Delivery to the Consignee”).

**Prof. van der Ziel** explained that 9.1(a) (which requires that a consignee who claims delivery must also accept delivery) had been redrafted to address concerns raised at the previous meeting. “Delivery” is primarily a contractual matter. If it is not governed by the contract, it will be necessary to look to custom and usage. The default rule is the discharge of the cargo.

**Mr. Chandler** noted that in the container trade it is impossible for the consignee to accept delivery of the cargo on discharge.

**Mr. Diamond** observed that 9.1 seems to say that if the consignee asks for delivery of the cargo then it must accept delivery. Surely that was not the intent. He suggested that the provision might make sense if it provided that a consignee had a general duty to accept delivery.

**Prof. van der Ziel** expressed his personal agreement with **Mr. Diamond**’s sentiment, but the concept that the consignee has a duty to accept delivery before becoming a party to the contract was flatly rejected at the previous meeting. We nevertheless have a problem with consignees who assert rights but refuse delivery (perhaps wishing to take advantage of inexpensive storage in the container yard).

**Captain Lüddeke** explained that some consignees appear and assert the right to delivery, but demand the right to inspect the goods before taking delivery. What does the carrier do if the consignee refuses delivery after inspection?

**Mr. Diamond** added that 9.2.1 (which governs the responsibility of the carrier after delivery) addresses the carrier’s retention of possession after “delivery.” He found this to be problematic.

**Mr. Hooper** assumed that 9.2.1 was intended to address a constructive delivery situation, after which the carrier was no longer liable as a carrier.

**Mr. Diamond** suggested that more thought needed to be given to this provision.

**Prof. van der Ziel** reported that Prof. Zunarelli had suggested that the

carrier should be entitled to the protection of this Instrument, but that the contract of carriage should not be extended.

**Mr. Gombrii** expressed his concern that 9.2.2 (which applies in cases of delivery prior to the discharge of the goods from the vessel) seems to entirely negate 3.2 (which permits the contract of carriage to impose responsibility on the shipper or the consignee for certain activities during the carrier's period of responsibility).

**Mr. De Orchis** noted that this is another case in which the draft must address the distinction between performing and contracting carriers.

**Mr. Chandler** asked if limitations were included in "defenses and remedies."

**Mr. Beare** opened the discussion of chapter 10 ("Right of Control"), which he noted consists primarily of commentary.

**Mr. Rasmussen** felt that these provisions could be highly controversial. How can the consignee demand delivery before the goods arrive (10.1(a)(i))?

**Prof. van der Ziel** explained that this refers to a demand at a prior port on the vessel's itinerary; it does not permit the consignee to order a deviation.

**Mr. Rasmussen** predicted that even that limited proposal would be unacceptable in liner traffic.

**Mr. von Ziegler** responded that this proposal only gives the consignee the right to renegotiate the contract. The carrier can impose an extra charge for the variation.

**Prof. van der Ziel** explained that his intent was to coordinate rights under the sales contract and under the contract of carriage, as set out in the commentary.

**Prof. Gorton** and **Mr. Diamond** both doubted that the sales contract would give the consignee such a broad right.

**Mr. Rasmussen** thought that 10.2(iii), which may subject the carrier to the orders of two masters, was unworkable.

**Prof. Berlingieri** suggested that 10.1 (which defines the right of control) and 10.2 should be aimed at identifying who has the right to deal with the carrier, without prejudice to the carrier's rights in dealing with that person. 10.3 then addresses the relationship between that person and the carrier.

**Mr. von Ziegler** referred to CMNI article 14, which is very broad. Simply identifying who has the right to negotiate with the carrier is important.

**Mr. Beare** concluded the discussion of the outline instrument, which will not go to Singapore as a draft approved by this International Sub-Committee but instead as a basis for discussion. **Mr. Gombrii** will prepare the first draft of an agenda paper for Singapore.

**Mr. Gombrii** recalled that three documents will go forward to Singapore: (1) the outline instrument, along lines that we have already seen and discussed; (2) a paper addressing multi-modal issues paper which **Mr. Koronka** is drafting; and (3) an agenda paper.

He saw three broad areas to include in the agenda paper: (1) the scope of the instrument; (2) liability; and (3) transport documents.

Under the scope of the instrument, issues arise regarding the mandatory

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nature of the provisions, the type of instrument, and multi-modal issues (including through transport).

Under liability, the first issue is whether to have a fault-based or a broader regime. If fault-based, should there be a detailed catalogue of exceptions? The Singapore Conference should also deal with delay, the loss of the right to limit liability, the treatment of performing carriers, and the shipper's liability.

Under transport documents, issues include transferability, the right of control, documents of title, the negotiability of transport documents, the information in transport documents, liability for incorrect information, and EDI.

**Mr. von Ziegler** observed that the Singapore Conference will clearly be unable to discuss every detail on all of these issues, but must focus on the burning issues. He asked if it would help to have a parallel effort in the national member associations to provide more general comments, which the International Sub-Committee could then consider in preparing the consultation paper in May, or whether it would confuse the national member associations to pursue two tasks simultaneously.

**Prof. van der Ziel** raised the need to focus on some of the EDI issues in the agenda paper.

**Prof. Berlingieri** suggested that national member associations might be asked to express tentative views in advance of Singapore. This could help to frame the debate.

**Mr. Beare** offered to make that suggestion in his cover letter to the national member associations. He asked if the International Sub-Committee would agree to the publication of a draft report of the current meeting in the CMI Yearbook — as a draft subject to formal approval at the International Sub-Committee's next meeting — so that the delegates at Singapore who had not attended this meeting would have at least some report of the proceedings here.

[No dissent was expressed.]

**Mr. Beare** expressed the International Sub-Committee's thanks to **Ms. Howlett** for hosting the meeting.

The meeting adjourned at 1:30 p.m.