

# **YEARBOOK**

## **2000**

### **ANNUAIRE**



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PART I

**Organization of  
the CMI**

# *Comité Maritime International*

## CONSTITUTION

(1992)

### PART I - GENERAL

#### **Article 1**

##### **Object**

The Comité Maritime International is a non-governmental international organization, the object of which is to contribute by all appropriate means and activities to the unification of maritime law in all its aspects.

To this end it shall promote the establishment of national associations of maritime law and shall cooperate with other international organizations.

#### **Article 2**

##### **Domicile**

The domicile of the Comité Maritime International is established in Belgium.

#### **Article 3**

##### **Membership**

- a) The Comité Maritime International shall consist of national (or multinational) Associations of Maritime Law, the objects of which conform to that of the Comité Maritime International and the membership of which is open to persons (individuals or bodies corporate) who either are involved in maritime activities or are specialists in maritime law. Member Associations should endeavour to present a balanced view of the interests represented in their Association.

Where in a State there is no national Association of Maritime Law in existence, and an organization in that State applies for membership of the Comité Maritime International, the Assembly may accept such organization as a Member of the Comité Maritime International if it is satisfied that the object of such organization, or one of its objects, is the unification of maritime law in all its aspects. Whenever reference is made in this Constitution to Member Associations, it will be deemed to include any organization admitted as a Member pursuant to this Article.

Only one organization in each State shall be eligible for membership, unless the Assembly otherwise decides. A multinational Association is eligible for

## *Comité Maritime International*

### STATUTS

1992

### Ière PARTIE - DISPOSITIONS GENERALES

#### **Article 1er**

##### **Objet**

Le Comité Maritime International est une organisation non-gouvernementale internationale qui a pour objet de contribuer, par tous travaux et moyens appropriés, à l'unification du droit maritime sous tous ses aspects.

Il favorisera à cet effet la création d'Associations nationales de droit maritime. Il collaborera avec d'autres organisations internationales.

#### **Article 2**

##### **Siège**

Le siège du Comité Maritime International est fixé en Belgique.

#### **Article 3**

##### **Membres**

- a) Le Comité Maritime International se compose d'Associations nationales (ou multinationales) de droit maritime, dont les objectifs sont conformes à ceux du Comité Maritime International et dont la qualité de membre est accordée à toutes personnes (personnes physiques ou personnes morales) qui, ou bien participent aux activités maritimes, ou bien sont des spécialistes du droit maritime. Chaque Association membre s'efforcera de maintenir l'équilibre entre les divers intérêts représentés dans son sein.

Si dans un pays il n'existe pas d'Association nationale et qu'une organisation de ce pays pose sa candidature pour devenir membre du Comité Maritime International, l'Assemblée peut accepter une pareille organisation comme membre du Comité Maritime International après s'être assurée que l'objectif, ou un des objectifs, poursuivis par cette organisation est l'unification du droit maritime sous tous ses aspects. Toute référence dans les présents statuts à des Associations membres comprendra toute organisation qui aura été admise comme membre conformément au présent article.

Une seule organisation par pays est éligible en qualité de membre du Comité

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*Part I - Organization of the CMI*

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membership only if there is no Member Association in any of its constituent States.

- b) Individual members of Member Associations may be appointed by the Assembly as Titulary Members of the Comité Maritime International upon (i) the proposal of the Association concerned, endorsed by the Executive Council, or (ii) the proposal of the Executive Council. The appointment shall be of an honorary nature and shall be decided having regard to the contributions of the candidates to the work of the Comité Maritime International, and/or to their services rendered in legal or maritime affairs in furtherance of international uniformity of maritime law or related commercial practice. Titulary Members shall not be entitled to vote.

Titulary Members presently or formerly belonging to an association which is no longer a member of the Comité Maritime International may continue to be individual Titulary Members at large, pending the formation of a new Member Association in their State.\*

- c) Nationals of States where there is no Member Association in existence and who have demonstrated an interest in the object of the Comité Maritime International, may upon the proposal of the Executive Council be admitted as Provisional Members, but shall not be entitled to vote. A primary objective of Provisional Membership is to facilitate the organization and establishment of new Member national or regional Associations of Maritime Law. Provisional Membership is not normally intended to be permanent, and the status of each Provisional Member will be reviewed at three-year intervals. However, individuals who have been Provisional Members for not less than five years may upon the proposal of the Executive Council be appointed by the Assembly as Titulary Members, to the maximum number of three such Titulary Members from any one State.\*

- d) The Assembly may appoint to Membership *Honoris Causa* any individual who has rendered exceptional service to the Comité Maritime International, with all of the rights and privileges of a Titulary Member but without payment of contributions.

Members *Honoris Causa* shall not be attributed to any Member Association or State, but shall be individual Members of the Comité Maritime International as a whole.

- e) International organizations which are interested in the object of the Comité Maritime International may be admitted as Consultative Members but shall not be entitled to vote.

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\* Paragraphs (b) and (c) have been amended by the CMI Assembly held on 8 May 1999.



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*Constitution*


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Maritime International, à moins que l'Assemblée n'en décide autrement. Une association multinationale n'est éligible en qualité de membre que si aucun des Etats qui la composent ne possède d'Association membre.

- b) Des membres individuels d'Associations Membres peuvent être nommés Membres Titulaires du Comité Maritime International par l'Assemblée (i) sur proposition émanant de l'Association intéressée et ayant recueilli l'approbation du Conseil Exécutif, ou (ii) sur proposition du Conseil Exécutif. Cette nomination aura un caractère honorifique et sera décidée en tenant compte des contributions apportés par les candidats à l'œuvre du Comité Maritime International, et/ou des services qu'ils auront rendus dans le domaine du droit ou des affaires maritimes dans la poursuite de l'uniformisation internationale du droit maritime ou des pratiques commerciales qui y sont liées. Les Membres Titulaires n'auront pas le droit de vote.

Les Membres Titulaires appartenant ou ayant appartenu à une Association qui n'est plus membre du Comité Maritime International peuvent rester membres titulaires individuels hors cadre, en attendant la constitution d'une nouvelle Association membre dans leur Etat.\*

- c) Les nationaux des pays où il n'existe pas d'Association membre mais qui ont fait preuve d'intérêt pour les objectifs du Comité Maritime International peuvent, sur proposition du Conseil Exécutif, être admis comme Membres Provisoires, mais ils n'auront pas le droit de vote. L'un des objectifs essentiels du statut de Membre Provisoire est de favoriser la mise en place et l'organisation, au plan national ou régional, de nouvelles Associations de Droit Maritime affiliées au Comité Maritime International. Le statut de Membre Provisoire n'est pas normalement destiné à être permanent, et la situation de chaque Membre Provisoire sera examinée tous les trois ans. Cependant, les personnes physiques qui sont Membres Provisoires depuis cinq ans au moins peuvent, sur proposition du Conseil Exécutif, être nommées Membres Titulaires par l'Assemblée, à concurrence d'un maximum de trois par pays.\*
- d) L'Assemblée peut nommer membre d'honneur, jouissant des droits et privilèges d'un membre titulaire mais dispensé du paiement des cotisations, toute personne physique ayant rendu des services exceptionnels au Comité Maritime International.

Les membres d'honneur ne relèvent d'aucune Association membre ni d'aucun Etat, mais sont à titre personnel membres du Comité Maritime International pour l'ensemble de ses activités.

- e) Les organisations internationales qui s'intéressent aux objectifs du Comité Maritime International peuvent être admises en qualité de membres consultatifs, mais n'auront pas le droit de vote.

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\* Les paragraphes (b) and (c) ont été modifiés par l'Assemblée du CMI qui a eu lieu le 8 mai 1999.

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*Part I - Organization of the CMI*

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**PART II - ASSEMBLY****Article 4****Composition**

The Assembly shall consist of all Members of the Comité Maritime International and the members of the Executive Council.

Each Member Association and Consultative Member may be represented in the Assembly by not more than three delegates.

As approved by the Executive Council, the President may invite Observers to attend all or parts of the meetings of the Assembly.

**Article 5****Meetings**

The Assembly shall meet annually on a date and at a place decided by the Executive Council. The Assembly shall also meet at any other time, for a specified purpose, if requested by the President, by ten of its Member Associations or by the Vice-Presidents. At least six weeks notice shall be given of such meetings.

**Article 6****Agenda and Voting**

Matters to be dealt with by the Assembly, including election to vacant offices, shall be set out in the agenda accompanying the notice of the meeting. Decisions may be taken on matters not set out in the agenda, other than amendments to this Constitution, provided no Member Association represented in the Assembly objects to such procedure.

Each Member Association present in the Assembly and entitled to vote shall have one vote. The right to vote cannot be delegated or exercised by proxy.

All decisions of the Assembly shall be taken by a simple majority of Member Associations present, entitled to vote, and voting. However, amendments to this Constitution shall require the affirmative vote of a two-thirds majority of all Member Associations present, entitled to vote, and voting.

**Article 7****Functions**

The functions of the Assembly are:

- a) To elect the Officers of the Comité Maritime International;
- b) To admit new members and to appoint, suspend or expel members;
- c) To fix the rates of member contributions to the Comité Maritime International;
- d) To consider and, if thought fit, approve the accounts and the budget;
- e) To consider reports of the Executive Council and to take decisions on the future activity of the Comité Maritime International;
- f) To approve the convening and decide the agenda of, and ultimately approve resolutions adopted by, International Conferences;

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## 2ème PARTIE - ASSEMBLEE

### Article 4

#### Composition

L'Assemblée est composée de tous les membres du Comité Maritime International et des membres du Conseil Exécutif.

Toute Association membre et tout membre consultatif peuvent être représentés à l'Assemblée par trois délégués au maximum.

Le Président peut, avec l'approbation du Conseil Exécutif, inviter des observateurs à assister, totalement ou partiellement, aux réunions de l'Assemblée.

### Article 5

#### Réunions

L'Assemblée se réunit chaque année à la date et au lieu fixés par le Conseil Exécutif. L'Assemblée se réunit en outre à tout autre moment, avec un ordre du jour déterminé, à la demande du Président, de dix de ses Associations membres, ou des Vice-Présidents. Le délai de convocation est de six semaines au moins.

### Article 6

#### Ordre du jour et votes

Les questions dont l'Assemblée devra traiter, y compris les élections à des charges vacantes, seront exposées dans l'ordre du jour accompagnant la convocation aux réunions. Des décisions peuvent être prises sur des questions non inscrites à l'ordre du jour, exception faite de modifications aux présents statuts, pourvu qu'aucune Association membre représentée à l'Assemblée ne s'oppose à cette façon de faire.

Chaque Association membre présente à l'Assemblée et jouissant du droit de vote dispose d'une voix. Le droit de vote ne peut pas être délégué ni exercé par procuration.

Toutes les décisions de l'Assemblée sont prises à la majorité simple des Associations membres présentes, jouissant du droit de vote, et prenant part au vote. Toutefois, le vote positif d'une majorité des deux tiers de toutes les Associations membres présentes, jouissant du droit de vote et prenant part au vote sera nécessaire pour modifier les présents statuts.

### Article 7

#### Fonctions

Les fonctions de l'Assemblée consistent à:

- a) Elire les membres du Bureau du Comité Maritime International;
- b) Admettre de nouveaux membres et nommer, suspendre ou exclure des membres;
- c) Fixer les montants des cotisations des membres du Comité Maritime International;
- d) Examiner et, le cas échéant, approuver les comptes et le budget;
- e) Etudier les rapports du Conseil Exécutif et prendre des décisions concernant les activités futures du Comité Maritime International;
- f) Approuver la convocation et fixer l'ordre du jour de Conférences Internationales du Comité Maritime International, et approuver en dernière lecture les résolutions adoptées par elles;

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*Part I - Organization of the CMI*

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- g) To amend this Constitution;
- h) To adopt rules of procedure not inconsistent with the provisions of this Constitution.

## **PART III - OFFICERS**

### **Article 8**

#### **Designation**

The Officers of the Comité Maritime International shall be:

- a) The President,
- b) The Vice-Presidents,
- c) The Secretary-General,
- d) The Treasurer,
- e) The Administrator (if an individual), and
- f) The Executive Councillors.

### **Article 9**

#### **President**

The President of the Comité Maritime International shall preside over the Assembly, the Executive Council, and the International Conferences convened by the Comité Maritime International. He shall be an ex-officio member of any Committee, International Sub-Committee or Working Group appointed by the Executive Council.

With the assistance of the Secretary-General and the Administrator he shall carry out the decisions of the Assembly and of the Executive Council, supervise the work of the International SubCommittees and Working Groups, and represent the Comité Maritime International externally.

In general, the duty of the President shall be to ensure the continuity and the development of the work of the Comité Maritime International.

The President shall be elected for a full term of four years and shall be eligible for re-election for one additional term.

### **Article 10**

#### **Vice-Presidents**

There shall be two Vice-Presidents of the Comité Maritime International, whose principal duty shall be to advise the President and the Executive Council, and whose other duties shall be assigned by the Executive Council.

The Vice-Presidents, in order of their seniority as officers of the Comité Maritime International, shall substitute for the President when the President is absent or is unable to act.

Each Vice-President shall be elected for a full term of four years, and shall be eligible for reelection for one additional term.

### **Article 11**

#### **Secretary-General**

The Secretary-General shall have particular responsibility for organization of the non-administrative preparations for International Conferences, Seminars

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- g) Modifier les présents statuts;
- h) Adopter des règles de procédure sous réserve qu'elles soient conformes aux présents statuts.

### 3ème PARTIE - MEMBRES DU BUREAU

#### **Article 8**

##### **Désignation**

Les membres du Bureau du Comité Maritime International sont:

- a) le Président,
- b) les Vice-Présidents,
- c) le Secrétaire Général,
- d) le Trésorier,
- e) l'Administrateur (s'il est une personne physique) et
- f) les Conseillers Exécutifs.

#### **Article 9**

##### **Le Président**

Le Président du Comité Maritime International préside l'Assemblée, le Conseil Exécutif et les Conférences Internationales convoquées par le Comité Maritime International. Il est membre de droit de tout comité, de toute commission internationale ou de tout groupe de travail désignés par le Conseil Exécutif.

Avec le concours du Secrétaire Général et de l'Administrateur il met à exécution les décisions de l'Assemblée et du Conseil Exécutif, surveille les travaux des commissions internationales et des groupes de travail, et représente, à l'extérieur, le Comité Maritime International.

D'une manière générale, la mission du Président consiste à assurer la continuité et le développement du travail du Comité Maritime International.

Le Président est élu pour un mandat entier de quatre ans et est rééligible une fois.

#### **Article 10**

##### **Les Vice-Présidents**

Le Comité Maritime International comprend deux Vice-Présidents, dont la mission principale est de conseiller le Président et le Conseil Exécutif, et dont d'autres missions leur sont confiées par le Conseil Exécutif.

Le Vice-Président le plus ancien comme membre du Bureau du Comité Maritime International supplée le Président quand celui-ci est absent ou dans l'impossibilité d'exercer sa fonction.

Chacun des Vice-Présidents est élu pour un mandat entier de quatre ans, renouvelable une fois.

#### **Article 11**

##### **Le Secrétaire Général**

Le Secrétaire Général a tout spécialement la responsabilité d'organiser les préparatifs, autres qu'administratifs, des Conférences Internationales,

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*Part I - Organization of the CMI*

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and Colloquia convened by the Comité Maritime International, and to maintain liaison with other international organizations. He shall have such other duties as may be assigned by the Executive Council and the President.

The Secretary-General shall be elected for a term of four years, and shall be eligible for reelection without limitation.

### **Article 12**

#### **Treasurer**

The Treasurer shall be responsible for the funds of the Comité Maritime International, and shall collect and disburse, or authorize disbursement of, funds as directed by the Executive Council.

The Treasurer shall keep the financial accounts, and prepare the balance sheet for the preceding calendar year and the budgets for the current and next succeeding year, and shall present these not later than the 31st of January each year for review by the Executive Council and approval by the Assembly.

The Treasurer shall be elected for a term of four years, and shall be eligible for re-election without limitation.

### **Article 13**

#### **Administrator**

The functions of the Administrator are:

- a) To give official notice of all meetings of the Assembly and the Executive Council, of International Conferences, Seminars and Colloquia, and of all meetings of Committees, International Sub Committees and Working Groups;
- b) To circulate the agendas, minutes and reports of such meetings;
- c) To make all necessary administrative arrangements for such meetings;
- d) To carry into effect the administrative decisions of the Assembly and of the Executive Council, and administrative determinations made by the President;
- e) To circulate such reports and/or documents as may be requested by the President, the Secretary General, the Treasurer or the Executive Council;
- f) In general to carry out the day by day business of the secretariat of the Comité Maritime International.

The Administrator may be an individual or a body corporate. If an individual, the Administrator may also serve, if elected to that office, as Treasurer of the Comité Maritime International.

The Administrator, if an individual, shall be elected for a term of four years, and shall be eligible for re-election without limitation. If a body corporate, the Administrator shall be appointed by the Assembly upon the recommendation of the Executive Council, and shall serve until a successor is appointed.

### **Article 14**

#### **Executive Councillors**

There shall be eight Executive Councillors of the Comité Maritime International, who shall have the functions described in Article 18.

The Executive Councillors shall be elected upon individual merit, also giving due regard to balanced representation of the legal systems and geographical areas of the world characterized by the Member Associations.

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séminaires et colloques convoqués par le Comité Maritime International, et de poursuivre la liaison avec d'autres organisations internationales. D'autres missions peuvent lui être confiées par le Conseil Exécutif et le Président.

Le Secrétaire Général est élu pour un mandat de quatre ans, renouvelable sans limitation de durée.

### **Article 12**

#### **Le Trésorier**

Le Trésorier répond des fonds du Comité Maritime International, il encaisse les fonds et en effectue ou en autorise le déboursement conformément aux instructions du Conseil Exécutif.

Le Trésorier établit les comptes financiers, prépare le bilan de l'année civile écoulée ainsi que les budgets de l'année en cours et de l'année suivante, et soumet ceux-ci, au plus tard le 31 janvier de chaque année, à l'examen du Conseil Exécutif et à l'approbation de l'Assemblée.

Le Trésorier est élu pour un mandat de quatre ans, renouvelable sans limitation de durée.

### **Article 13**

#### **L'Administrateur**

Les fonctions de l'Administrateur consistent à:

- a) envoyer les convocations pour toutes les réunions de l'Assemblée et du Conseil Exécutif, des conférences internationales, séminaires et colloques, ainsi que pour toutes réunions de comités, de commissions internationales et de groupes de travail,
- b) distribuer les ordres du jour, procès-verbaux et rapports de ces réunions,
- c) prendre toutes les dispositions administratives utiles en vue de ces réunions,
- d) mettre à exécution les décisions de nature administrative prises par l'Assemblée et le Conseil Exécutif, et les instructions d'ordre administratif données par le Président,
- e) assurer les distributions de rapports et documents demandées par le Président, le Secrétaire Général, le Trésorier ou le Conseil Exécutif,
- f) d'une manière générale accomplir la charge quotidienne du secrétariat du Comité Maritime International.

L'Administrateur peut être une personne physique ou une personne morale. L'Administrateur personne physique peut également exercer la fonction de Trésorier du Comité Maritime International, s'il est élu à cette fonction.

L'Administrateur personne physique est élu pour un mandat de quatre ans, et est rééligible sans limite. L'Administrateur personne morale est élu par l'Assemblée sur proposition du Conseil Exécutif et reste en fonction jusqu'à l'élection d'un successeur.

### **Article 14**

#### **Les Conseillers Exécutifs**

Le Comité Maritime International compte huit Conseillers Exécutifs, dont les fonctions sont décrites à l'article 18.

Les Conseillers Exécutifs sont élus en fonction de leur mérite personnel, en ayant également égard à une représentation équilibrée des systèmes juridiques et des régions du monde auxquels les Association membres appartiennent.

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Each Executive Councillor shall be elected for a full term of four years, and shall be eligible for re-election for one additional term.

**Article 15**  
**Nominations**

A Nominating Committee shall be established for the purpose of nominating individuals for election to any office of the Comité Maritime International.

The Nominating Committee shall consist of:

- a) A chairman, who shall have a casting vote where the votes are otherwise equally divided, and who shall be elected by the Executive Council
- b) The President and past Presidents,
- c) One member elected by the Vice-Presidents, and
- d) One member elected by the Executive Councillors.

Notwithstanding the foregoing paragraph, no person who is a candidate for office may serve as a member of the Nominating Committee during consideration of nominations to the office for which he is a candidate.

On behalf of the Nominating Committee, the chairman shall first determine whether any officers eligible for re-election are available to serve for an additional term. He shall then solicit the views of the Member Associations concerning candidates for nomination. The Nominating Committee shall then make nominations, taking such views into account.

Following the decisions of the Nominating Committee, the chairman shall forward its nominations to the Administrator in ample time for distribution not less than one-hundred twenty days before the annual meeting of the Assembly at which nominees are to be elected.

Member Associations may make nominations independently of the Nominating Committee, provided such nominations are forwarded to the Administrator before the annual meeting of the Assembly at which nominees are to be elected.

**Article 16**  
**Immediate Past President**

The Immediate Past President of the Comité Maritime International shall have the option to attend all meetings of the Executive Council with voice but without vote, and at his discretion shall advise the President and the Executive Council.

**PART IV - EXECUTIVE COUNCIL**

**Article 17**  
**Composition**

The Executive Council shall consist of:

- a) The President,
- b) The Vice-Presidents,
- c) The Secretary-General,
- d) The Treasurer,
- e) The Administrator (if an individual),
- f) The Executive Councillors, and
- g) The Immediate Past President.



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Chaque Conseiller Exécutif est élu pour un mandat entier de quatre ans, renouvelable une fois.

**Article 15****Présentations de candidatures**

Un Comité de Présentation de candidatures est mis en place avec mission de présenter des personnes physiques en vue de leur élection à toute fonction au sein du Comité Maritime International.

Le Comité de Présentation de candidatures se compose de:

- a) un président, qui a voix prépondérante en cas de partage des voix, et qui est élu par le Conseil Exécutif;
- b) le Président et les anciens Présidents du C.M.I.;
- c) un membre élu par les Vice-Présidents;
- d) un membre élu par les Conseillers Exécutifs.

Nonobstant les dispositions de l'alinéa qui précède, aucun candidat ne peut siéger au sein du Comité de Présentation pendant la discussion des présentations intéressant la fonction à laquelle il est candidat.

Agissant au nom du Comité de Présentation, son Président détermine tout d'abord s'il y a des membres du bureau qui, étant rééligibles, sont disponibles pour accomplir un nouveau mandat. Il demande ensuite l'avis des Associations membres au sujet des candidats à présenter. Tenant compte de ces avis, le Comité de Présentation fait alors des propositions.

Le président du Comité de Présentation transmet les propositions décidées par celui-ci à l'Administrateur suffisamment à temps pour être diffusées cent-vingt jours au moins avant l'Assemblée annuelle appelée à élire des candidats proposés.

Des Associations membres peuvent, indépendamment du Comité de Présentation, faire des propositions, pourvu que celles-ci soient transmises à l'Administrateur avant l'Assemblée annuelle appelée à élire des candidats présents.

**Article 16****Le Président sortant**

Le Président sortant du Comité Maritime International a la faculté d'assister à toutes les réunions du Conseil Exécutif avec voix consultative mais non délibérative, et peut, s'il le désire, conseiller le Président et le Conseil Exécutif.

**4ème PARTIE - CONSEIL EXECUTIF****Article 17****Composition**

Le Conseil Exécutif est composé:

- a) du Président,
- b) des Vice-Présidents,
- c) du Secrétaire Général,
- d) du Trésorier,
- e) de l'Administrateur, s'il est une personne physique,
- f) des Conseillers Exécutifs,
- g) du Président sortant.

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*Part I - Organization of the CMI*

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**Article 18****Functions**

The functions of the Executive Council are:

- a) To receive and review reports concerning contact with:
  - (i) The Member Associations,
  - (ii) The CMI Charitable Trust, and
  - (iii) International organizations;
- b) To review documents and/or studies intended for:
  - (i) The Assembly,
  - (ii) The Member Associations, relating to the work of the Comité Maritime International or otherwise advising them of developments, and
  - (iii) International organizations, informing them of the views of the Comité Maritime International on relevant subjects;
- c) To initiate new work within the object of the Comité Maritime International, to establish Standing Committees, International Sub-Committees and Working Groups to undertake such work, and to supervise them;
- d) To encourage and facilitate the recruitment of new members of the Comité Maritime International;
- e) To oversee the finances of the Comité Maritime International;
- f) To make interim appointments, if necessary, to the offices of Treasurer and Administrator;
- g.) To review and approve proposals for publications of the Comité Maritime International;
- h) To set the dates and places of its own meetings and, subject to Article 5, of the meetings of the Assembly, and of Seminars and Colloquia convened by the Comité Maritime International;
- i) To propose the agenda of meetings of the Assembly and of International Conferences, and to decide its own agenda and those of Seminars and Colloquia convened by the Comité Maritime International;
- j) To carry into effect the decisions of the Assembly;
- k) To report to the Assembly on the work done and on the initiatives adopted.

The Executive Council may establish and delegate to its own Committees and Working Groups such portions of its work as it deems suitable. Reports of such Committees and Working Groups shall be submitted to the Executive Council and to no other body.

**Article 19****Meetings and Quorum**

At any meeting of the Executive Council seven members, including the President or a VicePresident and at least three Executive Councillors, shall constitute a quorum. All decisions shall be taken by a simple majority vote. The President or, in his absence, the senior Vice-President in attendance shall have a casting vote where the votes are otherwise equally divided.

The Executive Council may, however, take decisions when circumstances so require without a meeting having been convened, provided that all its members are consulted and a majority respond affirmatively in writing.

*Constitution***Article 18****Fonctions**

Les fonctions du Conseil Exécutif sont:

- a) de recevoir et d'examiner des rapports concernant les relations avec:
  - (i) les Associations membres,
  - (ii) le "CMI Charitable Trust", et
  - (iii) les organisations internationales;
- b) d'examiner les documents et études destinés:
  - (i) à l'Assemblée,
  - (ii) aux Associations membres, concernant le travail du Comité Maritime International, et en les avisant de tout développement utile,
  - (iii) aux organisations internationales, pour les informer des vues du Comité Maritime International sur des sujets adéquats;
- c) d'aborder l'étude de nouveaux travaux entrant dans le domaine du Comité Maritime International, de créer à cette fin des comités permanents, des commissions internationales et des groupes de travail et de contrôler leur activité;
- d) d'encourager et de favoriser le recrutement de nouveaux membres du Comité Maritime International;
- e) de contrôler les finances du Comité Maritime International;
- f) en cas de besoin, de pourvoir à titre provisoire à une vacance de la fonction de Trésorier ou d'Administrateur;
- g) d'examiner et d'approuver les propositions de publications du Comité Maritime International;
- h) de fixer les dates et lieux de ses propres réunions et, sous réserve de l'article 5, des réunions de l'Assemblée, ainsi que des séminaires et colloques convoqués par le Comité Maritime International;
- i) de proposer l'ordre du jour des réunions de l'Assemblée et des Conférences Internationales, et de fixer ses propres ordres du jour ainsi que ceux des Séminaires et Colloques convoqués par le Comité Maritime International;
- j) d'exécuter les décisions de l'Assemblée;
- k) de faire rapport à l'Assemblée sur le travail accompli et sur les initiatives adoptées.

Le Conseil Exécutif peut créer ses propres comités et groupes de travail et leur déléguer telles parties de sa tâche qu'il juge convenables. Ces comités et groupes de travail feront rapport au seul Conseil Exécutif.

**Article 19****Réunions et quorum**

Lors de toute réunion du Conseil Exécutif, celui-ci ne délibère valablement que si sept de ses membres, comprenant le Président ou un Vice-Président et trois Conseillers Exécutifs au moins, sont présents. Toute décision est prise à la majorité simple des votes émis. En cas de partage des voix, celle du Président ou, en son absence, celle du plus ancien Vice-Président présent, est prépondérante.

Le Conseil Exécutif peut toutefois, lorsque les circonstances l'exigent, prendre des décisions sans qu'une réunion ait été convoquée, pourvu que tous ses membres aient été consultés et qu'une majorité ait répondu affirmativement par écrit.

## PART V - INTERNATIONAL CONFERENCES

### Article 20

#### **Composition and Voting**

The Comité Maritime International shall meet in International Conference upon dates and at places approved by the Assembly, for the purpose of discussing and taking decisions upon subjects on an agenda likewise approved by the Assembly.

The International Conference shall be composed of all Members of the Comité Maritime International and such Observers as are approved by the Executive Council.

Each Member Association which has the right to vote may be represented by ten delegates and the Titulary Members who are members of that Association. Each Consultative Member may be represented by three delegates. Each Observer may be represented by one delegate only.

Each Member Association present and entitled to vote shall have one vote in the International Conference; no other members or Officers of the Comité Maritime International shall have the right to vote.

The right to vote cannot be delegated or exercised by proxy.

The resolutions of International Conferences shall be adopted by a simple majority of the Member Associations present, entitled to vote, and voting.

## PART VI - FINANCE

### Article 21

#### **Arrears of Contributions**

Member Associations remaining in arrears of payment of contributions for more than one year from the date of the Treasurer's invoice shall be in default and shall not be entitled to vote until such default is cured.

Members liable to pay contributions who remain in arrears of payment for more than three years from the date of the Treasurer's invoice shall, unless the Executive Council decides otherwise, receive no publications or other rights and benefits of membership until such default is cured.

Contributions received from a Member in default shall be applied to reduce arrears in chronological order, beginning with the earliest year of default.

### Article 22

#### **Financial Matters**

The Administrator shall receive compensation as determined by the Executive Council.

Members of the Executive Council and Chairmen of Standing Committees, International SubCommittees and Working Groups, when travelling on behalf of the Comité Maritime International, shall be entitled to reimbursement of travelling expenses, as directed by the Executive Council.

The Executive Council may also authorize the reimbursement of other expenses incurred on behalf of the Comité Maritime International.

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*Constitution*

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## 5ème PARTIE - CONFERENCES INTERNATIONALES

### Article 20

#### Composition et Votes

Le Comité Maritime International se réunit en Conférence Internationale à des dates et lieux approuvés par l'Assemblée aux fins de délibérer et de se prononcer sur des sujets figurant à un ordre du jour également approuvé par l'Assemblée.

La Conférence Internationale est composée de tous les membres du Comité Maritime International et d'observateurs dont la présence a été approuvée par le Conseil Exécutif.

Chaque Association membre, ayant le droit de vote, peut se faire représenter par dix délégués et par les membres titulaires, membres de leur Association. Chaque membre consultatif peut se faire représenter par trois délégués. Chaque observateur peut se faire représenter par un délégué seulement.

Chaque Association membre présente et jouissant du droit de vote dispose d'une voix à la Conférence Internationale, à l'exclusion des autres membres et des membres du Bureau du Comité Maritime International.

Le droit de vote ne peut pas être délégué ni exercé par procuration.

Les résolutions des Conférences Internationales sont prises à la majorité simple des Associations membres présentes, jouissant du droit de vote et prenant part au vote.

## 6ème PARTIE - FINANCES

### Article 21

#### Retards dans le paiement de Cotisations

Les Associations membres qui demeurent en retard de paiement de leurs cotisations pendant plus d'un an depuis la date de la facture du Trésorier sont considérés en défaut et ne jouissent pas du droit de vote jusqu'à ce qu'il ait été remédié au défaut de paiement.

Les membres redevables de cotisations qui demeurent en retard de paiement pendant plus de trois ans depuis la date de la facture du Trésorier ne bénéficient plus, sauf décision contraire du Conseil Exécutif, de l'envoi des publications ni des autres droits et avantages appartenant aux membres, jusqu'à ce qu'il ait été remédié au défaut de paiement.

Les cotisations reçues d'un membre en défaut sont imputées par ordre chronologique, en commençant par l'année la plus ancienne du défaut de paiement.

### Article 22

#### Questions financières

L'Administrateur reçoit une indemnisation fixée par le Conseil Exécutif.

Les membres du Conseil Exécutif et les présidents des comités permanents, des commissions internationales et des groupes de travail ont droit au remboursement des frais des voyages accomplis pour le compte du Comité Maritime International, conformément aux instructions du Conseil Exécutif.

Le Conseil Exécutif peut également autoriser le remboursement d'autres frais exposés pour le compte du Comité Maritime International.

## **RULES OF PROCEDURE\***

### **Rule 1**

#### *Right of Presence*

In the Assembly, only Members of the CMI as defined in Article 3 of the Constitution, members of the Executive Council as provided in Article 4 and Observers invited pursuant to Article 4 may be present as of right.

At International Conferences, only Members of the CMI as defined in Article 3 of the Constitution (including non-delegate members of national Member Associations), Officers of the CMI as defined in Article 8 and Observers invited pursuant to Article 20 may be present as of right.

Observers may, however, be excluded during consideration of certain items of the agenda if the President so determines.

All other persons must seek the leave of the President in order to attend any part of the proceedings.

### **Rule 2**

#### *Right of Voice*

Only Members of the CMI as defined in Article 3 of the Constitution and members of the Executive Council speak as of right; all others must seek the leave of the President before speaking. In the case of a Member Association, only a listed delegate may speak for that Member; with the leave of the President such delegate may yield the floor to another member of that Member Association for the purpose of addressing a particular and specified matter.

### **Rule 3**

#### *Points of Order*

During the debate of any proposal or motion any Member or Officer of the CMI having the right of voice under Rule 2 may rise to a point of order and the point of order shall immediately be ruled upon by the President. No one rising to a point of order shall speak on the substance of the matter under discussion.

All rulings of the President on matters of procedure shall be final unless immediately appealed and overruled by motion duly made, seconded and carried.

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\* Approved by the CMI Assembly held on 13th April 1996.

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*Rules of Procedure*

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## Rule 4

*Voting*

For the purpose of application of Article 6 of the Constitution, the phrase “Member Associations present, entitled to vote, and voting” shall mean Member Associations whose right to vote has not been suspended pursuant to Articles 7 or 21, whose voting delegate is present at the time the vote is taken, and whose delegate casts an affirmative or negative vote. Member Associations abstaining from voting or casting an invalid vote shall be considered as not voting.

Voting shall normally be by show of hands. However, the President may order or any Member Association present and entitled to vote may request a roll-call vote, which shall be taken in the alphabetical order of the names of the Member Associations as listed in the current CMI *Yearbook*.

If a vote is equally divided, the proposal or motion shall be deemed rejected.

Notwithstanding the foregoing, all contested elections of Officers shall be decided by a secret written ballot in each category. Four ballots shall be taken if necessary. If the vote is equally divided on the fourth ballot the election shall be decided by drawing lots.

If no nominations for an office are made in addition to the proposal of the Nominating Committee pursuant to Article 15, then the candidate(s) so proposed may be declared by the President to be elected to that office by acclamation.

## Rule 5

*Amendments to Proposals*

An amendment shall be voted upon before the proposal to which it relates is put to the vote, and if the amendment is carried the proposal shall then be voted upon in its amended form.

If two or more amendments are moved to a proposal, the first vote shall be taken on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all amendments have been put to the vote.

## Rule 6

*Secretary and Minutes*

The Secretary-General or, in his absence, an Officer of the CMI appointed by the President, shall act as secretary and shall take note of the proceedings and prepare the minutes of the meeting. Minutes of the Assembly shall be published in the two official languages of the CMI, English and French, either in the CMI *News Letter* or otherwise distributed in writing to the Member Associations.

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*Part I - Organization of the CMI*

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**Rule 7***Amendment of these Rules*

Amendment to these Rules of Procedure may be adopted by the Assembly. Proposed amendments must be in writing and circulated to all Member Associations not less than 60 days before the annual meeting of the Assembly at which the proposed amendments will be considered.

**Rule 8***Application and Prevailing Authority*

These Rules shall apply not only to meetings of the Assembly and International Conferences, but shall also constitute, *mutatis mutandis*, the Rules of Procedure for meetings of the Executive Council, International Sub-Committees, or any other group convened by the CMI.

In the event of an apparent conflict between any of these Rules and any provision of the Constitution, the Constitutional provision shall prevail in accordance with Article 7(h). Any amendment to the Constitution having an effect upon the matters covered by these Rules shall be deemed as necessary to have amended these Rules *mutatis mutandis*, pending formal amendment of the Rules of Procedure in accordance with Rule 7.



## **GUIDELINES FOR PROPOSING THE APPOINTMENT OF TITULARY AND PROVISIONAL MEMBERS\***

### *Titulary Members*

No person shall be proposed for appointment as a Titulary Member of the Comité Maritime International without supporting documentation establishing in detail the qualifications of the candidate in accordance with Article 3(b) of the Constitution. The Administrator shall receive such documentation not less than sixty (60) days prior to the meeting of the Assembly at which the proposal is to be considered.

Contributions to the work of the Comité may include active participation as a voting Delegate to two or more International Conferences or Assemblies of the CMI, service on a CMI Working Group or International Sub-Committee, delivery of a paper at a seminar or colloquium conducted by the CMI, or other comparable activity which has made a direct contribution to the CMI's work. Services rendered in furtherance of international uniformity may include those rendered primarily in or to another international organization, or published writing that tends to promote uniformity of maritime law or related commercial practice. Services otherwise rendered to or work within a Member Association must be clearly shown to have made a significant contribution to work undertaken by the Comité or to furtherance of international uniformity of maritime law or related commercial practice.

### *Provisional Members*

Candidates for Provisional Membership must not merely express an interest in the object of the CMI, but must have *demonstrated* such interest by relevant published writings, by activity promoting uniformity of maritime law and/or related commercial practice, or by presenting a plan for the organization and establishment of a new Member Association.

Every three years, not less than sixty (60) days prior to the meeting of the Assembly, each Provisional Member shall submit a concise report to the Secretary-General concerning the activities organized or undertaken by that Provisional Member in pursuance of the object of the CMI.

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\* Approved by the CMI Assembly held on 8 May 1999.

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*Member Associations*

## MEMBER ASSOCIATIONS

## ASSOCIATIONS MEMBRES

### ARGENTINA

#### ASOCIACION ARGENTINA DE DERECHO MARITIMO

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*Member Associations*


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## AUSTRALIA AND NEW ZEALAND

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#### Membership:

635.

## BELGIUM

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(Belgian Maritime Law Association)

c/o Henry Voet-Genicot, Mr. Henri Voet Jr.,  
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Tel.: (3) 218.7464 - Fax: (3) 218.6721

*Established: 1896*

#### Officers:

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Rio de Janeiro - 20031-45 RJ - Brasil - Tel.: (21) 220.5488

*Established: 1924*

Officers:

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Physical Members: 180; Official Entities as Life Members: 22; Juridical Entity Members: 16; Correspondent Members: 15.

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*Established: 1951*Officers:

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### Membership:

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ESTUDIOS MARITIMOS  
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Tel.: (506) 253.4416 - Fax: (506) 225.9320 - E-mail: [nassarpe@sol.racsa.co.cr](mailto:nassarpe@sol.racsa.co.cr)*Established: 1981***Officers:***President:* Lic. Tomas Federico NASSAR PEREZ, Abogado y Notario Publico, Apartado Postal 784, 1000 San José.*Vice-President:* Licda. Roxana SALAS CAMBRONERO, Abogado y Notario Publico, Apartado Postal 1019, 1000 San José.*Secretary:* Lic. Luis Fernando CORONADO SALAZAR*Treasurer:* Lic. Mario HOUED VEGA*Vocal:* Lic. Jose Antonio MUNOZ FONSECA*Fiscal:* Lic. Carlos GOMEZ RODAS

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*Established: 1983*

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## **PART II**

# **The Work of the CMI**

## **Singapore I**

### **Documents for the Conference**

- REPORT OF THE CMI PLANNING  
COMMITTEE**
- ISSUES OF TRANSPORT LAW**
- GENERAL AVERAGE**
- MARINE INSURANCE**
- SALVAGE**
- PIRACY**
- IMPLEMENTATION AND INTERPRETATION  
OF THE 1976 LLMC CONVENTION**
- CARRIAGE OF PASSENGERS**

## **REPORT OF THE CMI PLANNING COMMITTEE**

### *Members of the Committee*

P. J.S. Griggs (UK)  
José M. Alcantara (Spain)  
D.W. Taylor (UK)  
C. Davis (USA)  
Dr. A. Capagli (Argentina)  
S. Harrington (Canada)  
S. Hetherington (Australia)  
T. Guzman (Chile)

### *Introduction*

At the CMI Centenary Conference in Antwerp it was agreed that in the year before a major CMI Conference a Planning Committee would be formed to consider the current and future work programme of the CMI.

*The Work Programme splits into four categories as follows:*

#### *Ongoing:*

- (i) Issues of Transport Law including multimodal and EDI.
- (ii) Issues of Marine Insurance
- (iii) Implementation and Interpretation of Conventions
- (iv) General Average – the IUMI proposals
- (v) Passengers by Sea
- (vi) UNESCO draft Convention on Underwater Cultural Heritage

#### *(B) Coming to an end:-*

- (i) Piracy and Acts of Maritime Violence / Model Law

#### *Finished:*

- (i) Athens Convention Questionnaire
- (ii) IMAO (ICC/CMI) Rules
- (iii) Time Charter Interpretation Code (FONASBA)

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*Report of the CMI Planning Committee*

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*Possible new topics:*

- (i) Admiralty Rules of practice to complement Arrest Conventions
- (ii) Pilotage – Immunity from suit.
- (iii) Results of application of CLC and Fund Conventions is it working?
- (iv) CMI – Young lawyers Group. Encourage. Mention of those who participate in preparation of responses to CMI Questionnaires.
  - (a) Annual Prize (CMI Charitable Trust)
  - (b) Training programmes (international exchange of young lawyers)
  - (c) National Seminars regarding activities of CMI and International Organisations.
- (v) Charterparties; use of terminology and construction of chartering clauses.
- (vi) Uniformity of Chartering terms.
- (vii) Maritime Arbitration; Co-operation with ICMA.
- (viii) Stowaways; harmonisation of the domestic law applied by Port Authorities.
- (ix) Body to Co-ordinate actions of National Associations in drawing attention of National Governments to practical / legal problems requiring international action.
- (x) Containers; promotion of Protocol to extend benefits of UNIDROIT Convention (draft) on Security for Mobile Equipment.

*Commentary on the work programme*

*(A) Ongoing:*

The Planning Committee advises that in relation to the ongoing items in the work programme the position is as follows:

*(i) Issues of Transport Law including Multimodal and EDI*

The work of the CMI will continue after the Singapore Conference in co-operation with UNCITRAL and is likely to stay in the work programme for some years to come.

*(ii) Issues of Marine Insurance*

Much preliminary work has been done on this subject but it will continue in the CMI work programme for some years to come.

*(iii) Implementation and Interpretation of Conventions*

The CMI is working on this project in conjunction with the IMO Legal Committee. Currently the Convention under review is the 1976 LLMC. The CMI is not yet in a position to report to the Legal Committee but hopes to be able to do so within the coming year.

It is for consideration whether the CMI should, as was suggested at the Toledo Colloquium, seek to set up an international data base which would contain an up to date record of decisions of all national courts on

*Report of the CMI Planning Committee*

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the application and interpretation of International Conventions in national law. Should it be decided to develop such a data base the work on this subject would be on going indefinitely though the extent of involvement of the CMI would need to be examined. It is for consideration whether other ways might be found of ensuring uniformity of application of Conventions.

(iv) *General Average – The IUMI Proposals*

A decision will be made at the Singapore Conference about future work on this subject. If it is decided that further work on revision of the York Antwerp Rules is warranted this subject will be on going and time consuming.

(v) *The Carriage of Passengers by Sea*

The CMI has been acting in an observer capacity in relation to the work of the IMO Legal Committee to amend the Athens Convention. This role will continue but it is not anticipated that the CMI will, itself, become deeply involved.

(vi) *UNESCO Draft Convention on Underwater Cultural Heritage*

The Executive Council decided at its meeting in Toledo that it would become more actively involved in this subject and will seek to promote a solution to problems relating to Underwater Cultural Heritage by way of a protocol to the Salvage Convention 1989 rather than through the creation of a special convention on Underwater Cultural Heritage which, as currently drafted, conflicts with international salvage law. This subject will therefore be on going and active.

(B) *Coming to an end:*

As regards the one subject coming to an end – Piracy and Acts of Maritime Violence / Model Law – it is anticipated that the Model Law will have been finalised at the Singapore Conference. The CMI may continue to be involved in promoting the Model Law and advising on implementation. This will not be a major exercise though it will be ongoing for a period of time.

(C) *Finished projects:*

As regards finished projects no comment is required.

(D) *Possible new topics:*<sup>1</sup>

In relation to possible new topics some further detail may be necessary.

(i) *Admiralty Rules. Practice to complement Arrest Conventions.*

It has been suggested that this might be a useful project for the CMI though it is to be observed that instruments for the harmonisation of

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(1) One member of the Planning Committee wishes it to be placed on record that in relation to all comparative law studies and drafting projects the need to give equal weight to the Civil Law and Common Law tradition will be respected.



international maritime law normally deal with substantive law leaving procedural matters to national legislation. It is for consideration whether this topic should be placed in the work programme.

(ii) *Pilotage – Immunity from suit.*

There is a view that national legislation which gives immunity to pilots for their actions is unreasonable in today's environment. A study might be made to ascertain the position internationally and to find out what national Associations understand their members concerns are in this area. It is suggested that a comparative study might be useful but it is not seen as a suitable topic for international harmonisation.

(iii) *CLC and Fund Conventions.*

The IMO Legal Committee at its 82<sup>nd</sup> Session resolved to increase the CLC and Funds limits. These increases will take effect from late 2003. The IOPCF is considering a major review of the CLC and Fund Conventions and it is suggested that a member of the Executive Council should ascertain whether CMI can contribute to this review.

(iv) The IMO Legal Committee, in its long-term work plan has included "Consideration of the legal status of novel types of craft, such as air – cushion vehicles, operating in the marine environment". It is for consideration whether the CMI should offer to undertake a study of the ways in which such vehicles are dealt with under existing national laws in member states.

(v) The IMO Legal Committee also has in its long-term work plan "a possible Convention on the regime of vessels in foreign ports". It is for consideration whether CMI might have anything to contribute on this subject.

(vi) *CMI Young Lawyers Group*

It is widely recognised that National Maritime Law Associations affiliated to the CMI experience considerable difficulty in interesting younger members in the activities of their Association and the CMI. The recommendation is that a small sub-committee under the chairmanship of a member of the CMI Executive Council should be set up to consider ways in which the interest of younger members might be stimulated. Possible means of promotion might include (a) an annual prize to be funded by the CMI Charitable Trust, (b) training programmes including an international exchange of young lawyers and (c) national seminars to explain and promote the activities of CMI and other International organisations.

(vii & viii) *Charterparties; Use of Terminology and Construction of Chartering Clauses; Uniformity of Chartering Terms.*

In the past the CMI has kept away from the drafting of Charterparty clauses and the promotion of codes of interpretation. It maybe that this type of work is more appropriately undertaken by FONASBA, BIMCO and other similar international organisations. It is for consideration whether the CMI should get involved in this field.

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*Report of the CMI Planning Committee*

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*(ix) Maritime Arbitrations; Co-operation with ICMA*

It has been suggested by a member of the Planning Committee that CMI should establish contacts with ICMA to see whether in the field of arbitration there are any areas in which the skill and experience of the CMI might be applied. It is proposed that such contact should be made on the understanding that no work will be undertaken without reference back to a CMI Assembly.

*(x) Stowaways; harmonisation of the Domestic Law applied by Port Authorities.*

This subject is currently under close study by the IMO Facilitation Committee. The CMI has observer status at such committee meetings and will continue to follow this topic conscious of the fact that the CMI was responsible for drafting the Convention on Stowaways of 1957 which has never come in to force. It is proposed that this should remain as a possible subject for detailed work by CMI in the future.

*(xi) Body to Co-ordinate actions of National Associations in drawing attention of National Governments to Practical / Legal Problems Requiring International Action.*

There is a general feeling that National Associations take insufficient interest in the current work programme of intergovernmental and non-governmental bodies in the development of International Maritime Law. The Planning Committee does not feel that this should be a topic of study in its own right but it recognises that the CMI, through its publications, could and should regularly carry reports on the work being carried out by intergovernmental and non-governmental organisations.

*(xii) Containers; Promotion of a Protocol to extend the benefits of the UNIDROIT Convention (draft) on Security for Mobile Equipment.*

There has already been some correspondence between the CMI Secretariat and the international organisation representing container owners and operators. These contacts should continue and might result in a request from those in the container trade to CMI to assist in drafting a protocol specific to their interests.

*Conclusions*

Delegates to the Singapore Conference are invited to note the proposals contained in this report and to authorise the CMI Executive Council to proceed in accordance with the recommendations contained in this report.

PATRICK J.S. GRIGGS  
*President*

# ISSUES OF TRANSPORT LAW

## INTRODUCTION

The International Sub-Committee on Issues of Transport Law ("ISC") has met four times in January, April, July and October 2000. Reports of these meetings (the report of the fourth meeting in October has not been approved by the ISC and is therefore at present in draft) are included at pages 176 to 289 below.

The background to the formation of the ISC is set out in the Introductory Paper which was prepared for the first meeting and which was published in Yearbook 1999 at pages 117 to 120. The ISC's terms of reference were:

*To consider in what areas of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law; and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability.*

In accordance with these terms of reference a draft Outline Instrument has been prepared and is included at pages 122 to 171 below. The papers for consideration at meetings of the ISC have been prepared by the International Working Group ("IWG"). A preceding draft of the Outline Instrument was prepared by the IWG for the fourth meeting of the ISC in October. That draft was considered by the ISC and the draft published below contains revisions made by the IWG in the light of the discussions at that meeting. It should be noted that the section relating to the basis of liability only sets out options for consideration; at this stage it does not propose draft provisions.

At its meeting on 17<sup>th</sup> September 2000 the Executive Council confirmed that the ISC's terms of reference should extend to considering how the Instrument might accommodate other forms of carriage associated with the carriage by sea. The IWG has accordingly prepared a paper for discussion at Singapore entitled "Door to Door Transport" which is included at pages 118 to 121 below.

The electronic commerce implications of the draft Outline Instrument have been considered by the E-Commerce Working Group. Its report entitled "Electronic Commerce Implications of the Draft Outline Instrument" is included below at pages 172 to 175.

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*Introduction*

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It is proposed that the sessions of the Committee on this topic at the Singapore Conference should concentrate on the main issues of principle and should not attempt to revise the draft Outline Instrument. Such issues are summarised in an Agenda Paper for the Conference which is at pages 114 to 117. It is proposed that this Agenda Paper should form a basis for the discussions.

It is also proposed that a report of the discussions be prepared and approved at the Conference. The draft Outline Instrument will then be revised in accordance with this report and considered at the next meeting of the ISC.

STUART N. BEARE

## AGENDA PAPER

### 1 *Introduction*

The purpose of this Agenda Paper is to provide a framework for the discussion of “Issues of Transport Law”. For the background of that agenda item, see CMI Yearbook 1999, pages 117-120.

The Agenda Paper is based on and should be read together with (i) the paper entitled “Door to Door Transport”, (ii) the draft Outline Instrument, and (iii) the paper entitled “Electronic Commerce Implications of the Draft Outline Instrument”. It is intended to identify a number of questions which are regarded as being of particular importance and as such deserving particular consideration at the Conference by the membership of the CMI.

The paper is divided into three sections, i.e. Scope of Application, Liability and Transport Documents, all with subsections. To a considerable degree the sections are interrelated and some of the subsections are equally important in several contexts. It is also appreciated that there may be diverging views as to which issues are most important and that the selection of issues made herein can be discussed. In view of the limited time available during the Conference for consideration of “Issues of Transport Law”, a selection must be made and the Agenda Paper has selected issues that are important, although there may be others that are equally important. On that basis, it is hoped that the structure which has been chosen will be conducive to fruitful deliberations.

### 2 *Scope of Application*

#### 2.1 *Type of instrument*

The first, and no doubt also the last question to be addressed is what kind of instrument should be the result.

- **Should it be a**
  - **convention (which is binding on Contracting States unless the convention allows them to derogate in their national law from certain of its provisions)**
  - **model law (an example for the national legislator)?**
- **To what extent the subjects of the convention/model law should be mandatory for the private parties involved in the performance of a contract of carriage, or are unsuitable for a mandatory regime, thus permitting the private parties to exclude its provisions by contract.**

#### 2.2 *Period of responsibility*

The main questions to be addressed are **whether the period of responsibility should be**

- **limited to the “tackle to tackle” period as in the Hague-Visby Rules; or**
- **limited to the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge, as in the Hamburg Rules; if so**

*Agenda Paper*

- how should the “port” be defined for the purposes of pick up and delivery services, cfr Warsaw Convention 1955 Article 15.3
- extended to cover inland carriage preceding or subsequent to maritime carriage from the place and point of time where and when the goods are handed over by the shipper to the maritime carrier until the place and point of time where and when the goods are delivered to the consignee; if so,
  - the nature and the limits of liability that should be applied to the inland part of the carriage, and
  - how to define the borderlines between the different modes, which question is related to the gap filling issue.

### 2.3 *Through transport*

In relation to through transport a question is **whether**

- **through transport should be permitted; if so whether**
  - the Instrument should have a set of relatively detailed provisions on the duties of the carrier as agent (or freight forwarder) as in 3.3 of the Outline Instrument; or
  - there should be a more generally worded due diligence obligation.

## 3 *Liability*

### 3.1 *Introduction*

It is suggested that consideration of liability should be given against the backdrop of the work of the CMI International Sub-Committee on the Uniformity of the Law of the Carriage of Goods by Sea, see CMI Yearbook 1999, pages 105 - 116. It is noted, for the sake of order, that many of the issues raised in the paper entitled “Door to Door Transport” are of course directly relevant for the consideration of liability.

### 3.2 *Basis of liability*

It is suggested that consideration should first be given to the question as to **whether liability should**

- **be based on fault** such as in the Hague-Visby Rules and the Hamburg Rules; or
- **be more stringent** such as in the Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR) or in the United Nations’ Convention on Contracts for the International Sale of Goods 1980 (CISG), see 5.1 of the Outline Instrument.

### 3.3 *General or detailed provisions*

Once a decision on the basis of liability has been taken, consideration might be given to the question as to **whether**

- **the relevant provisions should be of a general nature**, such as in the Hamburg Rules and the CISG; or
- **they should be more detailed** as in the Hague-Visby Rules or the CMR.

### 3.4 *Exemptions*

Subsequent to that, consideration could be given as to **whether**

- **there should be any exemptions from the general rules on liability, such as for error in the navigation or management of the vessel**, cfr. Article IV.2 a of the Hague-Visby Rules.

### 3.5 *Burden of proof*

The issue of the burden of proof may have to be considered.

### 3.6 *Performing carrier's liability*

It is envisaged that a performing sub-carrier will be directly liable to cargo interests for loss of or damage to the goods, possibly also including delay (cfr. 3.7 below), occurring during the period when the goods in question are in the performing carrier's custody. On that basis, consideration might be given to

- **whether the definition of performing carrier** (cfr. 1.4 of the Outline Instrument) **should be narrowed to include only a person who is engaged to carry** (cfr. CMNI<sup>1</sup> Article 1.3), **possibly supplemented by a Himalaya provision to protect other subcontractors than performing carriers**
- **to what extent the liability of the performing carrier should be affected by**
  - **the fact that a declared value has been inserted in the transport document**, cfr. 5.7.1 of the Outline Instrument
  - **the fact that a specific time of delivery has been agreed with the contracting carrier**, cfr. 5.4.1 of the Outline Instrument, or
  - **the contents of the transport document**, cfr. 7.2.3 (b) and 7.3.3 of the Outline Instrument

Another issue in relation to the performing carrier is **whether**

- **there should be a presumption, such as in 7.4.2 of the Outline Instrument, that the registered owner of a performing vessel is the performing carrier; and**
- **whether there should also be a presumption that the registered owner of the vessel named in the transport document shall be the contracting carrier if the transport document is ambiguous in that respect**, cfr. 7.4.2 of the Outline Instrument.

Finally, it is noted that the liability issues raised in the paper entitled "Door to Door Transport" are of course also directly relevant for the performing carrier's liability when it is not a sea carrier.

### 3.7 *Delay*

It should be considered **whether**

- **there is a need for special provisions for liability for delay and, if so, if there is a need for special provisions regarding the limitation of such liability**, cfr. 5.4 of the Outline Instrument.

### 3.8 *Loss of right to limit liability*

It is assumed that a new Instrument will provide for a right for the carrier to limit its liability. It is further assumed that it would be premature to discuss actual limits of liability at this stage. However, consideration might be given to the question as to **whether**

<sup>1</sup> Budapest Convention on the Contract for Carriage of Goods in Inland Navigation 2000.

*Agenda Paper*

- **“breakable behaviour” by a servant or agent, including a performing sub-carrier, of the carrier, i.e. acts or omissions which are such that the acting or omitting person loses its right to limit its liability, should result also in the loss of the contracting carrier’s right to limit its liability.**

### 3.9 *Shipper’s responsibilities and its liability therefor*

With reference to section 6 of the Outline Instrument and particularly 6.5 and 6.6 consideration might be given **as to whether the basis of shippers’ liability should be fault liability or a more stringent liability.**

Consideration might also be given **as to whether a distinction should be made between liability for damage caused by dangerous cargo on the one hand and liability caused by other cargo on the other hand.**

Further, **questions of limitation of shippers’ liability and time bar** may also merit consideration.

## 4 *Transport documents*

### 4.1 *Transfer of rights and obligations*

The Outline Instrument covers more substance and is more detailed with respect to transport documents, their contents and related rights and obligations than the existing international carriage of goods conventions. It is suggested the following topics should be discussed

- **transfer of rights**, see 11 of the Outline Instrument, including transfer of control, as dealt with in 10.1 (b) of the Outline Instrument
- **right of control**, cfr. 10 of the Outline Instrument
- **the function of the bill of lading as a document of title**, cfr. 10.2 (b), 11.1 to 11.5 of the Outline Instrument
- **rights and obligations of the carrier and consignee as regards delivery** cfr. 9.4 of the Outline Instrument.

### 4.2 *Cargo information in transport documents*

It should be considered whether the Outline Instrument is satisfactory with respect to

- **the detail of the information required**, see 7.2.1 and 7.2.3 of the Outline Instrument
- **carriers’ duty to check and right to qualify information in the transport document**, see 7.2.2 and 7.3.5(b) of the Outline Instrument
- **liability for incorrect information**, see 6.5, 7.2.3, 7.3.3, 7.3.6 and 7.4 of the Outline Instrument.

## 5 *Electronic Commerce*

It is clearly an objective that the Instrument should be operable also in relation to a documentation system which is entirely or partly paperless. In this context consideration should be given as to

- **what principles should be followed in order to make the Instrument capable of being applied to electronically concluded contracts of carriage or transport documents and to otherwise permit the use of electronic means of communication.**



## DOOR TO DOOR TRANSPORT

### 1. *Introduction*

The draft Outline Instrument contemplates door to door transport (see Chapter 3.1 and definition 1.1), but it does not define the carrier's liability, which Chapter 5 leaves open for further consideration. The purpose of this paper is to consider how the Instrument might accommodate other modes of transport normally associated with the carriage by sea.

### 2. *General*

It is submitted that the provisions of the Outline Instrument require remarkably few major alterations to adapt it for multimodal transport. Only relatively few provisions are peculiar to sea transport and these could be put into a section or sections dealing with carriage by sea only, or with movements involving a sea leg as the principal mode of transport, i.e. where any land transport is performed for the purpose of accepting or delivering the goods either side of a sea leg.<sup>1</sup>

### 3 *Scope of Application*

**3.1** In order to accommodate present practice, particularly in containerised trades, the current draft Outline Instrument applies from the time of receipt to the time of delivery irrespective of where the place of receipt and place of delivery might be geographically. However it is clear that where the place of receipt and/or the place of delivery are inland, outside the port area, and involve a movement by truck, rail or barge preceding or subsequent to the maritime carriage, such movement is presently considered only to the extent that it is subsidiary to the carriage by sea.

**3.2** Since many sea transports in the containerised field involve movement by more than one mode of transport, it is often difficult, if not impossible, to see whether the movement on land is subsidiary to that by sea. It is therefore considered by many that any future Instrument should contain provisions applying to the full scope of the carriage irrespective of whether or not the movement on land may be deemed subsidiary to that by sea, providing carriage by sea is contemplated at some stage.

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<sup>1</sup> Cf Article 18.3 of the Convention for the Unification of Certain Rules relating to International Carriage by Air 1929 as amended by the 1955 Protocol ("the Warsaw Convention") which provides: "*The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or trans-shipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air*".

#### **4    *Applicability and definitions***

**4.1** Multimodal transport must be distinguished from through transport to ensure there is no confusion between the two. The latter situation is where more than one means of transport is contemplated by the contract of carriage and the carrier acts as an agent on behalf of the owner of the goods in arranging for any part of the transportation not actually performed by himself. The former is where more than one mode of transport is contemplated by the contract of carriage and the carrier assumes responsibility throughout. If the cargo is transhipped from one means of transport into another within the same mode, this will not be regarded as multimodal transport; there must be transhipment between different modes.

**4.2** The present Outline Instrument does not outlaw a carrier acting as both a principal and an agent. Chapter 3.2 sets out some of the essential obligations that must be fulfilled by a carrier acting in an agency capacity. It is suggested that this possibility should remain if the Instrument is extended to multimodal transport.

**4.3** It should not matter whether the carrier under this scenario is a carrier by sea, a non vessel-owning carrier ("NVOC") or a freight forwarder. It would be odd if the regime applying to such a contract differed according to the status of the carrier, which is not immediately apparent in any event.

#### **5    *Liability***

**5.1** Multimodal transport comprises different legs each representing unimodal carriage to which international conventions, national legislation or standard conditions of contract may apply. Under the network system such regimes apply by contract as between the contractual carrier or multimodal transport operator ("MTO") and the shipper or cargo claimant. The uniform system attempts to super-impose a single basis of liability on the MTO which applies throughout the period of carriage whatever leg or mode of transport is involved. A "pure" network or uniform system is more a theoretical than a practical concept. From the MTO's point of view a network system has the advantage that his liability to the cargo claimant should generally correspond with the performing carrier's, or unimodal operator's, liability to him. He should therefore be able to have recourse against his sub-contractor for any sum he may be liable to pay to the cargo claimant.

**5.2** From the shipper's or cargo claimant's point of view the network system has many disadvantages. They are well documented and will not be rehearsed at length in this paper. In short:

- in many cases, particularly involving a sealed container, the location of the loss or damage, and hence the identification of the unimodal leg on which it occurred, will be difficult if not impossible to ascertain.
- in other cases the loss or damage will occur gradually over more than one leg.
- there may be a "liability gap" between the application of the various unimodal regimes.
- the liability regime could depend on the care taken by the MTO in negotiating satisfactory terms in his subcontracts.

The above disadvantages result in unpredictability. The shipper, whether the seller or the buyer of the goods, will not know which liability regime, or what limits of liability, or possibly what system of law, will apply in the event of loss or damage.

**5.3** In practice the network system is modified by contract. For example:

- (i) The UNCTAD/ICC Rules<sup>2</sup> set out a basis of liability, including liability for delay, but preserve the nautical fault, error in management and fire defences in respect to goods carried by sea or internal waterways, and provide that the limits of liability in the compulsory unimodal regimes will apply if the location of the loss or damage can be proved, otherwise the Hague-Visby limits will apply, or the CMR limits if no sea leg is involved.
- (ii) MULTIDOC 95<sup>3</sup> provides that the carrier will be liable on the same basis as set out in the UNCTAD/ICC Rules.
- (iii) The COMBICONBILL<sup>4</sup>, which is based on the 1973 ICC Rules for a combined transport document, sets out the carrier's basic liability, but provides that if it can be proved where the loss or damage occurred the parties may be entitled to require liability to be settled according to the relevant compulsory applicable unimodal regime. If no mandatory law applies to any carriage by sea or by inland waterway, the Hague-Visby Rules will apply.

**5.4** These modified network systems, by introducing "fall back" provisions, overcome the problems of the liability gap and the location of the loss or damage. They do not overcome the problems of gradual occurrence of the loss or damage, or of unpredictability.

**5.5** A uniform system of liability shifts the risk of unpredictability onto the MTO. His rights of recourse against his sub-contractors will be governed by the unimodal regimes which apply to the various legs of the transport. The problems of location of damage, liability gap and gradual occurrence of damage will apply to such recourse claims and the limit of the sub-contractor's liability may be less than the limit of the MTO's liability to the cargo claimant. It follows that adopting a uniform system has commercial and insurance implications for the MTO. The commercial considerations may differ as between a MTO, very probably a NVOC, who operates a largely land based transportation service, for whom the sea leg is insignificant and in any event

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<sup>2</sup> The UNCITAD/ICC Rules for Multimodal Transport Documents 1992 published by the International Chamber of Commerce. Rule 5.1 provides: *Subject to the defences set forth in Rule 5.4 and Rule 6, the MTO shall be liable for loss of or damage to the goods, as well as for delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Rule 4.1., unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person referred to in Rule 4 has caused or contributed to the loss, damage or delay in delivery. However, the MTO shall not be liable for loss following from delay in delivery unless the consignor has made a declaration of interest in timely delivery which has been accepted by the MTO.*

<sup>3</sup> The Multimodal Transport Bill of Lading issued by the Baltic and International Maritime Council (BIMCO).

<sup>4</sup> The Combined Transport Bill of Lading (revised 1995) issued by BIMCO.

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*Door to door transport*

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likely to be on waybill terms, and a MTO who is an ocean carrier operating an intercontinental container service.

**5.6** It is arguable that a MTO who carries on the terms of the UNCTAD/ICC Rules accepts a measure of this risk. BIMCO therefore recommends its members only to use MULTIDOC 95 if requested by their customers to issue a transport document subject to the Rules and strongly advises them to consult their P & I Club before doing so. Most MTO's who are intercontinental container operators issue "house" bills of lading on terms based on the COMBICONBILL.

**5.7** The United Nations Convention on Multimodal Transport of Goods 1980 ("the 1980 Convention") attempts to give effect to a uniform system of liability for loss of damage and delay modelled on (but not identical to) the Hamburg Rules. It does however incorporate a network system as regards the limits of liability, albeit with uniform minimum limits. Thus the limit of the carrier's liability to the cargo claimant remains unpredictable. The 1980 Convention has not attracted international support and has not come into force.

**5.8** A further problem, which is arguably inherent in any uniform liability system, is that such a system may conflict with provisions of existing unimodal conventions relating to the basis of liability, limitation of liability, time bar and other matters. Doubts may be expressed whether a solid legal solution to this problem is available.

## DRAFT OUTLINE INSTRUMENT

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## 1    DEFINITIONS

**1.1 Contract of carriage means a contract under which the contracting carrier, against payment of freight, undertakes to carry the goods wholly or partly by sea from one place to another.**

This definition is subject to change, depending on the outcome of the discussion on multimodality.

**1.2 Carrier means a contracting carrier or a performing carrier.**

This definition is generally based on the discussion at the ISC's third meeting in July and on the proposed amendments to the U.S. COGSA. The broad term "carrier" includes each of the possible types of carriers that are defined in the draft. The different types of carriers are not mutually exclusive.

**1.3 Contracting carrier means the person who enters into a contract of carriage with the contracting shipper.**

This definition is generally based on the discussion at the ISC's third meeting in July and on the proposed amendments to the U.S. COGSA.

The "contracting carrier" in this draft is substantially the same as the "carrier" under article 1.1 of the Hamburg Rules. The Hamburg Rules' terminology is rejected as ambiguous. Both the current draft and the Hamburg Rules recognise that different types of carriers exist, yet article 1.1 of the Hamburg Rules uses the unmodified term "carrier" to mean only one of these different types. (Under the Hamburg Rules, an "actual carrier" may not be a

“carrier.”) When referring to one particular type of carrier, it is preferable to modify the term “carrier” to identify which of the different types of carriers is intended. Thus the carrier who enters into the contract of carriage is the “contracting carrier.”

The current draft also differs from the Hamburg Rules in its omission of a “person ... in whose name” a contract has been completed. This clause is either unnecessary or wrong. If a person acting on its own behalf enters into a contract of carriage as carrier in its own name, then that person qualifies as the “contracting carrier” under the proposed definition and the omitted clause is unnecessary. Furthermore, if an agent acting on its principal’s behalf enters into a contract of carriage as carrier in the principal’s name, then the principal also qualifies as the “contracting carrier” under the proposed definition and the clause is once again unnecessary. The principal has “enter[ed] into a contract of carriage” through its agent. But if an impostor enters into a contract of carriage as carrier in someone else’s name, then that other person should not be treated as the “contracting carrier,” and the Hamburg Rules clause—to the extent that it suggests the contrary result—is wrong.

**1.4 Performing carrier means a person who performs, undertakes to perform, or procures to be performed any of a contracting carrier’s responsibilities under a contract of carriage, to the extent that the person acts, either directly or indirectly, at the request of, or under the supervision or control of, the contracting carrier, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term “performing carrier” does not include any person (other than the contracting carrier) who is retained by a shipper or consignee, or is an employee, servant, agent, contractor, or subcontractor of a person (other than the contracting carrier) who is retained by a shipper or consignee.**

This section is generally based on the discussion at the ISC’s third meeting in July and on the proposed amendments to the U.S. COGSA.

The definition here is also broader and more specific than article 1.2 of the Hamburg Rules. It provides a functional definition, clarifying that anyone performing any of the contracting carrier’s duties under the contract of carriage is a “performing carrier,” without regard for the contractual formalities that appear to be part of the Hamburg Rules’ definition. Furthermore, the proposed definition specifies more clearly than do the Hamburg Rules that the class of “performing carriers” includes not only the contracting carrier’s sub-contractors but also the entire line of subsidiary persons who perform the contract (*i.e.*, the sub-contractor’s sub-contractors, that party’s sub-contractors, and so on indefinitely).

The “performing carrier” in this draft is similar to the “actual carrier” under article 1.2 of the Hamburg Rules. The Hamburg Rules’ terminology is rejected as ambiguous and confusing. By using the phrase “actual carrier,” the Hamburg Rules imply that other carriers (including the “carrier” under article 1.1) are not “actually” carriers. This is contrary to commercial practice (not to mention article 1.1 of the Hamburg Rules), which undoubtedly regards the

carrier who enters into the contract of carriage as a person who is actually a “carrier” (or even *the* carrier). It is preferable to modify the term “carrier” to identify functionally which of the different types of carriers is intended. Thus the carrier who performs the contract of carriage (or part of the contract) is the “performing carrier.”

The definition also clarifies that “performing carriers” are only those who work, directly or indirectly, for the contracting carrier. If the consignor or consignee has a servant or agent performing a task that would otherwise be the contracting carrier’s responsibility under the contract of carriage, that servant or agent does not thereby become a “performing carrier.”

### **1.5 Shipper means a contracting shipper or a consignor.**

This definition is generally based on the discussion at the ISC’s third meeting in July. As in 1.2 (with reference to carriers), the broad term “shipper” includes each of the possible types of shippers that are defined in the draft. The different types of shippers are not mutually exclusive. Indeed, the consignor is often the contracting shipper.

Article 1.3 of the Hamburg Rules defines “shipper” to include the possibilities that are covered by this definition, but nothing in the Hamburg Rules distinguishes between the two possibilities.

There was some discussion at the ISC’s third meeting in July suggesting that the term “shipper” should also include a third possibility—the party identified as the “shipper” in the transport document. Such a party might be called the “documentary shipper.” The present draft defines such a party as the “first holder,” but does not include that person within the “shipper” definition.

### **1.6 Contracting shipper means the person who enters into the contract of carriage with the contracting carrier.**

This definition is generally based on the discussion at the ISC’s third meeting in July and on the first part of article 1.3 of the Hamburg Rules. As was the case with 1.2 (with reference to carriers), when referring to only one type of shipper it is preferable to modify the term “shipper” to identify which of the different types of shippers is intended. Thus the shipper who enters into the contract of carriage is the “contracting shipper.” The reference in article 1.3 of the Hamburg Rules to a “person ... in whose name or on whose behalf” a contract has been completed is omitted here for essentially the same reasons that comparable language was omitted from 1.3 (with reference to the contracting carrier).

### **1.7 Consignor means the person from whom a carrier receives the goods.**

This definition is generally based on the discussion at the ISC’s third meeting in July and on the concept of the second part of article 1.3 of the Hamburg Rules. It might have been preferable here to modify the term “shipper” to identify which of the different types of shippers is intended. Thus the shipper who delivers the goods to a carrier might be the “delivering shipper” or the “consigning shipper.” Such usage seems unnatural, however, and the term “consignor” is well-established in commercial practice.

The Working Group recognises that a carrier will generally receive the

goods from a person acting on behalf of another. For example, a carrier may receive the goods from a freight forwarder or a trucking company acting on behalf of a seller who arranged to have the goods transported to an overseas buyer. In such a case, the seller qualifies as a “consignor” because a carrier received the goods from the seller (who was acting through an agent). The freight forwarder or trucking company would also qualify as a “consignor” because it was “the person from whom a carrier receives the goods.”

**1.8 Holder means the person who is for the time being in possession of the negotiable transport document and entitled to transfer the rights embodied in such document.**

**1.9 First Holder means the person who is named as the shipper in, or is identifiable as such from, a negotiable transport document.**

**1.10 Intermediate Holder means the holder, not being the first holder, until the moment that he claims delivery of the goods.**

**1.11 Consignee means the person entitled to take delivery of the goods under the contract of carriage or a transport document issued under the contract of carriage.**

This definition is generally based on the discussion at the ISC’s third meeting in July and more directly on article 1.4 of the Hamburg Rules. The phrase “under the contract of carriage” does not appear in article 1.4 of the Hamburg Rules, but has been added for clarification. Under commercial practice, a person entitled to take delivery of the goods on some basis other than the contract of carriage (*e.g.*, the true owner of stolen goods) would not be described as the “consignee.”

**1.12 Transport document means a document issued by a carrier that**

- (a) evidences a contract of carriage,**
- (b) [is a document of title to goods under a contract of carriage], or**
- (c) evidences a carrier’s receipt of goods under a contract of carriage.**

This definition is generally based on the discussion at the ISC’s third meeting in July. Transport documents include not only such traditional documents as bills of lading and waybills, but also current and future substitutes for these traditional documents (including electronic documents when appropriate).

The definition is phrased in the alternative, meaning that a document qualifies as a transport document if it satisfies any one of the three alternatives listed in 1.12(a), 1.12(b), or 1.12(c). This means, for example, that being a “document of title to goods under a contract of carriage” (1.12(b)) is sufficient to qualify a document as a “transport document,” but being a transport document is not sufficient to qualify a document as a document of title.

During the discussion at the ISC’s fourth meeting in October, the question was raised whether 1.12(b) adds anything of substance to the definition, or if every relevant document of title is also a receipt, and thus already covered under the definition by 1.12(c). Accordingly, 1.12(b) is bracketed in this draft.



**1.13 Negotiable transport document** means a transport document, such as a bill of lading, that states that the goods are to be delivered to order, to bearer, or to order of any person named in the document, and is not prominently marked “non-negotiable” or “not negotiable.”

**1.14 Non-negotiable transport document** means a transport document that [is prominently marked “nonnegotiable” or “not negotiable,” states that the goods are to be delivered to a person named in the document, or otherwise] fails to qualify as a negotiable transport document.

This definition is intended to cover every “transport document” that is not a “negotiable transport document” under 1.13. The three parts of the definition are 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 1.13 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 1.13 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.

During the discussion at the ISC’s fourth meeting in October, the question was raised whether the first two parts add anything of substance to the definition. It is possible to define “non-negotiable transport document” with only the third part, *i.e.*, as “a transport document that fails to qualify as a negotiable transport document.” The first two parts, which illustrate the two most common ways that a transport document would fail to qualify as a negotiable transport document, do not cover any additional transport documents that are not also covered by this shorter definition. As a result of this discussion, the first two parts are bracketed here to flag the possible alternative approach.

**1.15 Freight** means the remuneration payable to the carrier for the carriage of goods under any contract of carriage.

Freight is defined as the contractual consideration. It should be read in relation to 1.1. According to 8.1, ‘freight’ in Chapter 8 includes deadfreight as well.

**1.16 Goods** means the whole or any part of the wares, merchandise and articles of every kind whatsoever, except for live animals, which a carrier received for carriage and includes the packing and any equipment and container not supplied by or on behalf of a carrier.

The exclusion of live animals follows the consensus in the Uniformity Sub-Committee.

**1.17 Container** includes any type of container, transportable tank or flat,

swapbody, lashbarge, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

**1.18 In writing** includes, unless otherwise agreed between the parties concerned, information generated, sent, received or stored by electronic, optical or similar means of communication, including, but not limited to, telegram, facsimile, telex, electronic mail or electronic data interchange (EDI), provided the information contained therein is accessible so as to be usable for subsequent reference.

The wording of this definition is taken from UNCITRAL Model Law on Electronic Commerce.

## **2 SCOPE OF APPLICATION**

**2.1** The provisions of this Instrument apply to all contracts of carriage in which the place of receipt or port of loading and the place of delivery or port of discharge are in different States if:

- (a) the place of receipt or port of loading specified in either the contract of carriage or a transport document under the contract of carriage is located in a [Contracting State], or
- (b) the place of delivery or port of discharge specified in either the contract of carriage or a transport document under the contract of carriage is located in a [Contracting State], or
- (c) the actual place of delivery or port of discharge is one of the optional places of delivery/ports of discharge specified in either the contract of carriage or a transport document under the contract of carriage and it is located in a [Contracting State], or
- (d) the contract of carriage is entered into in a [Contracting State] or a transport document under the contract of carriage is issued in a [Contracting State], or
- (e) the contract of carriage or a transport document under the contract of carriage provides that the provisions of this Instrument or the legislation of any State giving effect to them are to govern the contract.

This chapter is generally based on article 2 of the Hamburg Rules. The term “Contracting State” is bracketed to indicate that it has not yet been decided what form the Instrument will ultimately take. “Convention” and “Contracting State” are appropriate for a diplomatic convention. Until the “door-to-door” issues are resolved, this provision is broadly drafted to cover not only the port of loading but also the place of receipt; similarly, it covers not only the port of discharge but also the place of delivery. It may be necessary to revise this language when the “door-to-door” issues are resolved.

**2.2** The provisions of this Instrument apply without regard to the nationality of the ship, the contracting carrier, the performing carriers, the shippers, the consignees, or any other interested parties.

This provision follows article 2.2 of the Hamburg Rules.

## 2.3

### **2.3.1 The provisions of this Instrument do not apply to charter parties.**

This provision follows the first sentence of article 2.3 of the Hamburg Rules. During the discussion at the ISC's fourth meeting in October, the question was raised how broadly this exclusion should apply. The charter party exclusion in international conventions goes back to the Hague Rules, and has been retained in essentially the same form ever since. Modern practice, however, goes well beyond traditional charter parties. It will thus be necessary to decide if this traditional exclusion should continue to be limited to traditional charter parties, or if it should be expanded to other contracts of carriage such as contracts of affreightment, volume contracts, service contracts, and similar agreements.

**2.3.2 Notwithstanding 2.3.1, if a transport document evidencing a contract of carriage is issued under or pursuant to a charter party, [contract of affreightment, volume contract, service contract, or similar agreement,] then the provisions of this Instrument apply to the contract evidenced by that transport document to the extent that the transport document governs the relation between the carrier and the party other than the person with whom the carrier concluded such contract.**

This provision follows the second sentence of article 2.3 of the Hamburg Rules. The bracketed language reflects the issue discussed in the commentary to 2.3.1.

**2.4 [If a contract provides for the future carriage of goods in a series of shipments, the provisions of this Instrument apply to each shipment to the extent that 2.1, 2.2, and 2.3 so specify.]**

This provision follows article 2.4 of the Hamburg Rules. It may need to be revised in light of the resolution of the issue discussed in the commentary to 2.3.1. If the exclusion in 2.3.1 is expanded to cover a contract providing for the future carriage of goods in a series of shipments, such as a service contract in the United States, then this provision should not undermine the exclusion by making the individual shipments subject to the provisions of this Instrument.

## **3 PERIOD OF RESPONSIBILITY**

**3.1 Subject to the provisions of paragraphs 3.2 and 3.3 below, the responsibility of the carrier for the goods under this Instrument covers the period from the time that the carrier has received the goods from the consignor in the place of receipt until the time that the goods are delivered by the carrier to the consignee in the place of delivery.**

**3.2 However, parties may agree in the contract of carriage that-**

- (a) certain activities, which according to the contract of carriage are to be performed during the period referred to in 3.1, shall be carried out by or on behalf of the shipper or the consignee, such as loading, stowage, discharging, or temporary storage of the goods;**

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- (b) the carrier acting as an agent of the shipper may contract out certain specified parts of the carriage to a third party, thereby limiting the scope of the contract.

In the event a negotiable transport document will be issued, such document shall reflect any agreement referred to in this paragraph.

**3.3 In the event the carrier acting as an agent of the shipper contracts out certain specified parts of the carriage to a third party, it shall:**

- [(a) conclude a contract with such third party on the terms which are customary for the particular mode of transport or which are compulsory applicable to the part of the carriage that is contracted out;**
- (b) take care that parties to such contract shall be the contracting shipper and such third party, while the consignee under such contract should be a subsequent carrier or the consignee under the contract of carriage, as the case may be;**
- (c) effect payment of the remuneration due under such contract, unless otherwise agreed,**
- (d) exercise reasonable care, having regard to the specific factors that locally apply, in the selection of the third party;**
- (e) provide such third party with all information and instructions which are necessary for a proper carrying out of his tasks, including, as the case may be, any information on loss or damage incurred in respect of the goods and any instructions on the handing over of the goods to a subsequent carrier or to the consignee under the contract of carriage;**
- (f) take care that any information, which the shipper, the person in possession of the right of control, or the consignee, may reasonably request in respect of the part of the carriage contracted out to the third party, will be provided to any of these persons with reasonable despatch.]**

**[exercise due diligence in selecting the third party, conclude the contract with the third party on customary terms and shall do everything that is reasonably necessary or desirable for enabling the third party to perform duly under such contract.]**

During the period that the goods are in his custody, a carrier is responsible for the goods. This means that, where in the event of port-to-port carriage a terminal operator acts as the subcontractor of the carrier, the goods are already under the responsibility of the carrier when they are still on the terminal, waiting to be loaded. The same situation applies, *mutatis mutandi*, in the discharge port. Whether during such period a carrier will be liable for loss or damage to the goods is another matter. This will depend on whether a tackle-to-tackle clause will be held valid under this Instrument.

The second paragraph leaves intact two existing practices. The first is the practice that certain activities, which expectedly would be the task of the carrier, are carried out by or on behalf of another party to the contract of carriage. Most typical example is the *fios* clause in the charterparty carriage. It is a matter of course that a 'who does what' has to be clearly agreed between

the parties and evidenced in the transport document. In view of the protection that the third party holder of a negotiable transport document deserves, this exception of the rule should be reflected in such document.

The second practice is that of 'through carriage'. This has to be distinguished from 'combined transport' or 'multimodal transport'. The last two expressions cover contracts of carriage under which the goods may be transshipped from one mode of transport into another, but under the responsibility of one single carrier.

'Through carriage' or 'through transport' means that (usually) part of the voyage is carried out by the carrier and another part by another carrier, who is contracted by the first carrier not as his subcontractor, but on behalf of the shipper. A typical example leading to 'through transport' is a provision in a contract of carriage that the carrier only assumes responsibility for that part of the carriage that he carries out with means of transport under his own management. In fact, a 'through transport' contract is a mixed contract: it is partly a contract of carriage and partly a forwarding contract. Because this practice of 'through carriage' may create ambiguity, it is felt that the duties of such carrier, who also acts as an agent, should be spelled out in this chapter. This has been done in the third paragraph.

It follows that, during the parts of the carriage which are contracted out, the carrier will not be responsible in a capacity as a carrier, but in his capacity as an agent only. If the first part of the carriage is contracted out, the responsibility of the carrier starts when he takes over the goods from the third party. If the last part of the carriage is contracted out, the responsibility of the carrier ends when he hands over the goods to the on-carrier. Such handing over of the goods must be deemed to be the delivery of the goods under the carriage part of the mixed contract. Any negotiable transport document has to be produced to the carrier at that point in time. It is, subsequently, the duty of the on-carrier to deliver the goods at their final destination to the consignee as he appears under the contract of carriage.

#### **4 OBLIGATIONS OF THE CARRIER**

##### **4.1 The carrier shall, in accordance with the terms and conditions of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee in the condition in which they were received by him from the consignor.**

This is the basic obligation of the carrier, which is further qualified by the other provisions of this Instrument as well as by the terms and conditions of the contract of carriage, such as an agreed time limit for delivery.

##### **4.2 During the period of its responsibility the carrier shall properly care for the goods.**

This provision is a contraction of article III, rule 2, of the Hague-Visby Rules. It provides for the standard of care that the carrier has to exercise in respect of the goods. Pending the further discussions on the liability regime, a provision along the lines of article III, rule 1, i.e. the due diligence of the carrier, has not been inserted yet.

## 5 LIABILITY OF THE CARRIER

### 5.1 Basis of Liability

#### 5.1.1 Introduction

From the final report of the Uniformity Sub-Committee<sup>1</sup> it appears that there was a consensus within the Uniformity Sub-Committee that the system of liability adopted in the Hague-Visby Rules should be retained except for the defence relating to faults in the navigation and management of the ship, in respect of which views were divided. There was also a consensus on the need for a provision such as that contained in Article 3(1) and (2) of the Hague-Visby Rules. The Uniformity Sub-Committee did not deem it appropriate to draft any text in view of the work that had commenced on other issues of transport law.

The ISC considers that, in view of the broader spectrum covered by the draft Outline Instrument and, also, of the future possible extension of the scope of such Instrument to door-to-door transport, in addition to a liability regime based on the Hague-Visby Rules, with or without the defence relating to faults in the navigation and management of the ship, some alternative options should be envisaged.

**5.1.2** The first of such additional options could consist in a general rule pursuant to which the carrier is liable for loss of or damage to the goods unless he proves the absence of his fault. It was suggested that a provision to give effect to this option could be modelled on Article IV Rule 2 (q) of the Hague-Visby Rules. Such a provision could read:

**The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when it receives the goods and the time of delivery, as well as for any delay in delivery, unless the carrier can prove that the loss, damage or delay did not result from any fault or neglect on the part of the carrier or its servants or agents.**

It is submitted that the effect of this provision would be similar to the effect of Article 5.1 of the Hamburg Rules (read in accordance with the Common Understanding set out in Annex II thereto) whereby the carrier is liable “unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence [which caused the loss, damage or delay] and its consequences”. The catalogue of exceptions would consequently disappear, except for the exception relating to saving of life or property at sea. Also if this option were adopted, a provision setting out the duties of the carrier, along the lines of Article 3(1) of the Hague-Visby Rules might still be considered useful.

**5.1.3** The second of such additional options might impose a more stringent basis of liability. It was suggested that a provision to give effect to this option

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<sup>1</sup> Published in CMI Yearbook 1999 at pp 105-116

could be modelled on Article 17<sup>2</sup> of Convention on the Contract for the International Carriage of Goods by Road (CMR) on the grounds that it was familiar to the industry and had been interpreted by the courts. Such a provision could read:

- (i) **The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when it receives the goods and the time of delivery, as well as for any delay in delivery.**
- (ii) **The carrier shall however be relieved of liability if the loss, damage or delay was caused by:**
  - (a) **The wrongful act or neglect of the claimant<sup>3</sup>;**
  - (b) **The instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier;**
  - (c) **Inherent vice of the goods;**
  - (d) **Perils, dangers, and accidents of the sea or other navigable waters;**
  - (e) **Saving or attempting to save life or property at sea;**
  - (f) **Circumstances which the carrier could not avoid and the consequences of which it was unable to prevent.**
- (iii) **The burden of proving that the loss, damage or delay was due to one of the causes specified in 2(a)-(f) shall rest upon the carrier.**

It is arguable that exceptions (c) and (d) are embraced in (f) and that they are unnecessary.

<sup>2</sup> Article 17 provides

1. The carrier should be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.
2. The carrier shall however be relieved of liability if the loss, damage or delay was caused by wrongful act or neglect of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.
3. The carrier shall not be relieved of liability by reason of the defective condition of the vehicle used by him in order to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle or of the agents or servants of the latter.
4. Subject to Article 18, paragraphs 2-5 [which contain certain burden of proof provisions], the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:
  - a) Use of open unsheathed vehicles when their use has been expressly agreed and specified in a consignment note;
  - b) The lack of, or defective condition of packing in the case of goods which, by their nature are liable to wastage or to be damaged when not packed or when not properly packed;
  - c) Handling, loading, stowage or unloading of the goods by the sender, the consignee or persons acting on behalf of the sender or the consignees:
    - d) The nature of certain kinds of goods which particularly exposes them to a total or partial loss or to damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin;
    - e) Insufficiency or inadequacy of marks or numbers on the packages;
    - f) The carriage of livestock.
5. Where under this article the carrier is not under liability in respect of some of the factors causing the loss, damage or delay, he shall only be liable to the extent that those factors for which he is liable under this article have contributed to the loss, damage or delay.

<sup>3</sup> 'Claimant' is not read literally under the CMR; the carrier may plead the conduct of the sender or consignee. This point would need to be covered at the final drafting stage.

**5.1.4** Of course other options could be envisaged. For example, a liability regime could be adopted whereby the carrier is liable for loss of or damage to the goods unless he proves that such loss or damage resulted from an event beyond his control. This concept has been adopted in the Convention on Contracts for the International Sale of Goods 1980 ("Vienna Sales Convention"), article 79.1 of which so provides:

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

## **5.2 Allocation of damages**

If a breach of the carrier's obligations combines with another cause to produce loss, damage, or delay in delivery, the carrier is liable only to the extent that the loss, damage, or delay in delivery is attributable to such breach, provided that the carrier proves the amount of the loss, damage, or delay in delivery not attributable thereto.

This provision follows article 5.7 of the Hamburg Rules.

An alternative approach is illustrated by the proposed amendments to the U.S. COGSA, which put an equal burden on each party. The cargo claimant has the burden of showing the extent to which the loss or damage was due to a cause for which the carrier *is* responsible. Conversely, the carrier has the burden of showing the extent to which the loss or damage was due to a cause for which the carrier *is not* responsible. The court would then allocate the responsibility for the loss or damage in proportion to the respective causes. This provision is drafted in the U.S. proposal as follows:

If loss or damage is caused in part by a breach of a carrier's obligations, or the fault or neglect of a carrier, and in part by one or more of the exceptions [for which the carrier is not responsible], then the carrier or ship is-

- (A) liable for the loss or damage to the extent that the party seeking to recover for the loss or damage proves that it is attributable to that breach, fault, or neglect; and
- (B) not liable for the loss or damage to the extent the carrier proves that it is attributable to one or more of those exceptions.

Under article 5.7 of the Hamburg Rules, it is unnecessary to consider what happens if there is insufficient evidence to determine the cause of the loss or damage. Because the full burden is on the carrier, the carrier is fully responsible for the loss or damage in cases of insufficient evidence. If the parties carry an equal burden, however, it is necessary to consider what happens if there is insufficient evidence for either party to carry its burden. Under the proposed amendments to the U.S. COGSA, the responsibility for the loss or damage in such an unusual situation would be divided equally between the cargo claimant and the carrier (on the theory that each was equally unable to carry its burden).



### **5.3 Liability of Contracting and Performing Carriers**

**5.3.1 A performing carrier is subject to the responsibilities and liabilities under this Instrument, and entitled to the rights and immunities provided by this Instrument (a) during the period it has custody of the goods; and (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.**

This provision is generally based on the discussion at the ISC's third meeting in July and on the proposed amendments to the U.S. COGSA. The contracting carrier is liable (subject to the terms of this Instrument) under the contract of carriage for the entire period of responsibility under 3.1. A performing carrier, in contrast, is not liable under the contract of carriage, and under this Instrument it is not liable in tort. In return for escaping liability in tort, the performing carrier assumes liability under the Instrument during the period it has custody of the goods or when it is otherwise participating in the performance of the contract of carriage.

The current draft provides for uniform liability for performing carriers. An alternative approach would be to impose liability on performing carriers under the "network" system, whereby each carrier would be liable under its own liability system. European truckers, for example, would presumably be liable under the terms of CMR instead of under the terms of this Instrument.

**5.3.2 Subject to 5.3.4, a carrier shall be responsible for the acts and omissions of any performing carrier who performs, undertakes to perform, or procures to be performed any of that carrier's responsibilities under the contract of carriage as if such acts or omissions were its own.**

**5.3.3 Responsibility is imposed on a carrier under 5.3.2 only when the performing carrier's act or omission is within the scope of its contract, employment, or agency, as the case may be.**

**5.3.4 If an action is brought against a performing carrier who proves that it acted within the scope of its contract, employment, or agency, as the case may be, the performing carrier is entitled to the benefit of the defences and limitations of liability available to the contracting carrier under this Instrument.**

**5.3.5 To the extent that both the contracting carrier and performing carrier are liable, their liability is joint and several but only up to the limits provided for in [5.4], 5.6 and 5.7.**

**5.3.6 Without prejudice to the provisions of 5.8, the aggregate liability of the contracting carrier and performing carriers will not exceed the overall limits of liability under this Instrument.**

Under 5.3.2, each carrier is responsible for the acts and omissions of any performing carrier who works under it. Thus the contracting carrier is responsible for the acts and omissions of *any* performing carrier because all performing carriers work directly or indirectly for the contracting carrier (who assumes all of the carrier's responsibilities under the contract of carriage). A

performing carrier is responsible for the acts and omissions of the performing carriers who work under it, *i.e.*, its own subcontractors, employees, and agents; their subcontractors, employees, and agents; and so on, indefinitely. The length of the chain connecting a performing carrier to the contracting carrier does not matter; when a performing carrier is performing its duties under the contract of carriage, all those above it in the chain are responsible for its acts and omissions.

The responsibility imposed on a carrier under 5.3.2 is limited by 5.3.3, which provides that the rule stated in 5.3.1 only applies when the performing carrier's act or omission is within the scope of its contract, employment, or agency, as the case may be. In other words, if a carrier subcontracts part of its responsibilities under the contract of carriage, it is liable for the subcontractor's acts or omissions only when the subcontractor's act or omission is within the scope of its contract. Similarly, if a carrier hires employees, it is liable for the employees' acts or omissions that are within the scope of their employment. And if a carrier engages agents, it is liable for the agents' acts or omissions within the scope of their agency.

Under 5.3.4, a performing carrier is generally entitled to the same rights as the contracting carrier. This gives performing carriers the benefits of a broad Himalaya clause without the need to include a Himalaya clause in the contract of carriage or the transport document.

5.3.6 reiterates what is already the normal rule under the Hague and Hague-Visby Rules.

## **5.4 Delay**

### **5.4.1 Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon.**

At its third meeting the ISC considered that this provision should be drafted to reflect the consensus in the Uniformity Sub Committee.

Time may be an essential factor in the carriage of goods. Sometimes, parties have agreed in the contract specific provision on the performance of the carrier, including the time of arrival of the goods. Often, the agreed freight corresponds with the importance that the parties attach to a timely arrival of the goods. In principle, it is up to the parties to express in their contract what they expect from each other in terms of performance.

### **5.4.2 The liability for any economic loss caused by delay in delivery shall be limited to an amount equivalent to [...times the freight] payable for the goods being delayed. However, the aggregate liability under 5.7.1 and the first sentence of this paragraph shall not exceed the limits, which would be established under 5.7.1 for total loss of the goods in respect of which such liability was incurred.**

If the damage due to delay is physical damage to the goods, such damage can be dealt with according to the rule relating to loss or damage to the goods. However, the loss incurred in connection with delay may be wholly or partly economic loss. Under the Hague-Visby Rules such damage arguably does not

qualify for compensation. It is proposed to change this. The CMNI Convention limits this liability to the amount of the freight.

In view of the commercial aspects of delay in delivery, it may be questioned whether paragraph 5.4.2 should be of mandatory nature, i.e. parties should be allowed to make their own arrangements as to timely arrivals and to put an agreed amount of liquidated damages on arrivals overdue.

Further, it may be considered whether a new Instrument should contain a provision in the case of excessive delay to the effect that the goods shall be deemed to be lost, for the purposes of the measure of indemnity, if they are not placed at the disposal of the consignee within a period of time (e.g. 90 days) from the date on which the goods should have been delivered. Such provision could include that if the goods are placed at the disposal of the consignee after the lapse of the above period, the consignee should be given an option of either accepting payment of the indemnity for total loss, or accepting the late delivery of the goods, without prejudice to his claim for damages for delay. At its third meeting the ISC considered that no such provision should be drafted at this stage.

## **5.5 Deviation**

- (a) The carrier is not liable for damage, loss, or delay in delivery caused by a deviation to save or attempt to save life or property at sea, or any other reasonable deviation.**
- (b) An unreasonable deviation constitutes a breach of a carrier's obligations under this Instrument, and the remedies for such a breach shall be determined exclusively under this Instrument.**

This provision is generally based on the discussion at the meetings of the Uniformity Sub-Committee. 5.5(a) is based on article 4(4) of the Hague and Hague-Visby Rules. In light of the discussion at the ISC's fourth meeting in October, delay was added to the provision. 5.5(b) addresses a problem that arises particularly in the United States, and thus it is largely based on the proposed amendments to the U.S. COGSA. The intent of 5.5(b) is that a deviation as such does not deprive the carrier of its right to limit its liability, but a deviation that satisfies the requirements in 5.8 would.

## **5.6 Deck cargo**

### **5.6.1 Goods may be carried on deck only if**

- (i) such carriage is required by the relevant laws or administrative rules or regulations, or**
- (ii) they are carried in or on containers on decks which are specially fitted to carry containers, or,**
- (iii) in cases not covered by (i) or (ii) above, the carriage on deck is in accordance with the contract of carriage, or complies with the custom of the trade, or follows from other usage in the trade in question.**

**5.6.2 When the goods have been shipped in accordance with 5.6.1 (i) and (iii), the carrier shall not be liable for the loss or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on deck in breach of 5.6.1, the carrier shall be liable, irrespective of the provisions of 5.1, for loss and damage to the**

goods or delay in delivery which are exclusively the consequence of their carriage on deck.

**5.6.3 When the goods have been shipped in accordance with 5.6.1 (iii), the fact that particular goods are carried on deck must be stated in the transport document. Failing this, the carrier shall have the burden of proving that carriage on deck complies with 5.6.2.(iii) and is not entitled to invoke that provision against a third party which has acquired the negotiable transport document in good faith.**

**5.6.4 If the carrier under this paragraph 5.6 is liable for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided for in 5.4 and 5.7; however, if such liability occurs while it was expressly agreed to carry the goods under deck, the carrier is not entitled to limit his liability.**

At the third meeting the ISC considered that the draft provisions should reflect the consensus in the Uniformity Sub-Committee.

If goods are carried on deck, additional risks like weather exposure may be involved. Therefore, 5.6.1 limits the possibilities to carry goods on deck.

5.6.2 sets out the carrier's liabilities for loss or damage to goods carried on deck. An exception is made for containerised goods. The current practice is that, for operational reasons, container carriers want to have the option to load containers either under or on deck. The consequence thereof is that containers on deck must be subject to the same liability regime as containers carried under deck.

Again, because of the additional risks involved, the carriage on deck according to 5.6.1.(iii) should be stated in the transport document. 5.6.3 takes care of that and adds as a sanction a reversal of the burden of proof on the carrier and the denial of the benefit of the special provisions of 5.6 for the carrier.

5.6.4. makes clear that a carrier is also entitled to limit his liability in the event loss or damage occurs due to the special risks inherent to deck carriage. However, he will lose the benefit of limitation if he breaches an express agreement to carry the goods under deck.

At the fourth ISC meeting a proposal was made to simplify 5.6. It might 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 a breach of duty to properly care for the cargo. If the carrier does so knowingly, then it loses the benefit of limitation.

Further, a matter that requires attention is that, because of their special nature, odd size or otherwise, some cargoes are exclusively carried on deck. Examples are: goods carried on board of offshore supply vessels, construction modules on deck of pontoons, etc. Usually, in these cases parties agree on special conditions, such as knock-for-knock provisions, coinsurance arrangements and the like. It is proposed that these cases should be dealt with under a separate article dealing with special carriage along the lines of article VI of the Hague Visby Rules.

## **5.7 Limits of liability**

**5.7.1** The carrier's liability for the loss of or damage to or in connection with the goods is limited to [...] units of accounts per package or other shipping unit, or [...] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods had been declared by the shipper before shipment and inserted in the transport document, [or where a higher amount than the amount of limitation of liability set out in this article had been agreed upon between the contracting carrier and the contracting shipper.]

**5.7.2** In the event of carriage of goods in or on a container, the packages or shipping units enumerated in the transport document as packed in or on such container are deemed packages or shipping units. If not so enumerated, the goods in or on such container are deemed one shipping unit.

**5.7.3** The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Rights, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

At the fourth meeting of the ISC a clear view was expressed not to introduce a special limit per container.

The last part of 5.7.1 is put between [ ] because it has to be decided whether the Instrument should be of mandatory nature and whether any mandatory provision should be one-sided or two-sided mandatory.

5.7.2 complies with the current practice.

5.7.3 is in conformity with similar drafts in other recent transport conventions.

A further provision should be added dealing with an accelerated amendment procedure to adjust the amounts of limitation, along the lines of article 8 of the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims.

## **5.8 Loss of the right to limit liability**

**5.8.1** Neither the contracting carrier nor the performing carrier shall be entitled to limit its liability as provided for in [5.4,] 5.6 and 5.7 of this Instrument, or in the contract of carriage when the nature and value of the goods have been declared, if it is proved that the loss of, or damage to or in

connection with the goods resulted from a personal act or omission of such carrier done with the intent to cause such loss or damage, or recklessly and with the knowledge that such loss or damage would probably result.

**5.8.2** The servant or agent of the carrier shall not be entitled to limit its liability provided for in the [5.4,] 5.6 and 5.7 of this Instrument, or in the contract of carriage when the nature and value of the goods have been declared, if it is proved that the loss of, or damage to or in connection with the goods resulted from a personal act or omission of the servant or agent of the carrier done with the intent to cause such loss, damage, or recklessly and with the knowledge that such loss or damage would probably result.

The wording of this provision reflects similar provisions in other conventions, with one exception. It is considered that the declaration of the value of the goods effectively sets a new limit, because the declared value may differ from the actual value of the goods.

A point to consider is whether the limits in respect of delay have to be breakable as well. It should be borne in mind that very often delay may be caused by intentional acts (either from servants or agents or from the carrier personally) and that it concerns economic damage.

## **5.9 Notice of loss, damage or delay**

**5.9.1** The carrier shall be presumed to have delivered the goods according to their description in the transport document unless notice of loss of, or damage to or in connection with the goods, indicating the general nature of such loss or damage, shall have been given in writing to the carrier before or at the time of the delivery, or, if the loss or damage is not apparent, within three working days after the delivery of the goods. A written notice is not required in respect of loss or damage which is ascertained in a joint inspection of the goods by the carrier and the consignee.

**5.9.2** No compensation shall be payable for economic loss resulting from delay in delivery unless written notice of such loss was given to the carrier within 21 consecutive days following delivery of the goods.

**5.9.3** Where the goods have been delivered by the performing carrier, which had delivered the goods, the notice in writing referred to in this article given to the performing carrier shall have the same effect as that given to the contracting carrier, and that given to the contracting carrier shall have the same effect as that given to the performing carrier, which had delivered the goods.

The giving of prompt notice is of great practical importance. It enables the parties to do immediately a survey of the goods (preferably jointly) and to take the necessary measures in order to prevent further damage to the goods. As such, giving prompt notice is part of the general obligation of the parties to act reasonably towards each other and to limit the damage as much as possible. If the damage is not apparent, the consignee must have a certain period for inspection. In view of the purpose of the notice, such period may reasonably be restricted to three working days.

Under air transportation law, the sanction on not giving proper notice is the loss of the right to claim damages. In maritime transport this is considered a too harsh sanction for physical damage to the goods. Under the Hague Rules, only the assumption will apply that the goods are properly delivered in accordance with their description in the transport document.

This does not apply to not giving due notice in case of economic loss. Any notice of a claim for delay in delivery can and, consequently, must be given within a short period. Normally, such claim is a matter of calculation only. The second paragraph, including the period to be fixed at 21 days, corresponds with a similar provision in the draft CMNI convention.

For practical purposes it is provided in the third paragraph that valid notice may be given to a performing carrier when it is the person who delivers the goods to the consignee. Obviously, in that case notice may be properly given to the contracting carrier as well.

### **5.10 Non-contractual claims**

**The defences and limits of liability provided for in this Instrument and the responsibilities imposed by this Instrument apply in any action against the carrier for loss of, for damage to, or in connection with the goods covered by a contract of carriage, whether the action is founded in contract, in tort or otherwise.**

This provision reflects a principle which has become common in respect of transport law that contains mandatory provisions.

## **6 OBLIGATIONS OF THE SHIPPER**

**6.1 A shipper shall, in accordance with the terms and conditions of the contract of carriage, deliver the goods ready for carriage and in such condition that they may stand the intended carriage, including their loading, handling, stowage, lashing and securing, and discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a shipper-packed container or trailer, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods may stand the intended carriage, including loading, handling and discharge of the container or trailer, and that they will not cause injury or damage.**

The basic obligation of the shipper is to deliver the goods to the carrier in accordance with the contract of carriage, i.e. the goods as agreed and at the agreed place and time. Further, the goods have to be brought by the shipper in the proper condition for the intended voyage, e.g. packing has to be sound, dangerous goods have to be properly marked and labelled, temperature controlled goods have to be delivered at the right temperature for carriage, etc. For reason of accident prevention, this is of particular importance in respect of shipper packed containers and trailers, because in the normal course of events carriers do not check their contents.

**6.2 The contracting carrier shall provide to the shipper, on its request, all the information, including instructions, which it knows or ought to know**

**and which is reasonably necessary or of importance to the shipper in order to comply with its obligations under 6.1.**

It should be a two-way street. Anything that a shipper does not know, he should ask for, whereupon the carrier should to the best of his ability assist the shipper in meeting its responsibilities.

**6.3 The shipper shall provide to the contracting carrier all the information, instructions and documentation which is reasonably necessary, or of importance for-**

- (a) the handling and carriage of the goods, including precautions to be taken by the carrier, unless the carrier already knows or ought to know such information or instructions;**
- (b) the compliance with rules, regulations and other requirements of authorities in connection with the intended carriage, including filings, applications and licences relating to the goods;**
- (c) the issue by a carrier of the transport documents, including the data referred to in 7.2.1, (b) and (c), the name of the first holder and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the contracting carrier.**

**6.4 The information, instructions and documentation which the shipper and the carrier provide to each other under 6.2. and 6.3 must be accurate and complete, so as to enable the other party fully to rely on such information, instructions and documentation for the purpose that it is requested or intended for within the scope of the contract of carriage. Each party, however, is entitled, but never obliged, to examine whether the information, instructions and documentation provided by the other party is accurate and complete.**

A safe and successful voyage of the goods may depend to a large extent on the cooperation between the parties. Of primary importance is that the information etc. which the parties reasonably require for the voyage is reliable for that purpose. We live in an information society, wherein often time and money is not available to make checks on the accuracy or completeness of information.

**6.5 A shipper and the carrier are liable to each other, the consignee and any holder for any loss or damage that is caused by its failure to comply with its obligations under 6.2, 6.3 and 6.4.**

The liability of the parties for wrong or incomplete information should be a strict one.

**6.6 The contracting shipper is liable to the carrier for any loss, damage, or injury caused by the goods, [unless the contracting shipper proves that such loss or damage is caused by the facts or through circumstances which a prudent shipper could not avoid or the consequences such shipper was unable to prevent.]**

The exact basis of this shippers' liability is subject to further discussion. It is submitted that the distinction between ordinary goods and dangerous



or polluting goods is out of date. Whether certain goods are dangerous depends on the circumstances. Harmless goods may become dangerous under certain circumstances and dangerous goods (in the sense of poisonous or explosive) may be harmless when they are properly packed, handled and carried in an appropriate vessel. The notion 'dangerous' is relative. The essence of a shippers' liability regime may be that any damage caused on account of the nature of the cargo should be the shipper's risk and any damage caused by improper handling or carriage should fall under the rules for the carrier's liability.

Another matter is how to deal with goods which may become a danger to human life, property or the environment during the voyage. It may be considered that a master (or another person actually responsible for the goods) must have a wide discretion to deal with such goods under the circumstances without having to bother about liabilities. Whether the goods are carried with or without the carriers' consent (refer Article IV rule 6 of the Hague-Visby Rules) seems irrelevant. Article 13.4 of the Hamburg Rules does not make the distinction.

**6.7 The contracting shipper is responsible for the acts and omissions of persons of whose services it makes use to perform the tasks and meet the obligations referred to in this chapter, when such persons are acting within the scope of their employment as if such acts or omissions were its own.**

This provision is similar to article 8.2 of the draft CMNI Convention.

## **7 TRANSPORT DOCUMENTS**

### **7.1 Issuance of the Transport Document**

#### **7.1.1 Requirement to Issue a Transport Document**

After a carrier receives the goods, the contracting carrier must issue a transport document if the [contracting shipper/consignor] requests one.

This provision corresponds to existing law and practice in most countries, and to the current international regimes (including the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules). Implicit in 7.1.1 is the concept that the carrier need not issue a transport document if the shipper does not request one.

This provision specifies, in light of the discussion at the ISC's third meeting in July, that any carrier (not necessarily the "contracting carrier") may be the first to receive the goods from the consignor, and that the contracting carrier (not necessarily the carrier who received the goods from the consignor) is the one with the duty to issue a transport document if the shipper requests one.

It is still ambiguous as to which "shipper" has the right to request a transport document—the contracting shipper or the consignor. The issue was discussed but not resolved at the ISC's third meeting in July. In this context, it may make sense to give both the contracting shipper and the consignor the right to request some transport document. Even if it is the contracting shipper who is entitled to a negotiable transport document under 7.1.2, the consignor should presumably be entitled to a receipt for having delivered the goods to a carrier.

### **7.1.2 Shipper's Entitlement to a Negotiable Transport Document**

**The contracting shipper and the contracting carrier may agree that the transport document will be non-negotiable. Such an agreement may be express or implied. In the absence of such an agreement, the [contracting shipper/consignor] is entitled to a negotiable bill of lading or other negotiable transport document.**

This provision alters the existing law and practice in most countries. Under the current international regimes, a shipper is generally entitled to a negotiable bill of lading. In some trades, however, such as short ferry voyages, shippers never ask for a negotiable bill of lading and a negotiable document would serve no purpose. 7.1.2 permits a carrier to offer a service in which negotiable documents are simply not available. The contracting shipper and the contracting carrier may expressly agree (*e.g.* in the booking note) that a negotiable transport document will not be issued. In some circumstances, the contracting shipper and the contracting carrier will be deemed to have so agreed by implication (*e.g.* by the custom of the trade). But if there is no agreement, either express or implied, then the shipper (subject to the ambiguity discussed in the following paragraph) will continue to be entitled to a negotiable bill of lading or other negotiable transport document. (It is important to recognise that electronic documents may some day supersede bills of lading entirely. The proposal leaves open the possibility that a negotiable transport document other than a bill of lading (*e.g.*, an electronic equivalent) may some day be as fully acceptable in commerce as the current negotiable bill of lading.)

This provision (like 7.1.1) is still ambiguous as to which shipper is entitled to a negotiable bill of lading or other negotiable transport document in the absence of an agreement to the contrary. The issue was discussed but not resolved at the ISC's third meeting in July. On the one hand, it seems logical to give the contracting shipper the right to control entitlements under the contract of carriage. On the other hand, the contracting carrier may not know the identity the contracting shipper (*e.g.*, in the case of an FOB shipment when the consignor is paying the freight on the consignee/contracting shipper's account). At the very least, a carrier had dealt with the consignor, and the consignor should presumably be entitled to a receipt for having delivered the goods. Perhaps the solution would be to give the contracting shipper the right to a negotiable bill of lading or other negotiable transport document if the contracting carrier knows the identity the contracting shipper. The consignor could then have the right to a negotiable transport document if the contracting carrier does not know the identity the contracting shipper, and the right to a non-negotiable receipt in any event.

## **7.2 The Contents of the Transport Document**

### **7.2.1 Required Contents of the Transport Document**

**If the carrier issues a transport document, the transport document must—**

- (a) describe the apparent order and condition of the goods at the time a carrier receives them from the consignor;**

- (b) show the leading marks necessary for identification of the goods as furnished in writing by the shipper before the carrier receives the goods;
- (c) 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;
- (d) state the date—
  - (i) on which a carrier received the goods, or
  - (ii) on which the goods were loaded on board the vessel, [or][and]
  - (iii) on which the transport document was issued.
- (e) adequately identify the contracting carrier [and the contracting shipper]; and
- (f) be signed by the contracting carrier.

7.2.1(a) confirms the understanding that is clearly expressed in the *travaux préparatoires* of the Hague Rules and carried forward in subsequent international conventions. See, e.g., Hamburg Rules arts. 15(1)(b), 16(1)-(2). The courts in some countries have departed from this principle.

7.2.1(b) and (c) generally correspond to existing law and practice in most countries, and to the current international regimes (including the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules). The proposed draft does alter the existing law in one significant respect: The carrier's obligation to issue a transport document showing the information furnished by the shipper in this proposal is not qualified by any exception when the carrier has no reasonable means of checking the information furnished by the shipper. Under current law, the carrier may (in theory) simply omit this information if it has no reasonable means of checking the accuracy. Under this proposal, the carrier must issue a transport document showing the information furnished by the shipper even if it has no reasonable means of checking the accuracy (but it may protect its interests with a qualifying clause under 7.3). Also 6.3, 6.4 and 6.5 refer.

7.2.1(b) also omits the requirement that "the marks must be stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which the goods are contained, in a manner that would ordinarily remain legible until the end of the voyage." In view of the alteration noted above (which means that the carrier must include information furnished by the shipper even if it has no reasonable means of checking the accuracy), it seems inappropriate to permit the carrier to omit information furnished by the shipper concerning the marks if the carrier believes that the marks might not remain legible until the end of the voyage. Once again, the carrier's remedy should be to protect its interests with a qualifying clause under 7.3. This change is unlikely to make any difference in practice.

With respect to 7.2.1(b) and (c), the ISC agreed at its second meeting in April that the shipper must furnish the necessary information in writing *before* the carrier receives the goods, and that it is not sufficient to furnish the information before the carrier issues the transport document. With respect to 7.2.1(c), the ISC also agreed at its second meeting that the transport document must include all of the listed information furnished by the shipper (e.g. the number of pieces and the weight), and that it would not be sufficient to include

only one of the items on the list (*e.g.* the number of pieces or the weight) when the shipper desires fuller information.

7.2.1(d) gives effect to the ISC's view, clearly expressed at its second meeting in April, that *some* date should be included in the transport document. This draft gives the carrier three choices of date that may be used. Perhaps there should be an open-ended fourth choice, *e.g.*, "such other date as the parties may agree is relevant in the context of the contract of carriage." This option is not included in the draft because the ISC did not discuss this possibility (although it was highlighted in the Agenda Paper for the ISC's third meeting in July).

7.2.1(e) gives effect to the ISC's view, clearly expressed at its second meeting in April, that the carrier and the shipper should be identified in the transport document. The question of what identification is "adequate" will vary with the circumstances. As a general rule, the transport document should list at least the name and address for both the carrier and the shipper. The reference to the contracting shipper is in brackets, however, because it remains unclear whether the contracting shipper must be identified or if it is sufficient to identify the consignor (or perhaps, in case of a negotiable document, the first holder).

7.2.1(f) gives effect to the ISC's view, clearly expressed at its second meeting in April, that the transport document should be signed on behalf of the carrier. 7.2.1(f) does not define signature, but a definition section of the final Instrument should include a provision comparable to article 14(2)-(3) of the Hamburg Rules. 7.2.1(f) also does not address the consequences of an unauthorised signature, on which there was no consensus and very little discussion. More guidance will be necessary before a draft can address that issue. Finally, 7.2.1(f) uses the phrase "signed by the contracting carrier" rather than "signed on behalf of the contracting carrier" because the ISC, at its fourth meeting in October, agreed that a signature "on behalf of the contracting carrier" *is* a signature "by the contracting carrier" (acting through an agent).

**7.2.2 The phrase "apparent order and condition of the goods" in this Chapter 7 refers to the order and condition of the goods that would be known to a reasonable carrier based on (a) an external inspection of the goods as packaged at the time the consignor delivers them to a carrier and (b) any additional inspection that a carrier actually performs before issuing the transport document.**

This provision is generally based on the discussion at the ISC's third meeting in July. Under this definition, the phrase "apparent order and condition of the goods" has both an objective and a subjective component.

Under 7.2.2(a), the carrier issuing the transport document has no duty to inspect the goods beyond what would be revealed by an external inspection of the goods as packaged at the time the consignor delivers them to a carrier. If the goods are unpackaged, the transport document will need to describe the order and condition of the goods themselves. But if the goods are packaged, the transport document's statement of order and condition will relate primarily to the packaging (unless the order and condition of the goods themselves can be determined through the packaging). For containerised goods, in particular,

the transport document's statement of order and condition is highly unlikely to relate to the goods themselves if the consignor delivered a closed container that the carrier did not open before issuing the transport document.

Under 7.2.2(b), however, if the carrier actually carries out a more thorough inspection (e.g. inspecting the contents of packages or opening a closed container), then the carrier is responsible for whatever such an inspection would have revealed to a reasonable carrier.

### **7.2.3 Omission of Required Contents from the Transport Document**

- (a) **The absence in the transport document of one or more of the particulars referred to in 7.2.1, or the inaccuracy of one or more of those particulars, does not affect the legal character of the transport document. [The issuer of the transport document is liable to the shipper or other holder of the transport document for any damages that are proximately caused by its breach of 7.2.1.]**

The first sentence of this provision gives effect to the non-controversial view that the validity of the transport document does not depend on the inclusion of the particulars that should be included. For example, an undated bill of lading will still be valid, even though a bill of lading *should* be dated. The first sentence of this section also extends the rationale behind that non-controversial view to hold that the validity of the transport document does not depend on the *accuracy* of the particulars that should be included. Under this extension, for example, a misdated bill of lading will still be valid, even though a bill of lading should be accurately dated.

The second sentence of this provision, which is in brackets, attempts to address the consequences of failing to accurately provide the information that must be included in a transport document. This is not an issue on which the ISC has reached any consensus, but there seemed to be some support for at least the limited approach taken here. At the ISC's second meeting in April, there was also some support for denying the carrier the benefit of unit limitation if the carrier knowingly misdates the transport document, and for denying the carrier the benefit of the one-year time bar if the transport document does not adequately identify the carrier. At the ISC's fourth meeting in October, the bracketed language was criticised on the grounds that it is unnecessary and should be omitted entirely. Others criticised the bracketed language on the ground that the issuer is not always responsible in fact for inaccuracies in the transport document; it may be the consignor who prepared the document with inaccurate information. Perhaps liability should rest not on the issuer but on the party who is factually responsible for the inaccurate information.

- (b) **If a transport document fails to describe the apparent order and condition of the goods at the time a carrier receives them from the consignor, the transport document is *prima facie* or conclusive evidence under 7.3.3 that the goods were in apparent good order and condition at the time the consignor delivered them to a carrier.**

This provision is generally based on the discussion at the ISC's third meeting in July. This seems to be the logical place to include this provision, as 7.2.3(a) also deals with the omission of required information on the transport document.

### **7.3 Qualifying the Description of the Goods in the Transport Document**

#### **7.3.1 Circumstances Under Which a Carrier May Qualify the Description of the Goods in the Transport Document.**

Under the following circumstances, a carrier issuing a transport document may qualify the information mentioned in 7.2.1(b) or 7.2.1(c) with an appropriate clause in the transport document to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

- (a) For non-containerised goods—
  - (i) the carrier may include an appropriate qualifying clause in the transport document if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, or
  - (ii) the carrier may include a clause providing what it considers an accurate description of the goods if the carrier considers the information furnished by the shipper to be inaccurate.
- (b) For goods delivered to the carrier in a [closed/sealed] container, the carrier may include an appropriate qualifying clause in the transport document with respect to
  - (i) the leading marks on the goods inside the container, or
  - (ii) the number of packages, the number of pieces, or the quantity of the goods inside of the container,
 unless the carrier in fact inspects the goods inside the container.
- (c) For goods delivered to the carrier in a [closed/sealed] container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if (i) the carrier can show that the clause is accurate, and (ii) the contracting shipper and the contracting carrier did not agree in writing prior to the shipment that the container would be weighed and the weight would be recorded on the transport document.

This provision generally corresponds to existing law and practice in most countries. Although current law generally permits the carrier to protect itself by omitting from the transport document a description of the goods that it is unable to verify, this protection is essentially meaningless in practice. Even if the carrier is unable to verify the description, the typical shipper still requires a transport document describing the goods in order to receive payment under the sales contract. Commercial pressures therefore deny the carrier the one form of protection that is clearly recognised under current law. Qualifying clauses represent the carrier's attempt to regain its protection. Common examples of qualifying clauses include "said to contain" and "shipper's weight and count." Other qualifying clauses may also be effective, depending on the particular needs of the case.

The standards for including a qualifying clause under 7.3.1(a) and (b) are generally similar to those under the proviso to article 3(3) of the Hague and Hague-Visby Rules and to article 16(1) of the Hamburg Rules, except that this proposal eliminates the Hague Rules and Hamburg Rules language excusing

the carrier from including the otherwise required information if there are reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods. The ISC agreed, at its second meeting in April, that if the carrier has reasonable grounds for suspecting that the information furnished by the shipper does not accurately represent the goods, the carrier is obligated to check the information if it has a reasonable means of doing so. Thus the carrier would be excused from including the otherwise required information only if there is no reasonable means of checking it. The reasonable suspicion exception is accordingly redundant.

Clauses regarding the weight of containerised goods create special problems. In some ports, facilities for weighing loaded containers simply do not exist. In such cases, it is an easy matter for the carrier to prove that it had no reasonable means of checking the weight information furnished by the shipper. But even in ports where weighing facilities exist, and could be used, it is often customary to load containers without weighing them. Sometimes this is because the time spent weighing containers would delay the ship's departure (particularly when the shipper delivers the container to the carrier shortly before sailing). Often it is because the weight is of no commercial importance, and the time and expense of weighing a container is unjustified in the absence of any commercial benefit. In some cases, however, the weight is of commercial importance, and the consignee should be permitted to rely on the statement of weight in the transport document unless it is clear that the carrier has in fact not weighed the container.

In view of these special problems with qualifying clauses regarding the weight of containerised goods, 7.3.1(c) specifically addresses the issue in unique fashion. The proposal requires a clear statement that the carrier has in fact not weighed the container. The carrier can include such a statement only if it is true (*i.e.*, if the carrier did not weigh the container) and if the contracting carrier and the contracting shipper did not agree in writing prior to the shipment that the container would be weighed and the weight would be recorded on the transport document. 7.3.1(c)(ii) recognises that in some cases the container's weight is of commercial importance, and that in such cases the shipper may legitimately insist on having a weight listed in the transport document without a qualifying clause. A contracting shipper may protect this legitimate interest with an explicit agreement prior to shipment (*e.g.*, in the booking note). In the absence of such a prior agreement, however, the carriers may assume that the container's weight is of no commercial importance. A carrier may then load the container without weighing it, and any weight listed on the transport document may be qualified—without proof that the carrier had no reasonable means of checking the weight furnished by the shipper.

7.3.1(a)(ii) and 7.3.1(b) also recognise, in keeping with the discussion at the ISC's third meeting in July, that the carrier may also provide accurate information if it considers the information furnished by the shipper to be inaccurate.

In 7.3.1(b) and 7.3.1(c), the bracketed language reflects the disagreement in the ISC as to whether the container must be sealed or simply closed before the carrier can claim the benefit of 7.3. Some delegates feel that the

requirement should be no stronger than “closed” or “shipped packed” (FCL) in recognition of the fact that FCL but unsealed containers are often delivered to a carrier with the expectation that the carrier will then seal them. Other delegates feel that the requirement should be “sealed” so that the carrier will be required to show a “chain of custody” before it is allowed to take advantage of the benefit of this provision.

### 7.3.2 Reasonable Means of Checking

**For purposes of 7.3.1, a “reasonable means of checking” must be not only physically practical but also commercially reasonable.**

This provision clarifies the meaning of “reasonable means of checking.” Opening a sealed container or unloading a container to inspect the contents, for example, would not be commercially reasonable, even if it might be physically practical in some circumstances. Thus a carrier issuing a transport document would always be permitted to qualify the description of goods delivered by the shipper inside a sealed container—unless the carrier had some physically practical and commercially reasonable means of checking the information furnished by the shipper (which would have to be something other than opening the container). For example, if the carrier had an agent present when the shipper stuffed the container, and that agent verified the accuracy of the shipper’s information during loading, then the carrier would not be permitted to qualify the transport document’s description of the goods.

### 7.3.3 Prima Facie and Conclusive Evidence

**Except as otherwise provided in 7.3.4, a transport document is—**

- (a) prima facie evidence of the issuing carrier’s receipt of the goods as described in the transport document; and**
- (b) conclusive evidence of the issuing carrier’s receipt of the goods as described in the transport document [if the transport document has been transferred to a third party acting in good faith or if a third party acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the transport document].**

7.3.3(a) simply confirms the widely recognised rule that, as a general matter, a transport document is prima facie evidence of the issuing carrier’s receipt of the goods as described in the transport document.

7.3.3(b) recognises that, in order to protect innocent third parties who rely on the descriptions in transport documents, in some circumstances a transport document is not simply prima facie evidence but conclusive evidence. The ISC was unable to reach consensus on the definition of these circumstances, however, and thus the key language in 7.3.3(b) is bracketed to show the need for further discussion. There appears to be much broader support for the first alternative (“if the transport document has been transferred to a third party acting in good faith”), at least in the context of a negotiable transport document that has been duly negotiated to a third party acting in good faith. There appears to be weaker support for the second alternative (“if a third party acting in good faith has paid value or otherwise altered its position in reliance on the



description of the goods in the transport document”), particularly in the context of a non-negotiable transport document.

### **7.3.4 Effect of Qualifying Clauses**

**If a transport document contains a qualifying clause, then the transport document will not constitute prima facie or conclusive evidence under 7.3.3, to the extent that the description of the goods is qualified by the clause, when the clause is “effective” under 7.3.5.**

This provision simply describes the effect of a qualifying clause if it is “effective.” It is worth noting that a qualifying clause does not necessarily defeat the prima facie or conclusive evidence of the description of the goods in full. A qualifying clause such as “shipper’s weight,” for example, would not affect the evidentiary value of a description of the goods to the extent that it listed the number of packages in the shipment or described the leading marks.

### **7.3.5 When Qualifying Clauses Are Effective**

**Subject to 7.3.6, a qualifying clause in a transport document is “effective” for the purposes of 7.3.4 under the following circumstances:**

- (a) For non-containerised goods, a qualifying clause that complies with the requirements of 7.3.1 will be effective according to its terms.**
- (b) For goods shipped in a [closed/sealed] container, a qualifying clause that complies with the requirements of 7.3.1 will be effective according to its terms [if the carrier delivers the container intact and undamaged and there is no evidence that the container has been opened after the carrier received it/with the seal intact and undamaged].**

There are sharp distinctions between commercial expectations with respect to containerised and non-containerised goods. 7.3.5(a) addresses only non-containerised goods. Whenever the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it is entitled to qualify any statement regarding the leading marks, the number of packages or pieces, and the quantity or weight of the cargo, as appropriate, and the clause will be “effective.”

For containerised goods, the carrier will often not be in a position to verify any of the information furnished by the shipper, but this is not always the case. To take the most obvious example, the shipper may have delivered break-bulk cargo to the carrier and the carrier may have stuffed the container. Some containers are not fully enclosed (e.g., “flat rack” and “rag top” containers), and the carrier has at least some ability to verify the contents of such containers. Indeed, sometimes the carrier will have a representative present when a container is stuffed, even though the shipper ultimately delivers a sealed container for shipment. Thus it is arguable that the carrier must show that it had no reasonable means of checking the information furnished by the shipper before it can rely on a qualifying clause—even for containerised goods.

The carrier’s classic rationale for relying on a qualifying clause and escaping liability in a containerised goods case is that the carrier delivered to the consignee exactly what it received from the shipper: a closed/sealed container (the contents of which could not be verified). It is arguable that as soon as the carrier delivers something different (e.g., a container that is so

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damaged that goods may have been lost during shipment or a container that has been opened during the voyage), the equities shift. At this point the carrier can no longer establish the same chain of custody, and it furthermore appears that the carrier has done at least something wrong. The consignee's entitlement to rely on the description of the goods in the transport document accordingly becomes much stronger. 7.3.5(b) recognises this shift in the equities.

The bracketed language reflects the differences of opinion within the ISC.

### 7.3.6 Good Faith Requirement

**[Notwithstanding 7.3.5, no qualifying clause will be effective if a person relying on the description of the goods in the transport document can show that the carrier or any of the carrier's employees or agents responsible for issuing the transport document did not act in good faith when issuing the transport document.]**

This provision simply recognises the general maxim that no one should be allowed to profit from his or her own wrong-doing. For example, if the carrier knows that the containers do not in fact weigh anything near to the weight listed in the transport document, and the carrier chooses not to weigh the containers because it knows that it would discover this discrepancy and be required to correct the transport document, a consignee could well prove the carrier's failure to act in good faith when issuing the transport document. Other situations in which 7.3.6 might apply would be including a qualifying phrase in the transport document that is known to be inaccurate or including a qualifying phrase when the description of the goods in the transport document is known to be inaccurate.

This provision is bracketed because some delegates at the ISC's fourth meeting felt that it was inappropriate to have any such "good faith" requirement in the Instrument.

### 7.4 Ambiguities in the Transport Document

#### 7.4.1 Ambiguous Date on a Transport Document

**If the transport document is dated but fails to indicate the significance of the date, then the date will be considered to be:**

- (a) **the date on which the goods were loaded on board the vessel, if the transport document is an "on board" bill of lading or a similar document indicating that the goods have been loaded on board a vessel; or**
- (b) **the date on which a carrier received the goods, if the transport document is a "received for shipment" bill of lading or other document that does not indicate that the goods have been loaded on board a vessel.**

This provision gives effect to the unchallenged suggestions, made at the ISC's second meeting in April, concerning the consequences of including a date in the transport document without specifying its significance.

#### 7.4.2 Ambiguous Signature on a Transport Document

**If the transport document fails to identify the contracting carrier but does indicate that the goods have been loaded on board a named vessel,**

**then the registered owner of the vessel shall be presumed to be the contracting carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage and the bareboat charterer accepts contractual responsibility for the carriage of the goods.**

This provision gives effect to the views expressed in the Uniformity Sub-Committee. The issue remains controversial, but it was agreed at the ISC's second meeting in April that drafting would proceed (for the time being) on the basis of the report Uniformity Sub-Committee.

## **8 FREIGHT**

### **8.1 For the purpose of this Chapter 8 'freight' shall include deadfreight.**

#### **8.2**

- (a) Freight is deemed to be earned upon delivery of the goods to the consignee in accordance with 9.1, unless the parties have agreed that the freight shall be earned, wholly or partly, at an earlier point in time or at an earlier occasion.**
- (b) Unless otherwise agreed, no freight will become due for any goods which are lost before the freight for these goods is earned.**

This provision follows the main rule that the carrier must have performed duly before its remuneration becomes due. Obviously, this provision is not of mandatory nature. Practice may differ. In the various modes of inland transport (at least in Europe) this main rule is usually followed. In maritime container trade, however, it is customary that bills of lading include the provision that the freight is already earned upon receipt of the goods by the carrier. In maritime charterparty trade a lot will depend on the usages of the particular trade. It is not uncommon that charterparties include that the larger part of the freight is earned and payable at some point in time in the beginning of the voyage (e.g. upon shipment of the goods, on the third day after issue of the bill of lading, etc.) and the balance somewhere at the end of the voyage (e.g. when opening hatches, three days after delivery of the goods to the consignee, etc.).

No provision is included in the draft that the freight should be stated in the transport document. Unless national law requires otherwise, parties should be left free in that respect. By nature, freight is of confidential character and it is up to the parties how they want to evidence their agreement on freight. This may be different if the transport document is negotiable. (see 8.5 below)

#### **8.3**

- (a) Freight is payable when it is earned, unless the parties have agreed that the freight is payable, wholly or partly, at an earlier or later point in time or at an earlier or later occasion.**
- (b) If subsequent to the moment that the freight has been earned the goods will be lost, damaged, or otherwise not delivered to the consignee in accordance with the terms and conditions of the contract of carriage, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery.**

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- (c) **Unless otherwise agreed, payment of freight is not subject to set-off, deduction or discount on the grounds of any counterclaim that the contractual shipper or consignee may have against the carrier, [the indebtedness or the amount of which has not been agreed or established otherwise yet.]**

8.3(a) states the main rule that the freight is payable when it is earned. Parties may agree otherwise. Often, parties do not make the distinction between freight earned and freight payable. Whether they do or not, is a matter of interpretation of the contract, which interpretation may be influenced by the corresponding provisions in other contracts such as the contract of sale relating to the same goods. It is thought that in an international instrument of general nature no rules of interpretation of certain freight provisions in contracts of carriage should be given.

The usual exception to the main rule is that parties agree that the freight is payable *before* it is earned. It is not excluded, however, that parties for some reason or another agree that the freight will become payable at a later moment than it is earned.

8.3(b) includes the generally accepted principle that events, which occur after the moment that the freight is earned, are irrelevant to the obligation to pay the freight to the carrier. It may be questioned whether this principle also should apply if the goods get lost, etc. through default of the carrier for which he may be held liable by the consignee. The draft answers this question in the affirmative. In such case the freight should form part of the damage to the goods, which may be claimed from the carrier.

Further, freight payment should be without prejudice to any claim against the carrier. Normally, at the moment that the freight is payable, it is still open whether a valid counterclaim exists and, if so, the amount of such claim. Therefore, in 8.3.c the rule is given that, in principle, a set-off is not allowed.

#### 8.4

- (a) **Unless otherwise agreed, the contracting shipper is liable to pay the freight and other charges incidental to the carriage of the goods.**
- (b) **If the contract of carriage provides that the liability of the shipper, wholly or partly, will cease upon a certain event or after a certain point of time, such cessation is only valid if and to the extent that all the amounts payable to the contracting carrier under the contract of carriage may actually be satisfied through the contracting carrier enforcing its rights as referred to in 8.6. or otherwise.**

It may be expected that the parties to the contract of carriage have agreed which person(s) is/are liable to pay the freight, demurrage, damages for detention, etc.: the shipper, and/or the consignee, and/or any third party. This liability may be joint, several, or joint and several. The first paragraph of this article, therefore, has a limited character. It is only meant to provide a fall back in case no (clear) agreement exists as to who will have to pay the freight and other charges.

Normally, if a shipper is liable to pay the freight and other charges, such liability will not cease upon certain events, e.g. after he has parted with the bill

of lading or after the cargo has been shipped. However, parties may agree on a cesser clause. The second part of this provision, which is of mandatory nature, limits the validity of such a clause.

### 8.5

- (a) **If a negotiable transport document contains the statement ‘freight prepaid’ or wording of similar nature, such statement will have the effect that a holder of such transport document, other than the first holder, shall not be liable for the payment of the freight.**
- (b) **If a negotiable transport document contains the statement ‘freight collect’ or wording of similar nature, such statement has the effect that the consignee may be liable for the payment of the freight.**

In the explanatory note on 8.3 it is said that the new instrument should refrain from giving contract interpretations in respect of freight. An exception should be made, however, in respect of the usual statements ‘freight prepaid’ and ‘freight collect’ in bills of lading. Reason for this is the protection of the third party holder of a negotiable transport document. A third party holder must be able to learn from the contents of the document whether he might be held liable *in personam* for the freight.

On purpose, 8.5(a) is drafted in such a way that it is left open whether ‘freight prepaid’ also means that the freight is earned upon shipment. Again, that would be a matter of interpretation of the contract of carriage.

Also, 8.5(a) does not exclude that another person than the shipper may be liable for the freight. It is only meant to say that later holders than the shipper do not run the risk of becoming liable *in personam* for the freight.

8.5(b) is drafted in similar way. It does not say that in the event of ‘freight collect’ the freight is payable at destination or that the consignee shall be the (only) person liable for the freight. Usually, in these cases, if the consignee does not pay the freight, a carrier is entitled to address again to the shipper for payment of the freight.

Whether the consignee actually is liable for the payment of the freight, will depend on the terms of the contract of carriage. In practice, a carrier usually does not accept a freight collect booking without first having requested the (intended) consignee whether he agrees to pay the freight.

### 8.6

- (a) **Notwithstanding any agreement to the contrary, if and to the extent that the consignee is liable for the payments referred to below, a carrier is entitled to retain the goods until payment of**
  - (i) **the freight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods,**
  - (ii) **any damages due to the carrier under the contract of carriage,**
  - (iii) **any contribution in general average to the carrier relating to the goods****has been effected, or adequate security for such payment has been provided.**

- (b) If the payment as referred to in the previous paragraph will not, or not fully, be effected, the carrier is entitled to sell the goods (according to the procedure, if any, as provided for in the applicable national law) and to satisfy the amounts payable to it (including the costs of such recourse) from the proceeds of such sale. Any remainder of the proceeds of such sale shall be made available to the consignee.**

Again, it is a general principle that, when necessary, 'the goods must pay for its costs and freight'. National law differs in respect of the legal basis for this principle. Also national law works out this principle in various ways. The common denominator, however, seems to be a right of the carrier to retain the goods until payment and to seek recourse against the goods if no payment will be effected. Usually, such recourse will be effected through a sale of the goods in accordance with the applicable local rules and regulations. The second part of this provision provides for that.

## **9 DELIVERY TO THE CONSIGNEE**

Delivery completes the voyage of the goods. As a rule, it marks the end of the responsibility of the carrier for the goods (see Hamburg Rules, article 4).

Delivery is only to a limited extent dealt with in Hague-Visby Rules. The running time for the notice period as well as the timebar period starts upon delivery of the goods concerned. Further harmonisation of law as to various aspects of delivery may be desirable.

### **9.1**

- (a) The consignee, who claims the goods from the carrier, shall accept their delivery in accordance with the terms and conditions of the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, in accordance with the customs or usages in the trade or at the place of destination. In the absence of any such specific provision in the contract of carriage or of such customs or usages, such consignee shall accept delivery of the goods upon their discharge.**
- (b) In the event the carrier has to hand over the goods in the discharge port to an authority or other third party to whom, pursuant to law or regulation applicable at the discharge port, the goods must be handed over and who will take care of their delivery to the consignee, such handing over will be regarded as a delivery of the goods by the carrier to the consignee.**

The consignee who claims the goods, has a duty to take away the goods in the manner as provided for in the contract of carriage. Whether this duty should be extended to a consignee which interferes otherwise with the contract of carriage, e.g. by requesting to inspect the goods after discharge, should be an item for further discussion.

Further, this provision underlines that delivery is primarily a contractual matter. Parties are free to determine how the delivery of the goods will be effected. If certain usages of the trade or port of discharge exist and the contract is not quite specific as to delivery, these usages may, under the

applicable national law, be deemed to be part of the contract. As an example: in the container trade the usual way to deliver a container in a certain port may be the moment that a truck picks up the container in at the incoming stack or when the container leaves the container terminal. The last sentence is meant as a general fall back provision.

In a few countries the carrier is not allowed to deliver the goods directly to the consignee, but he has to hand over the goods to an intermediary, often a local authority, who takes care of the actual delivery to the consignee. 9.1.b deals with this situation.

## 9.2

**9.2.1 The responsibility of the carrier for the goods shall terminate upon their delivery as referred to in 9.1. If during a certain period after such delivery the goods remain in the custody of the carrier, and no [express or implied] contract has been concluded between the carrier and the consignee covering such period, then, the goods are at the risk and account of the consignee. In any event, if during such period any loss or damage occurs to the goods, the carrier is entitled to avail himself of the defences and limitations of this Instrument also towards third parties.**

**9.2.2 [Notwithstanding 3.2, if the goods have been delivered before their discharge from the vessel, the carrier shall remain liable for their loss or damage in accordance with the [mandatory] liability provisions of this Instrument until the moment that they have been discharged.]**

This provision deals with the legal consequences of delivery. As such, delivery marks the end of the responsibility of the carrier for the goods and the beginning of the responsibility of the consignee for these goods.

It frequently happens that after their discharge the consignee does not immediately take the goods away and that they will remain under the custody of the carrier for sometimes a substantial period. In such cases first it has to be determined whether this period is covered under the contract of carriage or that delivery in the legal sense has taken place already. If delivery has not been effected yet (see 9.2), the terms and conditions (usually including limitation of liability and Himalaya clause) still apply.

But if delivery in the legal sense has taken place already, the legal basis of the succeeding custody of the goods by the carrier may be uncertain. A contractual basis may exist, e.g. when the consignee has requested the carrier to store the goods temporarily. Then, a storage contract succeeds the contract of carriage and the carrier acts as storekeeper. Also, it may be possible that an implied contract can be construed on the basis of a certain applicable custom of the port.

The second and third sentence of 9.2.1 deals with the situation that such succeeding custody has no contractual basis. A consignee just may fail to take the goods away. Also the situation referred to in 9.5 is a clear example. Applicable national law may determine that a carrier in such event should act as c.g. *negotiorum gestor* or otherwise. It seems useful to provide for a general rule that in these cases the carrier (including his subcontractors) will continue to have the protection of defences and limitations of this Instrument also

towards persons who are not a party to the contract of carriage, but that everything he does or omits is for the risk and account of the consignee.

9.2.2 relates to a situation that, through the application of a *fio* clause, the delivery, under the applicable national law, has taken place *before* discharge. The various national laws differ on the question whether under such a *fio* clause parties are allowed to exclude the carrier's liability for loss or damage to the goods before the goods have been discharged. It is useful that uniformity on this issue should be achieved.

**9.3 On request of the carrier, the consignee shall provide a written confirmation of delivery of the goods by the carrier [in the manner as customary at the place of destination].**

In practice, many carriers request some form of written evidence from the consignee that he has delivered the goods to him. This provision provides a legal basis for this usage.

In the event that a negotiable transport document has been issued, often the accomplishment of the document is evidenced by the signature of the latest holder of the document on its reverse side.

**9.4**

**9.4.1 If no negotiable transport document has been issued,**

- (i) **the contractual shipper shall advise the contractual carrier, at the latest upon arrival of the goods at the place of destination, of the name of the consignee;**
- (ii) **the carrier shall deliver the goods in accordance with 9.2 to such consignee upon production of proper identification;**
- (iii) **if the contractual shipper has not advised the contractual carrier as to the name of the consignee according to paragraph (i) above, or the consignee named by the contractual shipper does not take delivery of the goods at the place of destination, the carrier shall advise the contractual shipper accordingly, whereupon the contractual shipper shall take delivery of the goods itself.**

9.4.1 (i) and (iii) deal with the question to whom the carrier has to deliver the goods and how it can find this person.

The starting point is that the contractual counterpart of the carrier, *i.e.* the contracting shipper, has to advise the carrier about the name of the person to whom the carrier should deliver. Subsequently, the carrier is obliged to deliver the goods to this person in accordance with the terms and conditions of the contract of carriage. 9.4.1 (ii) follows the wording of the CMI Rules on Sea Waybills.

In 9.4.1 (i) it is not provided that a consignee is obliged to take delivery. It appeared from the answers to the questionnaire and the discussions in the ISC that most national laws take the view that a consignee must have the opportunity not to accept delivery of the goods by the carrier.

Therefore, 9.4.1 (iii) only provides for the legal consequences when the intended consignee does not take delivery. The responsibility for the delivery will then rest on the contractual shipper. If the consignee does not show up at the place of destination or otherwise declines to take delivery of the goods, the



obligation to release the carrier of the goods remains on the shipper. If it also fails to do anything, 9.5 will apply, where it is laid down what the carrier is allowed to do with the goods in these events.

These principles are worked out in the above draft, the application of which is restricted to carriage under a non-negotiable document or no document at all.

**9.4.2** If the carriage is under a negotiable transport document, the situation is much more complicated. Hereunder follows an overview

**9.4.2.1** In case of a negotiable transport document, the first main rule is that its holder has the exclusive right to take delivery of the goods at the place of destination under surrender of the document to the carrier. This rule serves to protect the carrier and means that the carrier will only be discharged from its obligations under the contract of carriage if it delivers the goods to such holder.

A second main rule is that the transfer of the negotiable transport document may be used as part of the mechanism whereby the property in the goods is transferred from seller to buyer, or whereby a pledge of the goods is conferred on a lender. It is understood that in some jurisdictions it is a rebuttable presumption that legal title to the goods passes with the transfer of a negotiable transport document. In others the intention of the parties as evidenced by the underlying contract of sale or pledge governs the matter.

These two main rules are fairly universally applicable, but cannot be found in any international convention. They may be laid down in national law, in statute and case law, and are supplemented by usages and practices, which sometimes may be regarded as conflicting with the two main rules.

Often, these conflicts come to surface in case no holder of the negotiable transport document takes delivery of the goods at the place of destination. In this field, much legal uncertainty exists, resulting in risks for traders / (future) holders of the transport document and carriers alike. These ambiguities should be dealt with within the scope of this project. However, perceptions between the interested parties differ so much that first thorough discussions should take place before the drafting of provisions on these issues sensibly can be started. In order to provide some guidance to these discussions two key elements are addressed hereunder.

**9.4.2.2** First, it has to be realised that different categories exist in respect of the causes of the non-availability of the negotiable transport document at the place of destination:

- (a) There are many inadvertent causes, like genuine delays in the documentary process. If these lead to legal problems, solutions primarily have to be sought in a better business control. Sometimes, practical or ad hoc solutions may satisfy the parties concerned.
- (b) More serious problems arise when the non-availability is caused intentionally or structurally. Main examples are:
  - (i) The consignee is not interested in the goods because they have a negative value. They may have such value right from the outset, such as in the case of carriage of rags, used tyres and disposals. Sometimes, the goods may have acquired a negative value due to

events during the carriage, e.g. they become contaminated or otherwise damaged resulting in the need of a costly disposal operation (environmental regulations!). Or it happens that at the end of the carriage it appears that governmental measures prevent the importation of certain (low value) goods.

- (ii) The consignee does not take delivery due to a genuine business reason under the sales contract. He may be dissatisfied with a previous shipment of the same goods and, therefore, wants to reject them under the sales contract. Or the buyer returns the goods and the seller does not want them either. And it frequently happens that the consignee first has to resell the goods before he is financially able or willing to take up the negotiable transport document from the bank holding that document under a documentary credit or collection and that such resale has failed yet. Etc.
- (iii) Structural causes inherent to the trade of the particular goods. Credit terms under the sales contract may be longer than the voyage of the goods will last. Or the usual long string of buyers and sellers of the goods may prevent that the document is timely available at the place of destination. Such string may include sales that have been concluded long before the goods were shipped and the transport document issued.

**9.4.2.3** In all the above cases under (b), the first main rule in respect of negotiable transport documents, i.e. the presentation rule, is ignored by the holder / consignee. In the case (b), (iii), also the document no longer plays a role in respect of transfer of title to the goods. As between seller and buyer title usually<sup>4</sup> passes on the basis of a series of letters of indemnity. In these letters sellers guarantee to the buyers that they have title to the goods, while they all know that the bill of lading is in the hands of a seller earlier in the string who holds the bill of lading to secure payment of the goods.

**9.4.2.4.** The frequency of the non-availability of the document at the place of destination should not be underestimated. Fair estimates are that in liner shipping in 15% of all cases no document can be surrendered where such would be necessary. In the charterparty trade such figure may be as high as 50%, while in some important commodity trades, such as the mineral oil trade, the percentage rises to a near 100%. Many charterparties nowadays include the standard clause that a carrier has to deliver the goods at the place of destination without production of the bills of lading but on instruction of the charterer only.

The tendency is that the above given figures are still increasing.

**9.4.2.5** A second key element is the different perceptions that exist as to what the negotiability of a transport document includes. In a certain way, a negotiable transport document is a promissory note. But what are the contents

<sup>4</sup> Whether it actually does, will depend on the wording of the letter of indemnity and the law applicable to the transfer of title (often the *lex rei sitae*), which may be another law than the law applicable to the contract of sale.

of the promise contained in the note? Remarkably, many negotiable transport documents are not quite specific in that respect. They just promise to transport the goods to their place of destination and that the goods will be delivered against surrender of the document.

**9.4.2.6** On the one end of the spectrum the view exists that a carrier promises to any holder of the document to deliver the goods to it ("document is key to the warehouse"), or, failing such delivery, to provide the countervalue of the goods in money<sup>5</sup>. This is the view commonly held by traders and their bankers as referred to above under (b), (iii). As a result, a carrier may regard itself as having become the guarantor of the payment of the purchase price of the goods. Then, it should be allowed to act accordingly, i.e. to limit its credit risk in similar ways as banks do, e.g. requiring counter guarantees, fixing a maturity date on the note, etc. This view also might require a redefining of the presentation rule. Also, under this view, the legal function of the transfer of a bill of lading has to be addressed<sup>6</sup>.

**9.4.2.7** The other end's view is that the promise is to the shipper and that it includes to deliver the goods upon their arrival at their place of destination to the holder of the document against surrender thereof. The arrival of the goods is the contractual maturity date of the note. Title to the goods can only pass through transfer of the document during the period of transport because only during this period the carrier is bailee of the goods.

The consequence of this view might be that, if after arrival of the goods at their place of destination the holder of the document fails to exercise its right under the document, the shipper has to take care of delivery of the goods. Because of the maturity, the document has lost its title function after such delivery and any later passing of the document may transfer, at best, a claim which the shipper may have against the carrier.

**9.4.2.8.** In view of the fact that the law on this key issue of transport and trade law is uncertain and practice has gone its own risky way to a great extent, it is obvious that time has come to create clarity and, hopefully, uniformity.

## 9.5

**9.5.1** When the goods have arrived at the place of destination and the goods are not actually taken over by the consignee upon their delivery as referred to in 9.1 and no contract has been concluded between the carrier and the consignee which succeeds the contract of carriage, or the carrier is under the applicable law or regulations not allowed to deliver the goods to the consignee, the carrier is entitled, at the risk and account of the person entitled to the goods, to store the goods at any suitable place, to unpack the goods if they are packed in containers, or to act otherwise in respect of the goods as, in the opinion of the carrier, circumstances

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<sup>5</sup> In some jurisdictions a carrier is not entitled to limit its liability for claims based on wrong delivery or conversion.

<sup>6</sup> E.g. UK COGSA 1992, article 2, (2), refers to a bill of lading "possession (of which) no longer gives a right - as against the carrier - to possession of the goods to which the bill relates".

reasonably may require. It is entitled to cause the goods to be sold in accordance with the practices, or the requirements under the law or regulations, of the place where the goods are actually kept. After deduction of any costs incurred in respect of the goods and, as the case may be, other amounts as referred to in 8.6.(a) and due to the carrier, the proceeds of sale must be kept available to the person entitled to the goods.

**9.5.2 The carrier is only allowed to exercise his right referred to in 9.5.1 after it has given a notice to the person stated in the transport document as the person to be notified of the arrival of the goods at the place of destination, if any, to the consignee, or otherwise to the shipper that the goods have arrived at the place of destination.**

Occasionally, it occurs that at the place of destination the carrier is not able or entitled to deliver the goods. The consignee may not show up or declines delivery of the goods while the shipper is not interested either, or the goods may be attached or delivery of them may otherwise be legally prevented. In this type of cases, often the carrier has to do something in order to get rid of the goods.

Generally, this provision follows the provisions in the various national laws on this issue. The carrier should be given a reasonable freedom to act, but always within the limits of reasonableness. If he decides to sell the goods, applicable national law may provide for some form of court supervision. The net proceeds of such sale must be kept available to the person entitled to the goods on whose behalf the carrier has acted. Such person has not necessarily to be a party to the contract of carriage, but may be an owner of the goods or an insurer.

## **10 RIGHT OF CONTROL**

A carrier who transports certain goods is only the bailee of these goods. Unless the goods may have been abandoned, always a person exists who must be regarded to be in control of the goods.

The legal basis of such control may vary. The person in control may be the owner of the goods, a pledgee, or any other person with certain rights as against the goods. Two relevant examples are: A seller may under a sales contract have reserved 'the right of disposal' of the goods until certain conditions are fulfilled. The goods remain its property after delivery to the buyer until the condition, e.g. payment of the goods, is fulfilled. Also, a seller may have the 'right of stoppage in transit', i.e. the right of the unpaid seller who has transferred the ownership of the goods to his purchaser, to resume possession of the said goods during their transit to the agreed place of delivery. This right is restricted to specific circumstances, such as insolvency of the buyer<sup>7</sup> (See Vienna Sales Convention, Article 71, sec. 2.)

These rights as against the goods, which certain persons may have on a

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<sup>7</sup> This right may be lost if the goods have been resold for valuable consideration and a negotiable transport document has been endorsed to a third party acting in good faith.

statutory or contractual basis other than pursuant to the contract of carriage, should be exercisable under the contract of carriage by these persons. In other words, these rights have to be “translated” into certain rights under the contract of carriage.

Another matter is that certain persons under the contract of carriage itself must be regarded as being entitled to give the carrier specific instructions relating the carriage and/or the delivery of the goods. Examples of these are the instruction to carry the goods at a certain temperature or to deliver them at a certain point of time at the premises of the consignee.

The giving of instructions of this kind to the carrier may be in accordance with the terms and conditions of the contract of carriage. In other words, the following up of these instructions is part of his normal performance of the contract of carriage. However, they may also fall outside that scope. A request to deliver the goods at another place of destination is clearly a request to amend the contract of carriage itself. Same applies to a request to split a consignment during its carriage and to deliver the parts of it to different persons.

From the above it may be concluded that in various senses a variation exists in respect of the underlying reasons of the wish to instruct the carrier, which may result in different legal consequences. Therefore, control of the goods during their carriage is an issue which has to be dealt with under transport law.

The existing maritime conventions are silent about the right of control. Practices that have developed under the bill of lading system may have been the reason that in the past no urgent need was felt. However, with the growing use of non-negotiable documents in maritime carriage and, in future, probably carriage without documents at all, in a new instrument rules have to be developed covering this issue.<sup>8</sup>

The right of control may be defined as follows:

#### 10.1

- (a) **The right of control of the goods during the carriage means the right under the contract of carriage to instruct the contracting carrier in respect of these goods during the period of its responsibility as referred to in 3.1. Such right to instruct the contracting carrier may include:**
- (i) **the demand of delivery of the goods before their arrival at the place of destination;**
  - (ii) **the substitution of the consignee for any other person including the person who exercises the right of control;**
  - (iii) **any other instruction which qualifies as a variation of the contract of carriage;**
  - (iv) **to give or to modify instructions in respect of the goods in accordance with the terms and conditions of the contract of carriage.**

<sup>8</sup> The conventions relating to other modes of transport where the transport documents are non-negotiable include provisions on the right to instruct the carrier, see CMR article 12, Warsaw Convention article 12 and COTIF-CIM articles 30 – 32.

**(b) The person in possession of the right of control is entitled to transfer its right to another person. Unless a negotiable transport document is issued, the transferor shall give due notice to the contracting carrier of any such transfer.**

As to the terminology, it is preferred to use the term ‘right of control’<sup>9</sup>. The carrier has the actual control of the goods as a bailee. Here, the legal control of the goods is the essence. It must be emphasised that this right of control, as referred to in the above article, is a right under the contract of carriage.

Where there exists an actual carrier and a contractual carrier, the addressee of the instructions is the contractual carrier. If and to the extent required by the nature of the instruction, a contractual carrier has to pass on the instruction to the actual carrier.

The instructions referred to under (i) and (ii) are typically those which are needed under the contract of carriage by the person who is in control of the goods during their transport under a contract of sale or pledge. The ‘delivery of the goods before their arrival at the place of destination’ is the “translation” of ‘the right to stop the goods in transit’ into transport law terms. The instruction to substitute the consignee means that the stopped goods can be delivered to another person than the original consignee. It may be expected that these two instructions will be used in conjunction. Taken together, they form the minimum requirement for the execution under the contract of carriage of the control of the goods that may exist under the sales contract. Under the circumstances, it may be desirable to add further instructions, such as to temporarily store the goods (in an intermediate port or at the place of destination) or to return the goods to the place of their origin. These further instructions are covered under (iii).

All these instructions (i), (ii) and (iii) qualify as variations of the contract of carriage. However, because of their special functions under the contract of sale, instructions (i) and (ii) have to be followed up by the carrier, provided that certain conditions are met (see 10.3, (a), below).

The instructions under (iv) are the ‘normal’ instructions under a contract of carriage, of which examples already are given above.

10.1(b) gives the rule that the right of control may be transferred. A consignee who pays for the goods may wish to acquire the right of control upon such payment. Also a bank may need of the right of control if it is the pledgee of the goods.

In the event of a non-negotiable document the transfer of the right of control will normally take place through assignment of this right. In the case of a negotiable document this right will be transferred when the document is endorsed and transferred.

<sup>9</sup> CMR, article 12, refers to “the right of disposal” and Warsaw Convention, article 12, to “right of disposition”. The use of these terms under transport law may create ambiguity in view of the existence of the term “right of disposal” under the law relating to the sale of goods. COTIF-CIM refers to “modification of the contract of carriage”. However, not all instructions may be modifications of the contract of carriage, at least not in maritime transport. The term “control” is used in article 7 of the CMI Rules for Electronic Bills of Lading. Under these Rules “control” has been translated into French as “disposition”.

The next question is *who* holds the right of control under the contract of carriage. Here, a distinction has to be made whether a negotiable transport document has been issued or not.

## 10.2

- (a) **When no negotiable transport document is issued,**
- (i) **the contracting shipper and the consignee may agree who will hold the right of control, of which agreement the contracting carrier shall be given due notice by the shipper;**
  - (ii) **in the absence of such specific agreement, the contracting shipper holds the right of control as well as the consignee as from the moment such consignee under the applicable national law may have become a party to the contract of carriage;**
  - (iii) **in the event both the contracting shipper and the consignee hold the right of control, any instruction referred to in 10.1, (a), (i), (ii) and (iv) given by the consignee is subject to any earlier or later instruction to the contrary given by the contracting shipper; any instruction referred to in 10.1, (a), (iii) given by the consignee requires the consent of the contracting shipper before the carrier is allowed to carry out such instruction;**
  - (iv) **any person holding the right of control shall on request of the carrier produce proper identification.**
- (b) **When a negotiable transport document is issued, the holder of that document is the exclusive person entitled to exercise the right of control. On request of the carrier he shall produce the negotiable document to the carrier. In the event that more than one original of the negotiable document is issued, all originals shall so be produced.**

The starting point is that the right of control is a contractual matter. Parties are free to determine who will have the right to control the goods during their carriage. In the event the goods have been paid for and the ownership of them has been transferred to the consignee upon loading of the goods, the transport document may state that the right of control is in the hands of the consignee. And if during the carriage the goods will be paid for by the consignee, he may wish the right of control transferred to him.

It is obvious that the contracting carrier should be made aware which person is in control, either right from the beginning of the carriage or as from any stage during the carriage. It should be left to the parties how to effect this.

When no specific agreement is made, the contracting shipper is the person who should be in control of the goods. He may need this control as long as the goods are in the custody of the carrier. Not uncommon is the instruction to the carrier not to deliver the goods before the carrier has received the consent thereto from a third party, e.g. a bank that first must confirm that the goods have been paid for. Same applies to an instruction in respect of climate or temperature conditioned goods that these should not be delivered before a certain point in time or before the goods have reached a certain condition. These kind of instructions 'not to deliver before', which may run parallel with certain corresponding rights or obligations of the seller under the contract of

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sale, should not be frustrated by any action of the consignee.

On the other hand, a consignee may wish to give the carrier instructions on delivery, which may require a certain lead-time from the carrier. This desirability has found recognition in the CMR Convention<sup>10</sup> and in some national laws, where the shipper loses its right of control in favour of the consignee upon the latter becoming a party to the contract. In these jurisdictions the consignee may become a party by claiming the goods when they have arrived at the place of destination.

In the above draft the compromise has been devised that both the shipper and the consignee (the latter only if and from the moment that national law may attribute such right to it by becoming a party to the contract of carriage) may have the right of control, supplemented with a priority rule<sup>11</sup>. Contracting shippers' instructions must have priority when they conflict with actions of a consignee.

With such a rule, the shipper is assured that an essential instruction given by it cannot be frustrated by the consignee, while a consignee, who under the applicable national law may be entitled to give instructions to the carrier, can do so as long as the shipper will not resist.

Obviously, this system applies only to those instructions which a carrier is obliged to follow up. If any instruction would lead to a genuine modification of the contract of carriage, such has to be agreed by the parties to the contract, including the shipper.

The draft has not taken over the requirement of e.g. CMR and COTIF-CIM Conventions, that the person wishing to exercise his right of control, has to identify himself by showing a certain copy of the transport document. No legal need exists for such specific manner of identification. To follow the CMR and COTIF-CIM requirements in this respect, would be against the current practice in maritime transport and, additionally, in view of all modern communication techniques available, an outdated manner of identification as well.

10.2(b) follows the established rules and practices relating to the right of control when a negotiable transport document is issued.

The requirement that the full set of originals has to be produced, means that, when one original is carried on board, the shipper is in control as long as he possesses the other originals. The original on board is deemed to be carried on behalf of the shipper. When in such event the shipper has parted with the other originals, or the various originals may have come into the hands of different persons, the result is that nobody under the contract of carriage is in (legal) control of the goods anymore.

Also, a seller who under article 71, (2), of the Vienna Sales Convention

<sup>10</sup> See CMR, articles 12, (2), and 13. Here the right of control is connected to possession of the second copy (CMR consignment notes are issued in three copies) of the consignment note. This second copy is carried with the goods. A shipper loses his right of control when this second copy is handed over to the consignee. A consignee is entitled to require the handing over of the second copy as soon as the goods have arrived at their place of destination. As from the moment the consignee possesses the second copy or the moment that he claims the goods, "the carrier shall obey the orders of the consignee".

<sup>11</sup> Such priority rule has been inserted in sea waybills and has worked well in practice.



has the right to stop the goods in transit, is not able to exercise that right under the contract of carriage after it has parted with (any original of) the negotiable transport document(s). It will have to seek other means to prevent delivery of the goods by the carrier, e.g. through timely attachment of the goods.

### 10.3

- (a) The carrier shall follow up any instruction as referred to in 10.1, (a), (i), (ii) and (iv), provided that the execution of such instruction is reasonably possible at the moment that it reaches the person under a duty to perform it, does not interfere with the normal operations of the carrier or result in damages to the carrier or any person interested in other goods carried on the same voyage. The following up of any instruction as referred to in 10.1, (a), (iii), will be subject to agreement of the parties to the contract of carriage.**
- (b) The execution of any instruction by the carrier may not result in any additional expenses, loss or damage to the carrier or to any other person interested in other goods carried on the same voyage. The person giving instruction to the carrier shall indemnify the carrier or such other person against any such additional expenses, loss or damage, if they nevertheless occur.**
- (c) In the event a negotiable transport document is issued, any instruction as referred to in 10.1, (a), (i), (ii) and (iii) shall be stated in that document.**

The functional relation between the contract of carriage and the contract of sale and related contracts carries with it that a carrier, in principle, must comply with the demand to deliver to the goods before they have reached their destination. Same applies to the request to substitute the consignee for another person. A carrier will have to submit to these variations of the contract of carriage, because they are essential elements of the legal control of the goods.

The carrier has to satisfy any instruction 'in accordance with the terms and conditions of the contract of carriage' for quite another reason. A carrier must be deemed to have agreed to this kind of instruction when he concluded the contract of carriage.

Certain conditions precedent, of a mainly operational nature, apply to both types of instructions. The conventions, mentioned in footnote 8, include similar conditions precedent. It follows that, if these conditions cannot be met, a carrier is not obliged to carry out the instruction and it should advise the person giving such instruction accordingly.

The third category of instructions mentioned in 10.3.a relates to a straight variation of the contract of carriage. Like any contract variation, the carrying out of these instructions, including any conditions as appropriate in the circumstances, has to be agreed between the parties to the contract.

10.3(b) is a general provision which should be applicable to any instruction given to the carrier during a voyage. The other transport conventions include comparable provisions.

10.3(c) gives a rule aimed at the protection of third party holders of a negotiable transport document. These holders, generally, must be able to rely

on the contents of the document. Therefore, any amendment of the contract of carriage has to be reflected in the negotiable document.

A similar rule is not given for non-negotiable documents. The evidentiary status of such a document is different. In addition, the person giving the instruction may not possess the document. Further, it may be expected that any instruction is either given in writing or confirmed in writing. Therefore, it is submitted that no need exists to provide for a specific evidentiary rule when the contract of carriage is laid down in a non-negotiable document.

**10.4 Goods that are delivered pursuant to 10.1, are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in chapter 9, are applicable to these goods as well.**

The carrying out of the instructions may result in a delivery of the goods otherwise than originally intended. For avoidance of doubt, it seems useful to provide that the general provisions relating to delivery are applicable to such extraordinary delivery as well.

Finally, this chapter should include a draft provision relating to the issue to which person a carrier should address itself in the event that he needs some instruction *from* the cargo side in respect of the goods. This matter is related to the question how the carrier can find the person to which it is entitled to deliver the goods, which question, in particular when a negotiable document is issued, requires further discussion before appropriate provisions can be drafted. Therefore, for the time being, a provision on this matter is left out.

## **11 TRANSFER OF RIGHTS**

**11.1 In the event the carrier issues a negotiable transport document with the consent of the owner of the goods to the first holder, the carrier, after it has received these goods from the consignor, holds the goods in its custody for such holder.**

The holder of a negotiable document (if more than one original has been issued, the holder of the full set of originals) is the person for which the carrier holds the goods. The owner of the goods must have allowed the carrier to issue the document. Without such, usually implicitly, given consent, the document cannot represent proprietary rights in the goods.

It should be noted that, in the event a document is issued by a carrier without the (implied) consent of the owner of the goods, a bona fide third party holder, which acquires the negotiable transport document in accordance with 11.2, usually enjoys a protection on the basis of the general rules under national law relating to the position of bona fide acquirers of unregistered assets. However, this matter is left to the applicable national law

### **11.2**

**11.2.1 The holder may transfer rights embodied in the negotiable transport document by passing such document to another person,**

- (i) if an order document, duly endorsed either to such other person or in blank, or,
- (ii) if a bearer document or a blank endorsed document, without endorsement, or,

(iii) if a document made out to the order of a named party and the transfer is between the first holder and such named party, without endorsement.

This provision follows the general rules of transfer of rights embodied in negotiable documents.

**11.2.2 The passing of a negotiable transport document to another person in accordance with 11.2.1 shall have the same effect with regard of proprietary rights in the goods, as would the passing of the goods themselves.**

It is believed that this rule reflects the essence of the title function of a negotiable transport document.

**11.2.3 The other person to which the document has been passed in accordance with 11.2.1 will become the holder for which the carrier will hold the goods in its custody as from the moment of passing of the document.**

A person to whom the negotiable document has been transferred following the rules of transfer as stated in 11.2.1 will become the new holder. The carrier will hold the goods for it in the same manner as it held the goods for the previous holder.

**11.3 The transfer of any proprietary rights in the goods, for which a negotiable transport document has been issued by the carrier with the consent of the owner of the goods, shall only take place concurrent with the passing of such document to the person who acquires these proprietary rights. However, the parties to the contract of carriage may agree otherwise, in which case such agreement has to be stated in the document [either explicitly or incorporated therein by reference], or must be part of the custom of the trade in the goods for which the negotiable document has been issued. In no event, such agreement may affect detrimentally the position of any later holder of such negotiable document, which had or could reasonably have had no knowledge of such agreement.**

The first sentence of this provision reflects one of the essential elements of the system relating to negotiable transport documents. However, it is not part of mandatory law and, in practice, it frequently occurs that sellers and buyers deviate from the rule as laid down in the first sentence. Refer 9.4.2. Instead of using the bill of lading to transfer property in the goods, the traders provide letters of indemnity to each other, in which they guarantee that they possess title to the goods. In these cases, bills of lading usually refer to charterparties where it is agreed by the charterer and the carrier that the carrier must deliver the goods in the discharge port upon instruction of the charterer without the bill of lading being surrendered to the carrier by the person which acquires delivery of the goods. In some trades this practice has become customary. However, it should not be acceptable that in those trades where traders' letters of indemnity are not customary, the agreed deviation from the main rule cannot be inferred from the bill of lading. Otherwise, the value of a bill of lading could be undermined too much. Additionally, the position of the

innocent bill of lading holder has to be protected, but, on the other hand, among professional traders and/or their financing institutions, innocence should not too lightly be assumed.

**11.4 Where the parties to a contract of carriage have made an agreement in accordance with 11.3 with the result that the delivery of the goods by the carrier at the place of destination takes place without the negotiable transport document being surrendered to the carrier, a holder, which becomes a holder after the carrier has delivered the goods to the consignee, or to a person entitled to these goods pursuant to any other contractual or other arrangement than the contract of carriage, [and, consequently, the document is no longer capable to transfer proprietary rights in the goods,] will only acquire rights under the contract of carriage if the passing of the document was effected in pursuance of contractual or other arrangements made before such delivery of the goods, unless such holder had or could reasonably have had no knowledge of such delivery.**

This provision relates to situations referred to in 11.3. Where the parties have agreed that the negotiable document should not play a role in respect of delivery of the goods by the carrier, the question arises what after such delivery the value of the bill of lading still is. It frequently occurs that the bill of lading still has to go through a whole string of sellers and buyers which made their transactions during (or sometimes even before commencement of) the voyage. The above provision, which is based on a similar provision in UK COGSA 1992 (s.2.2), gives the rule that only these persons will acquire rights under the contract of carriage. Obviously, they will not acquire the right of delivery of the goods, because the goods already have been delivered in these cases.

However, again, the position of the innocent holder of the bill of lading has to be protected, reason why an exception should be made for the holder which is unaware of what in the real world happens.

**11.5 The intermediate holder, which does not claim any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder.**

This provision complies with a general perception in the banking industry. It is not thought that a provision of this kind is statutory law in any country, however, it belongs to the functional realities of bill of lading practice. Only the UK COGSA 1992 includes this principle, but goes a lot beyond: any holder of a bill of lading who claims any right under the bill of lading automatically assumes all the shippers' liabilities as well.

It should be noted that this provision does not exclude that, outside the contract of carriage, any liability may arise between the intermediate holder and the carrier. That may be the case e.g. if the carrier acts as a *negotiorum gestor* on account of the party interested in the goods.

**11.6 In the case of a non-negotiable transport document, the general principle is that a carrier holds the goods on account of the shipper. The shipper is allowed to advise the carrier that it should hold the goods for another person. In particular in cases where the no traditional documentation has been issued,**

but the transport is carried out on the basis of electronic messages only, a provision that unless, or until the moment that, the contracting shipper advises the carrier that it should hold the goods in its custody for another person, in which case such other person may advise the carrier likewise and that any notice to the carrier of the transfer of the right of control shall be deemed to include the instruction to the carrier to hold the goods for the party which acquired the right of control, would create clarity.

It should be noted that the goods must be in the custody of the carrier. If the goods are stolen from the carrier, the ship has sunk, the carrier has transferred the goods to another person not under his control, etc., the holdership of the goods by the carrier has been terminated.

Such a provision would include a link with the transfer of the right of control. The carrier holds the goods for the shipper or the party, which directly or indirectly acquires the right of control from the shipper. It is important to realise that under such a provision a carrier would not hold the goods for a consignee, which might (under national law) be in possession of the right of control without having acquired this right directly or indirectly from the shipper.

## **12 RIGHTS OF SUIT**

**12.1 Rights under the contract of carriage may only be asserted against the carrier either by :**

- (i) the contracting shipper, or**
- (ii) the consignee, or**
- (iii) any third party to which the contracting shipper or the consignee has transferred its rights,**

**depending on which of the above persons is interested in the right, or**

- (iv) any third party which has acquired rights under the contract of carriage by legal subrogation under the applicable national law.**

**In case of any passing of rights as referred to under (iii) or (iv) above, the carrier is entitled to all defences and limitation of liability which are available to it under the contract of carriage and under this Instrument towards such third party.**

This provision applies to any contract of carriage. A contracting shipper and a consignee can only assert those rights which belong to it and if it has a sufficient interest to claim. This means that in case of loss or damage to the goods the claimant must have suffered the loss or damage itself. If another person, e.g. the owner of the goods or an insurer is the interested party, such other person must either acquire the right of suit from the contracting shipper or from the consignee, or, when possible, assert a claim against the carrier outside the contract of carriage.

**12.2 In the event that a negotiable transport document is issued, the holder is entitled to assert rights under the contract of carriage against the carrier, without having to prove that it is the party interested in these rights itself. If such holder has no interest in these rights itself, it shall be deemed to act on behalf of the person which is the interested party.**

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*Draft outline instrument*

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The principle that a claimant must have an interest in the claim itself, does, according to the prevailing bill of lading law and practice, not apply to the holder of a bill of lading. It has to be discussed whether the right of suit should be exclusively vested in the holder, or that these rights should also be vested in a previous holder or the contracting shipper when such person is the interested person. The draft does not provide for such exclusivity. Therefore, the second sentence is needed in order to avoid that a carrier should have to pay twice.

### **13 TIME BAR**

The Uniformity Sub-Committee was undecided whether it should be one or two years.

## **ELECTRONIC COMMERCE IMPLICATIONS OF THE DRAFT OUTLINE INSTRUMENT**

### **REPORT OF THE E-COMMERCE WORKING GROUP**

The working group on E-Commerce was asked in mid-September to review the upcoming draft Outline Instrument to identify the provisions that could have an impact on the ability of the parties to use electronic transport documents. Despite the severe time constraint, it was decided that we would at least give to the national associations, some indications as to the issues upon which they may want to reflect prior to the Singapore meeting. We invite the national associations to indicate to us before January 15, 2001 any additional area of concern they may have.

Before getting into specific comments, it is important to note that this Outline Instrument is a crucial step in securing a uniform legal framework for electronic transport documents. There is a need to clarify certain functional issues such as the right of control and the transfer of rights in the context of an electronic transaction. These sections should therefore be considered carefully to ensure that they meet their purpose.\*

#### **Section 1.8:**

**Holder** means the person who is for the time being in possession of the negotiable transport document and entitled to transfer the rights embodied in such document.

Is the above wording suitable to define the Holder of an electronic transport document?

N.B. There is also a more general issue that will need to be discussed. Is the concept of "transport document" in the context of an electronic transaction well understood and sufficiently defined to ensure that it can also encompass a document comprising more than one electronic messages?

#### **Section 1.9:**

**First Holder** means the person who is named as the shipper in, or is identifiable as such from, a negotiable transport document.

Is the expression "is identifiable as such from" suitable in the context of an electronic transaction?.

#### **Section 1.13:**

**Negotiable transport document** means a transport document, such as a bill of lading, that states that the goods are to be delivered to order, to bearer, or to order of any person named in the document, and is not prominently marked "nonnegotiable" or "not negotiable".

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\* The words or phrases that it is thought would require modification or should be deleted are printed in italics.

The term “prominently marked” may not be suitable since one cannot mark an electronic document.

#### **Section 1.18:**

***In writing* includes, unless otherwise agreed between the parties concerned, information generated, sent, received or stored by electronic, optical or similar means of communication, including, but not limited to, telegram, facsimile, telex, electronic mail or electronic data interchange (EDI), provided the information contained therein is accessible so as to be usable for subsequent reference.**

The use of such a definition should be avoided. Ideally, there would be no reference at all to such term. For the moment, however, and until a better expression is found that will encompass the new means of communicating and transacting, it is believed that instead a separate provision (not in the definitions section ) could be added along the following lines:

Where anything in this instrument expressly or by implication requires information to be in writing, or provides for consequences if it is not, such requirement is satisfied, by the transmission, generation or storage of information by electronic, optical or similar means, provided the information contained therein is accessible so as to be usable for subsequent reference. The purpose of this section is to removed paper based obstacles to electronic transactions by adopting the relevant principles of the UNCITRAL Model Law on Electronic Commerce, 1996.

National associations will also wish to reflect upon the issue of “consent”. Is consent to an electronic transmission to be presumed unless agreed otherwise or on the contrary, is consent to an electronic transmission to be sought prior to proceeding with such transmission?

#### **Section 5.9.1:**

**The carrier shall be presumed to have delivered the goods according to their description in the transport document unless notice of loss of, or damage to or in connection of the goods, indicating the general nature of such loss or damage, shall have been given *in writing* to the carrier before or at the time of the delivery, or, if the loss or damage is not apparent, within three working days after the delivery of the goods. A *written notice* is not required in respect of loss or damage which is ascertained in a joint inspection of the goods by the carrier and the consignee.**

#### **Section 5.9.2:**

**No compensation shall be payable for economic loss resulting from delay in delivery *unless written notice* of such loss was given to the carrier within 21 consecutive days following delivery of the goods.**

As indicated in the comment under section 1.18 , we should endeavour to find and use from now on another expression better adapted to all means of communications. The term “expressly” would not be suitable if what one seeks is to avoid is the use of verbal notices.

The same comment applies to sections 7.3.1 and 9.3.



**Section 7.1.2: Shipper's Entitlement to a Negotiable Transport Document**

The contracting shipper and the contracting carrier may agree that the transport document will be non-negotiable. Such an agreement may be express or implied. In the absence of such an agreement, the [contracting shipper/consignor] is entitled to a *negotiable bill of lading or other negotiable transport document*.

"Negotiable transport document" is a term defined at section 1.13, it clearly includes a negotiable bill of lading. Because an electronic negotiable transport document must have the same value as a paper one, this reference may create an ambiguity. It should be deleted.

N.B. It will be important for the national associations to assess if there are obstacles to the use of electronic transport documents in their law and what additional provision, if any, in the Instrument could facilitate their use.

**Section 7.2.1 – Required Contents of the Transport Document**

If the carrier issues a transport document, the transport document must:-

**(f) be signed by the contracting carrier**

It may be advisable to have a separate section to clarify that in the context of an electronic transaction, transport documents may be signed using techniques appropriate to this mode of communication. A provision along the lines of article 7 of the UNCITRAL Model Law on Electronic Commerce could be suitable.

N.B. The final draft of UNCITRAL Model Law on Electronic Signatures will be reviewed and discussed further in the Discussion Paper.

**Section 7.2.3 Omission of Required Contents from the Transport Document**

- (a) The absence in the transport document of one or more of the particulars referred to in 7.2.1, or the inaccuracy of one or more of those particulars, does not affect the legal character of the transport document. [The issuer of the transport document is liable to the shipper or other holder of the transport document for any damages that are proximately caused by its breach of 7.2.1.]

It should be made clear that this section does not create liability for omissions resulting from errors in transmission be it in the form of an illegible paper b/l or of a garbled electronic communication.

**Section 7.4.2:****Ambiguous Signature on a Transport Document**

This title should read "ambiguous identification" to better reflect the content of the proposed provision which does not deal with "signature" per se.

**Section 10.1:**

- (b) The person *in possession of* the right of control is entitled to transfer its right to another person. Unless a negotiable transport document is issued, the transferor shall give due notice to the contracting carrier of any such transfer.

This provision shall be carefully considered to determine if any special additional provision will be required to deal with electronic transport document.

Also, is the use of “in the possession of” restrictive, if so, can it be avoided?

#### **Section 10.2:**

- (b) When a negotiable transport document is issued, the holder of that document is the exclusive person entitled to exercise the right of control. On request of the carrier, he shall produce the negotiable document to the carrier. In the event that more than one original of the negotiable document is issued, all originals shall so be produced.**

This section requires the production of the negotiable document. It clearly needs to be adapted for application to electronic transport documents.

#### **Section 11.3: Transfer of rights**

This section is important in the context of electronic transactions. The text to be adopted will need to include suitable wording to enable the endorsement or transfer of electronic transport documents. A provision along the lines of article 17 of the UNCITRAL Model Law (slightly modified) may suffice.

Where a right is to be granted to a person and no other person, if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer or use of, a document in writing that requirement is met if the right or obligation is conveyed by using one or more electronic communications, provided that a method is used which gives assurance that the right or obligation has become that of the intended person and of no other.

#### **Other provisions**

It may also be appropriate to include a section to expressly provide that expressions such as “issue” “issuance” “statement” etc. do not imply that something has to be done in writing and should not preclude the use of electronic transport documents.

Finally, it would be useful to have a provision along the lines of article 17(5) of UNCITRAL Model Law on Electronic Commerce:

(...)

*17. (5) “Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.”*

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

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

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*Report of the first meeting of the I-SC*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*Report of the first meeting of the I-SC*

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

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

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

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

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

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

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

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

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

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

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

**Mr. Alcantara** added that all of these issues relate to the "document."

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

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

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

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

[No one wished to discuss the issue.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Mr. Diamond** confirmed this interpretation of the 1992 Act.

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

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

Prof. Zunarelli agreed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

**Mr. von Ziegler** set out a number of questions for the International Sub-Committee to consider:

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

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

**Mr. von Ziegler** invited comments on the first question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting adjourned at 3:30.

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

## **REPORT OF THE SECOND MEETING OF THE INTERNATIONAL SUB-COMMITTEE ON ISSUES OF TRANSPORT LAW**

### **THE BALTIC EXCHANGE, LONDON 6TH AND 7TH APRIL 2000**

Present: Patrick J.S. Griggs (President of the CMI)  
Alexander von Ziegler (Secretary General of the CMI)  
Stuart N. Beare (Chairman of the International Sub-Committee)  
Prof. Michael F. Sturley (Rapporteur)  
Prof. Lars Gorton (Sweden; member of the Working Group)  
Sean Harrington (member of the Working Group)  
Paul Koronka (member of the Working Group)  
Prof. Gertjan van der Ziel (The Netherlands; member of the Working Group)  
Prof. Avv. Stefano Zunarelli (Italy; member of the Working Group)  
Barry Oland (Canada)  
Uffe Lind Rasmussen (Denmark)  
Prof. Tomotaka Fujita (Japan)  
Karl-Johan Gombrii (Norway)  
Francisco Goñi (Spain)  
Anthony Diamond Q.C. (UK)  
Vincent M. De Orchis (USA)  
Chester D. Hooper (USA)  
George F. Chandler, III (USA)  
Kay Pysden (FIATA)  
Viviane Schiavi (ICC)  
Linda Howlett (International Chamber of Shipping)  
Sara Burgess (International Group of P&I Clubs)  
Hugh Hurst (International Group of P&I Clubs)  
Christopher White (IUMI)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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observation that most of the issues had already been raised in the discussion of proposition I.1. Alternative A declares the principle that the carrier must issue a negotiable transport document if the shipper demands one, but may issue a non-negotiable transport document if that is acceptable to the shipper. Alternative B, in contrast, declares the principle that the carrier and shipper may expressly or impliedly agree on the type of transport document that the carrier will issue.

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

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

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

**Prof. Sturley** turned to proposition I.3, which declares the principle that a transport document must describe the apparent order and condition of the goods at the time the carrier receives them from the shipper. Although the courts in some countries have departed from this principle, it simply confirms the understanding that is clearly expressed in the *travaux préparatoires* of the Hague Rules and carried forward in subsequent international conventions.

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

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

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

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

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

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

**Prof. Sturley** began the discussion of proposition I.4, which declares the principle that a transport document must generally show the leading marks necessary for identification of the goods as furnished in writing by the shipper. The main issue for discussion was whether the shipper must furnish this information in writing before the carrier receives the goods, or whether it is sufficient to furnish the information before the carrier issues the transport document.



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Mr. Diamond** disagreed with that idea.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Mr. Rasmussen** thought that proposition 1.10 was superfluous.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Mr. Oland** asked where would sanctions go.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Mr. Gombrii** raised the choice of law issue.

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

**Mr. de Orchis** wondered whether the International Sub-Committee



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Prof. Zunarelli** also agreed.

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

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

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

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

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**Mr. Beare** asked about port charges and similar expenses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Mr. Koronka** replied that this was his intention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

means a time period when CMR does not apply.

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

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

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

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

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

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

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

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

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

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

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

An alternative possibility was as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*Report of the second meeting of the I-SC*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*Report of the second meeting of the I-SC*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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*Report of the second meeting of the I-SC*

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

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

**Mr. de Orchis** asked about the Toledo meeting.

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

The meeting adjourned at 3:40 p.m.

**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-

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*Report of the third meeting of the I-SC*

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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 prejudice 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.

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**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.

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**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

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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 slipper 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.

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.

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**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 Sub-Committee'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.

**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. Lüddecke (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

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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

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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

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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

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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.

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**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.

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**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 Lüddecke** 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?

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*Draft Report of the fourth meeting of the I-SC*

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**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.

## **GENERAL AVERAGE**

### **REPORT OF THE CMI WORKING GROUP**

In a letter dated 26<sup>th</sup> March 1999 Mr Stefan Peller, General Secretary of the International Union of Marine Insurance (IUMI), requested the President of the CMI to place the case for revision of the York-Antwerp Rules back on its working agenda.

A working group, consisting of M. Pierre Latron (France) Mr. Hans Levy (Denmark) and under the chairmanship of Dr. Thomas Remé (Germany) was set up and a questionnaire prepared, which was sent to all National Maritime Law Associations.

Responses have been received from 21 Maritime Law Associations in all, namely Argentina, Australia and New Zealand, Brasil, Canada, China, Denmark, Finland, France, Germany, Gulf States, Indonesia, Italy, Japan, Netherlands, Portugal, Senegal, Slovenia, Spain, Sweden, U.K., and the U.S.A. A copy of the questionnaire accompanies this report as Appendix A.

At the CMI Colloquium which took place in Toledo, Spain on 18<sup>th</sup> to 20<sup>th</sup> September 2000, the possible revision of the York-Antwerp Rules was one of the subjects selected for discussion. Papers were presented, inter alia, by Mr Eamonn Magee an underwriter, and Mr Geoffrey Hudson, an average adjuster, whose main thrust was respectively for and against the amendment of the York-Antwerp Rules. A lively discussion ensued, at the conclusion of which it was the common consensus that this was a subject which should be included on the work programme of the 2001 CMI Conference in Singapore. Mr. Richard Shaw (UK) was appointed Rapporteur of that session and he has agreed to continue in that role in Singapore.

It has not proved practicable to produce a synopsis of all the replies to the questionnaire which have been received. One of the great strengths of the CMI is the diversity of membership of the national maritime law associations of which it is composed, and many such associations have appointed a committee with broad mix of members to draft their association's reply. It is not surprising that in many cases the responses have indicated a divergence of views on their committee between those representing marine insurers who have favoured revision and those representing shipowning interests and average adjusters, who have not.

A number of associations have, very properly, pointed out that some of the questions were formulated in a way which did not allow a simple yes/no reply. That was not entirely an accident, but resulted from the Working Group's wish to ensure that the IUMI proposals were considered broadly by the respondents, and that the questions were not formulated in a way which might pre-judge the replies.

However, it is right that we should record that question 1 might have created the impression that the concept of common benefit was introduced relatively recently, whereas in fact it can trace its origins to 1890 and possibly to 1864. We are grateful to the Associations of Netherlands, Sweden, the UK and the USA for pointing this out.

Likewise it has been drawn to our attention that while we stated in question 5 that the 1994 Sydney amendments to the York-Antwerp Rules mentioned expressly for the first time the preventing or minimising of damage to the environment, such expenses have, in appropriate cases been allowed in GA for some years. The appropriate cases would arise where the pollution damage itself was the result of a General Average act. It was, however, clear that the substance of this question was well understood, and almost all the respondents considered that the compromise achieved in Sydney on this point (general exclusion of pollution damage from GA in Rule C, but limited exceptions to that principle in Rule XI (d)) should not be disturbed.

In summary, of the 21 national Maritime Law Associations which replied to our questionnaire, 10 were clearly in favour of retaining the "common benefit" principle of GA, while 7 associations were in favour of a change from "common benefit" to "common safety", and 4 associations were so divided as to be unable to formulate a common position. This subject is therefore very much open for discussion in Singapore.

In order to enable delegates to prepare for that discussion it has been decided to include in the 2000 Year Book the text of the papers presented in Toledo by Mr Magee and Mr Hudson with the arguments for and against the changes proposed by IUMI, and those papers accompany this report as Appendices B and C.

The York-Antwerp Rules are one of the exceptional cases where the CMI still has a role as "trustee", with the power to adopt changes to the Rules and to recommend them to carriers and merchants world-wide. It is therefore very important that there should be a wide-ranging review of the issues involved in the changes proposed by IUMI, so that an informed and wise decision can be made.

THOMAS M. REMÉ, Chairman  
RICHARD A.A. SHAW, Rapporteur

## APPENDIX A

**QUESTIONNAIRE ON AN EVENTUAL  
REVISION OF YAR 1994**

1. *The YAR originally provided for the distribution of expenses and sacrifices over the contributing interests only as far as they were incurred for the common safety of ship and cargo. Later on the scope was extended to include expenses incurred for the common benefit – like port of refuge and substituted expenses. Do you think time has come to reduce the scope of the YAR to the principle of common safety?*
2. *If so, do you support*
  - 2.1. *that sacrifices and expenses should be included in G/A only if made or incurred while ship and cargo are “in the grip of a peril”?*
  - 2.2. *that temporary repairs of the vessel in a port of refuge should be excluded from G/A?*
  - 2.3. *that the same should apply to crew wages and maintenance in the port of refuge?*
  - 2.4. *the cost of discharging, storage and reloading of cargo in the port of refuge should no longer be allowed in G/A?*
  - 2.5. *that no substituted expenses should be made good in G/A?*
  - 2.6. *that no non separation agreement should be allowed in G/A (revision of rule G)?*
  - 2.7. *that in consequence Rules X and XI should be abolished?*
3. *Rule D deals with the influence of fault of one of the parties to the adventure. Such fault has had to be shown under the rules of the national law applicable in addition to the YAR. Do you think any non-compliance with international conventions like the “ISM Code or STCW should be considered a fault irrespective of the merits of the individual case and the applicability of such convention?*
4. *Salvage cases are settled in different ways in different countries. In some countries ship and cargo join in settling salvage remuneration, in other countries they do not. Do you support the view that salvage remuneration should not be distributed in GA if settled separately by ship and cargo with the salvor?*
5. *Expenses preventing or minimizing damage to the environment have been included in the YAR only in 1994, evidently as a consequence of the revision of LOF and the 1989 Salvage Convention. Do you take the view that no such expenses should be allowed in G/A?*

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*Questionnaire*

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6. *The YAR have not included any rule on time bar leaving this matter to national law. Do you think a rule on time bar should be introduced so as to prevail over national law?*

*Any additional comments you may wish to make, particularly on items not dealt with in this questionnaire but treated in the report of IUMI, will be highly welcome.*

*February, 2000*



**APPENDIX B****GENERAL AVERAGE REFORM - THE IUMI POSITION\***

EAMONN MAGEE

Ten years ago this year I began looking at the subject of General Average. For my sins I was the nominee from the Irish Maritime Law Association to the International subcommittee set up by the CMI and chaired by David Taylor – a subcommittee charged with bringing forward proposals for a review of the law of General Average and the York Antwerp Rules 1974 to the CMI's Sydney Conference in 1994.

It was on a crisp winter morning then, in Brussels, that I first worked with Geoffrey Hudson and at the end of that first subcommittee session I invited him to scribble on my copy of his work on General Average. Although it would not qualify as my selection for Desert Island Discs alongside the Bible and Shakespeare I do recognise it for the scholarly work that it is, as I equally recognise the formidable adversary that Geoffrey is in any discussions on General Average.

IUMI recognises that it was late in Marshalling it's arguments in advance of the Sydney review by the CMI and realises that one view might exist within the CMI that to look at the system of General Average again so soon after 1994 may not prove popular. As against that, it could be argued that recent momentum in terms of the focus on General Average should not be lost and that the opportunity should be seized at the start of the new millennium to address the ongoing practice of General Average adjustment through the mechanism of the York Antwerp Rules.

IUMI is unashamedly interested in the operational aspects of General Average adjustment because as a market it is the principal if not sole payroler of the product. ( I don't know how many General Average adjustments are drawn up in situations where no insurance is in place in respect of the various property interests but I suspect they are few. (Perhaps Geoffrey can help us here.) The Marine Insurance industry is under threat in a changing Global marketplace and if it is not to be swallowed up by the very much bigger non marine market, where all embracing product covers are increasingly the order of the day, then of necessity there has to be a focus on those areas where the industry itself adjudges that there is an unnecessary duplicity of expense, an expense which at the end of the day is picked up by the industry and guess what

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\* Paper delivered at the Toledo Colloquium in September 2000.

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*Appendix B - Eamonn Magee, General Average reform. The IUMI position*

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– passed back to the customer ultimately. Who are our customers ? – Ship and Cargo Interests for whom General Average cover is way down their shopping list at premium negotiations.

This should be of concern not only to Underwriters of course but to all those who work in the sector, to consumers of marine insurance services and to all service providers to the Industry. General Average adjustment is part only and I suspect a small part of an Average Adjusters portfolio. The balance of that portfolio must surely depend on the *health* of the Industry within which they work. IUMI's General Average concerns are aimed at contributing to that *health* overall.

The CMI will be aware of the recommendations of the IUMI General Average - Drafting Working Group ( which accompanies this paper in appendix 1.) and hopefully at this stage have received the views of National Law Associations in response to those recommendations.

It is not my intention to deal specifically with each of the recommendations in the IUMI paper. We would like to think that such an examination will be undertaken by the CMI working group going forward from this point and that IUMI would be invited to participate in the work of that group but it is incumbent on me on IUMI's behalf to re-iterate some of our long stated concerns as a preface to our recommendations.

The total spend on General Average disbursements is in the order of \$300 million annually ( for comparison purposes the annual cost of Hull total losses is in the order of \$600 million.) Of this figure ( \$300m ) some 67% is funded by the cargo interests or more accurately by the Underwriters of the Cargo interests. By far the smaller contributor to the cost of General Average is the Hull interest or more accurately the Underwriters of the Hull interest. The inequity of this situation has been referred to repeatedly, particularly in light of the causes of general average which tend to be almost exclusively related to issues involving the management of the vessel such as engine breakdown, mechanical and structural failure, grounding through negligent navigation and so on, and recognising that there is an argument for continuing General Average in certain limited classes of situation, IUMI recommendations are aimed at addressing these inequities.

Behind the proposals for reform is the desire to limit recoverability in General Average to expenses incurred only "in time of peril" so that for example when a port of refuge has been reached and the acting peril averted no further expenses would be allowed in General Average. We feel that the concept of "Common Maritime Adventure" currently forming the basis of the York Antwerp Rules" should be replaced by the concept of "Common Safety", consistent with the "acting peril" argument and these considerations are the basis for our proposed redefinition of General Average at paragraph 1 of the recommendations.

#### Proposed Re-definition

"There is a General Average act when and only when any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety in time of peril for the purposes of preserving from peril the property."

*General Average*

We address our concerns on the “ fault ” issue at paragraph 7 of the recommendations. The primary causes of General Average vis poor maintenance, particularly in the engine room, can be addressed with a recommendation that the revised rules contain a clause preventing recovery in General Average where there have been breaches of the ISM Code, the STCW Convention and/or any breaches of the rules of the Classification Society with which the vessel is entered. This recommendation promotes compliance with Safety Conventions and addresses the inequity of requiring Cargo interests to contribute to expenses incurred where there has been vessel non compliance with safety requirements – and so we have our Rule D recommendations.

It is proposed that substituted expenses, most often encountered in the area of transshipment of cargo from a port of refuge to final destination, be abolished. This is a logical sequitur from our position that only expenses incurred in the grip of a peril be allowed in General Average. Similarly we recommend that Rules X and X1 (a) (b) and (c) expenses should be disallowed in General Average

One area of particular contention for Underwriters in any consideration of General Average is the unquestionable duplicity of effort and expense which sees Salvage expenditure redistributed in General Average. We quote Ian Stevens of LCO when he put it thus:

Ian Stevens

“What really aggravates me – no I do not get hysterical – are those situations where each party to the adventure provides it’s own security to Salvors and separately settles its proportion of the salvage remuneration. Why in the name of the York Antwerp Rules, is it necessary to go through a lengthy and costly process of re-apportioning the salvage settlements in General Average, often in situations where salved and contributory values are more or less identical? And why should one or more parties who have had the expertise and good business sense to settle with Salvors for a lesser remuneration than paid by other salved interests lose the benefit of their skill, because all payments are thrown into the melting pot of General Average?

All this nonsense only adds to the cost of General Average”

IUMI would like to see the replacement of Rule V1 with a clause along the following Lines;

- (a) salvage payments ( including legal fees associated with such payments) shall lie where they fall and not be brought into General Average save only that any amounts paid by one party to the General Average in respect of the proportion ( calculated on salved values and not GA contributory values) of another party or parties shall be apportioned between the parties to the General Average in accordance with these rules
- (b) in paragraph (a) of this section references to salvage payments and the like expressions shall be construed as excluding payments under Article 14 of the 1989 Salvage Convention and similar provisions (including Scopic).

The question of repairs is addressed in paragraphs 21 & 22 of the position paper. Some recommendations in respect of deductions new for old appear in paragraph 21. The question of recoverability of temporary repair costs under the

*Appendix B - Eamonn Magee, General Average reform. The IUMI position*

existing Rule XIV is addressed in the broader position disallowing all expenditure incurred following arrival at a port of refuge. Temporary repairs could qualify where they were incurred in circumstances of actual operative peril.

IUMI is concerned also at the existing practices in relation to the payment of Commission on General Average expenditure and the payment of interest on Adjustments and our position here is clarified in paragraph 27 of the Drafting Group's paper.

CMI has as one of its principal objectives, the search for uniformity in matters of private international maritime law and IUMI can anticipate the argument that if a set of Rules ( regardless of their content ) has universal application as for example is largely the case with the York Antwerp Rules, then issues of uniformity do not require that the interests of a single lobby group such as IUMI be necessarily accommodated. Against this it must be argued that:

- CMI were sufficiently concerned at the operation of the system and the application of the Rules to make significant recommendations for change in 1994. Concerns continue to exist and CMI, having rightly taken up the challenge then can make a further meaningful contribution now by addressing the remaining concerns.
- Since 1994 there have been significant developments aimed at a safer maritime environment for all. One thinks of the ISM code, the STCW Convention, the work of the CMI's own committees on for example the liability of Classification Societies and the search for new liability regimes governing transport by sea. Here is an opportunity to focus further on those very issues and to send a message to sub standard operators that their losses will not be made good in General Average.
- Insurance is the life-blood of international trade. Whilst traditional products are changing, and with that change comes a threat to the specialised marine insurance industry, that very change is coming about because of poor results fuelled by duplicity of cost and expense. Here, in the area of General Average, is one small opportunity to do something about that in the interests of the Industry, the Customer, the Supplier and in the interests of a safer and cleaner marine environment .

The argument is often made and the question put:

"What incentive is there to a Shipowner to get Cargo to a place of safety where his expenses are not guaranteed in General Average and where his freight may be at risk?"

The answer has to lie in commercial realities. General Average should not be a mechanism to subsidise sub standard operators. These operators deserve no place in international trade.

### Conclusion

Where genuine instances of peril are encountered IUMI is supportive of a limited and equitable application of General Average addressing the release of Ship and Cargo from that peril. A revised version of the existing York Antwerp Rules can bring that reality nearer and address the concerns of all legitimate interests.

## APPENDIX I

**REPORT OF IUMI G.A. DRAFTING WORKING GROUP****GENERAL AVERAGE  
HOW SHOULD IT BE CHANGED?**

The purpose of this report is to point to possible changes which might be proposed by property underwriters to the rules governing General Average worldwide. The aim of these changes is to rein back the progressive extensions in the scope of General Average which have taken place over at least the last 100 years with a view to lessening the burden which General Average places on property underwriters worldwide. It is felt that now that insurance is so very much more universally held by shipowners, the loss should lie where it falls to a greater extent than it does at present. The current concept of General Average is now felt to be outdated for a number of reasons (including the increased use of insurance, the fact that under many laws salvage is apportioned between ship and cargo in proportion to their values and the increased complexity of modern commerce which frequently makes the collection of G.A. security and the adjustment of G.A. contributions disproportionately expensive). Despite this, it is recognised that there is an argument for continuing G.A. in certain limited classes of situation and that it would be difficult to abolish G.A. altogether (as it might be replaced by claims at common law for restitution in the UK, for example, and because the maritime legislative community worldwide is not yet "ready" for such a novel step). The first task of this report, therefore, is to propose a statement of principle governing General Average similar to Rule A of York-Antwerp Rules in its purpose.

*1. Redefinition of General Average*

It is proposed that a definition of General Average be drawn from a slightly amended Section 66 Marine Insurance Act 1906 which would state:

"(1) A General Average loss is a loss reasonably, proximately and directly caused by or consequential on a General Average act. It includes General Average expenditure as well as General Average sacrifice.

(2) There is a General Average act when and only when any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety in time of peril for the purpose of preserving from peril the property."

At first sight it might be thought that if an attempt is going to be made to radically confine the ambit of General Average, substantial amendments are going to have to be made to Section 66 Marine Insurance Act 1906. In practice we feel only minor changes are required. Perhaps the most significant change is the deletion of the words "imperilled in the common adventure", coupled with the insertion of "for the common safety" in para. 2 as to which see Section 3.

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*Appendix B - Eamonn Magee, General Average reform. The IUMI position*

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With these minor amendments the wording of Section 66 Marine Insurance Act 1906 is a suitable basis for the new concept of General Average.

The broad intention behind the new definition would be to cover (where reasonable):

- jettison of cargo (see 10 below)
- salvage (but see 15 below)
- damage intentionally and reasonably caused to ships' engines by working them when aground in a reasonable attempt to refloat and/or lighten
- crews' extra wages and overtime and consumption of extra fuel and stores while in the grip of a peril (but not at a place of refuge)
- provided that the G.A. expenses/sacrifices claimed are intentional and reasonable, it should not matter whether the owner or master makes the decision to incur them.

We would suggest that the following types of expenditure should not be included in G.A. under the new regime:

- ordinary crew wages during the peril (except crew overtime while the vessel is in the grip of a peril)
- environmental expenses of any kind save only Article 13 salvage enhancements for environmental threats and Rule XI(d) expenses if for common safety
- costs of transshipment to destination
- ship's expenses at a port of refuge
- temporary repair costs (unless carried out while the ship and cargo are in the grip of a peril e.g. in a salvage operation)
- the cost of discharging, storing and reloading cargo while the vessel repairs at a port of refuge (these expenses will be borne by the carrier under the contract of carriage)
- consumption of extra fuel/stores once the immediate peril has ceased to exist.

We would propose that the draft rules should expressly state the types of claim included and excluded from G.A. as examples for the sake of clarity.

The foregoing does not consider how substituted expenses should be treated: on the one hand the substituted expenses can save property underwriters expense by permitting a shipowner flexibility in deciding what expenses he can safely incur whilst at the same time it can also be said that substituted expenses are a vehicle for allowing the shipowner to recover expenses which he otherwise would be unable to. Substituted expenses should be abandoned (see 9 below).

## 2. *"In time of peril"*

One of the key intentions behind the proposed reform is to stop expenses going into G.A. after the ship and cargo have been brought to safety (for example to a port of refuge). A definition of the word "peril" will therefore need to be reached. At present it is arguably the case at common law that a peril exists if a situation prevails in which the vessel and cargo "might or could" become a CTL (see Lowndes and Rudolph para A.27). It is submitted that a

peril should only continue until ship and cargo are in a condition of reasonable safety. It should not therefore usually continue after the arrival of the vessel at a port of refuge. Thus the costs of a standby tug in port would not be recoverable but the costs of a tug escorting a vessel proceeding to a place of safety would be recoverable in G.A. It is perhaps worth considering the words of Roche J in *Vlassopoulos -v- The British & Foreign Marine Insurance Co Limited* [1929] 1 K.B. 187. In that case the propeller of m/v *Makis* fouled some wreckage while on passage from Bordeaux to Cardiff and the vessel was obliged to put into Cherbourg for repairs. Roche J held that the ship and cargo were in danger and said:

"It is not necessary that the ship should be actually in the grip or even nearly in the grip of the disaster that may arise from the danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a General Average act.

That is all I think which need be said with regard to that matter unless I add this: that "peril", which means the same thing as "danger", is the word used in General Rule (A), just as it is the word used in the Marine Insurance Act Section 66. The word is not "immediate peril or danger". It is sufficient to say that the ship must be in danger or that the act must be done in order to preserve her from peril. It means, of course, that the peril must be real and not imaginary. It means that it must be substantial and not merely slight or nugatory. It must be a danger."

It is hard to disagree with Roche J's words and it is therefore probably unwise to confine the severity of the peril which would qualify for G.A. but merely the length of time over which G.A. expenses can be incurred and then recovered. It is submitted that the words "in time of peril" in Section 66(2) Marine Insurance Act 1906 should, properly interpreted, have this effect.

One question which may arise is whether contractual salvage awards or settlements involving services rendered in part when ship and cargo are in peril and in part after they have reached a place of safety shall be apportioned in G.A. and, if so, on what basis. To avoid complication it is suggested provisionally that no such apportionment should be done.

As to the severity of the peril or danger which qualify sacrifices/expenses for G.A., this must to some considerable extent depend on each case. Examples at Lowndes & Rudolph para A.33 are helpful when considering this aspect of the matter. It is further submitted that the peril must be real and not imaginary (at present, despite the words of Roche J, there is conflicting authority on the question of whether an imaginary peril is sufficient - see for example Lowndes & Rudolph A.37).

### 3. *Common Maritime Adventure/Common Safety*

We consider the concept of "Common Safety" should underlie the "new" General Average replacing the Common Maritime Adventure concept which now forms the basis of the York Antwerp Rules. There are 3 points to make about the concept of common maritime adventure:

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- It is widely thought that expenses based upon the principle of common maritime adventure are more extensive than is necessary to give shipowners sufficient encouragement to take prudent steps to preserve ship and cargo in time of peril. Once the peril is past expenses such as those incurred in a port of refuge or temporary repairs are more properly in the domain of maintenance. In other words, the “Common Safety” approach will reduce the exposure of Hull and Cargo Underwriters to G.A. claims.
- Technically, where there are two or more discharge ports and the General Average act occurs after part of the cargo has been discharged, the common maritime adventure has finished and no G.A. can be recovered. Obviously this is dealt with in various ways by different adjusters worldwide and in practice contributions are recovered. Nevertheless, this is intellectually untidy and it would be better to have some specific proviso dealing with it. This could be resolved by providing that cargo contribute only up to the time when it leaves the ship (although it is recognised this might increase the amount of work to be done by Adjusters); there should be a special clause dealing with cargo in lighters between ship and shore.
- Another difficulty about the idea of a common maritime adventure is that the word “adventure” implies a voyage. In this way it is argued that a hulk storing a bulk product such as oil or wheat, not on a voyage, cannot declare General Average because there is no common maritime adventure. This seems inequitable but it is an inequity to which property underwriters would normally have no real objection. However, in the interests of fairness and consistency with the concept of “Common Safety” we are prepared to include in G.A. storage tanks, FPSO’s and vessels at sea, stationary or otherwise.

We further consider Tugs and Tows should continue to be allowed to declare General Average.

It follows from the foregoing that the Non Separation of Interests Clause now incorporated into Rule G of the York-Antwerp Rules 1994 will no longer be required (see also para. 9).

#### 4. Reasonableness

A Rule Paramount would be included making it incumbent upon the claimant to show that the sacrifice/expense was both reasonably made and reasonable in amount. To the extent that it is unreasonable, credit should not be given in G.A. This was always the position at common law (before the York-Antwerp Rules were introduced) - see *Anderson -v- Owen SS Co* [1884] 10AC and is now enshrined in the Rule Paramount of the York-Antwerp Rules 1994.

#### 5. Causation

The courts presently interpret Section 66 Marine Insurance Act 1906 to mean that the G.A. loss must be directly caused by the G.A. act even though the word “directly” is omitted before the word “caused” in the section. It is, however, rather unclear as to whether or not the cause should be reasonably foreseeable (see *McCall -v- Houlder Bros* [1897] 2 Com Cas 129 which is



authority for the proposition that it is not necessary for a particular loss to have been contemplated to be included in G.A. provided it is incidental to the General Average Act). We believe that losses should be reasonably foreseeable to be included in G.A. under the proposed re-definition.

In *Austin Friars -v- Spillers and Bakers* [1915] 3 KB 586 the defence was unsuccessfully raised that there can be no G.A. act if what was done consisted of inflicting a tort on a third person's property. Under the proposed redefinition of G.A. we do not believe that *Austin Friars* would be decided differently.

#### 6. *Loss through Delay*

Rule C of the York-Antwerp Rules 1994 provides that:

"Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever such as loss of market, shall not be admitted as General Average."

We would not wish to change this position except to include the words "port charges and associated expenses of being in port" after the word "demurrage".

#### 7. *The Effect of Fault*

Although the fault based regime of the Hamburg Rules is attractive, the Working Group felt that it would not be appropriate to include it in a re-drafted York-Antwerp Rules. However, the Working Group did not wish to provide any further exemptions for shipowners beyond those already contained in the Hague and Hague-Visby Rules. Recognising that a substantial number of general averages are caused by poor maintenance, particularly in the engine room, the Working Group wished to provide some incentive to owners to improve their record in this respect. The Working Group therefore recommends that the new Rules should include a clause which prevents shipowners from recovering contributions in respect of general average losses which are caused by breaches of the ISM Code, the STCW Convention (once it enters into force) and/or the Rules of the Classification Society with which the vessel is entered (if any). This would have the benefit of encouraging owners to comply with the International Safety Conventions (excluding all but Chapter IX of SOLAS (ISM)) which must surely appeal to Governments while at the same time offering a solution to the apparent injustice of asking cargo to pay for the consequences of the faults of the shipowner. Engine breakdowns arising out of latent defects which give rise to general average losses will continue to entitle shipowners to declare and recover general average contributions.

It is suggested that Rule D of the York-Antwerp Rules 1994 should be incorporated into any revised set of Rules with the following proviso:

"Provided that no party to the common maritime adventure shall recover any general average loss or be entitled to have made good any general average sacrifice or expenditure if and to the extent that such general average loss, sacrifice or expenditure is shown to have been directly

caused by or consequential upon any breach of the ISM Code or the STCW Convention or the Rules of the Classification Society with which the vessel is classed.

This Rule shall apply whether or not the party concerned is obliged by law or otherwise to comply with the ISM Code or STCW Convention and whether or not the vessel is in fact classed. If the vessel is not classed then for the purposes of this clause it shall be deemed to be classed with Lloyd's Register 100A1 and the Rules applicable to a vessel of that class shall apply to the vessel for the purposes of determining whether any breach of Class Regulations has occurred".

#### 8. *Onus of Proof*

##### (a) Claiming losses/expenditure

It is proposed that no amendment to Rule E of the York-Antwerp Rules 1994 should be made and that it should be incorporated into the new Rules as it currently stands. In other words the onus of proof lies upon the party claiming in general average and the time limits for the presentation of documentation etc. contained in Rule E of the York-Antwerp Rules 1994 shall be incorporated into the new Rules.

##### (b) Resisting claims for G.A. Contributions on the merits

We believe that, as at present, the paying party (usually H&M Underwriters and Cargo Underwriters) should prove the shipowner is not entitled to collect a contribution. However, this should be made fairer than at present by the introduction of an obligation to allow access to the vessel and relevant papers by the paying party's surveyor(s) (see para. 31 below).

#### 9. *Substituted Expenses*

We cannot recommend any changes to the way in which contributory values are calculated now.

We propose Substituted Expenses should be abandoned.

Rule F of the York-Antwerp Rules 1974 states:

"Any extra expense incurred in place of another expense which would have been allowed as General Average shall be deemed to be General Average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the General Average expense avoided."

The most usual substituted expenses scenario occurs when a vessel has suffered damage and put into a port of refuge where it will be necessary to carry out repairs before the voyage can be completed. The cost of discharging, storing and reloading the cargo would exceed the cost of on-carriage to destination and, under the York-Antwerp Rules as they stand, it seems quite reasonable that the shipowners should have the option of transshipping the cargo to destination and recovering the transshipment costs in G.A.

However, if it is intended to substantially amend the York-Antwerp Rules to remove from General Average expenses and sacrifices suffered or incurred

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once ship and cargo are no longer in the grip of a peril then it would follow that this usual scenario could not arise because the cost of discharging, storing and reloading cargo would not in any event be recoverable in G.A.

It might be said that there could be other occasions on which a right to claim substituted expenses would be useful but we cannot think of an example of such an occasion: the definition of General Average set out in Section 66 Marine Insurance Act 1906 is wide enough to include any reasonable sacrifice or expense: it is submitted that Rule F is only necessary because of the way in which the numbered Rules of the York-Antwerp Rules have drawn the limits of G.A. so clearly and so widely. In the circumstances, we cannot see the need to retain a substituted expenses rule. To abandon substituted expenses would merely be to restore the English common law position (see Lowndes & Rudolph *General Average and York-Antwerp Rules 12th Edition* para F.02 et seq).

#### *10. Jettison of Cargo*

At present Rule I of the York-Antwerp Rules provides that no jettison of cargo should be made good in General Average unless such cargo is carried in accordance with the recognised custom of the trade. No change to this position is proposed.

#### *11. Loss or Damage by Sacrifices for the Common Safety*

Rule II YAR 1994 allows loss and damage to be made good in G.A. when incurred for the common safety. It is not proposed this should be changed.

#### *12. Extinguishing Fire on Shipboard*

Rule III of the York-Antwerp Rules 1994 allows for the making good of damage done to a ship and cargo by water or otherwise, including damage by beaching or scuttling a burning ship in extinguishing a fire on board, to be made good as General Average (with a minor exception in respect of smoke damage): it is submitted that this is perfectly reasonable and falls within the revised definition of General Average.

#### *13. Cutting away Wreck*

Rule IV of the York-Antwerp Rules prevents the recovery in G.A. of the costs of cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident. Once again, this is consistent with the revised idea of G.A. if done when ship and cargo are in actual danger.

#### *14. Voluntary Stranding*

Rule V of the York-Antwerp Rules 1994 provides that intentional voluntary stranding for the common safety is a G.A. act and it is not suggested that this should change.

### 15. *Salvage*

In a talk on the 1994 York-Antwerp Rules delivered shortly after the final text of the Rules had been approved in Sydney, Ian Stevens of LCO said:

“For some reason or another, which I cannot readily ascertain, Rule VI – Salvage Remuneration - never seemed to get much of an airing. And yet if there is any rule which causes aggravation, this surely is it.

Prima facie, the wording of the rule is innocuous, particularly when the shipowner has incurred expenditure in the nature of salvage on behalf of all parties to the common adventure, and thereafter seeks to recover cargo-owner’s share or shares in General Average.

What really aggravates me - no I do not get hysterical - are those situations where each party to the adventure provides its own security to salvors and separately settles its proportion of the salvage remuneration. Why in the name of the York-Antwerp Rules, is it necessary to go through what may be a lengthy and costly process of re-apportioning the salvage settlements in General Average, often in instances where salvaged and contributory values are more or less identical? And why should one or more parties who may have had the expertise and good business sense to settle with salvors for a lesser remuneration than paid by other salvaged interests lose the benefit of their skill, because all payments are thrown into the melting pot of General Average?

All this nonsense only adds to the cost of General Average.

My section has seen a number of adjustments where the General Average expenditures comprised the salvage remuneration, and very little else. If the salvage had been excluded the adjustment fees would probably have been of limited amount, but the inclusion of the salvage has enabled a considerable inflation of the charges. Not good news for cargo or for underwriters.”

As is well-known, Rule VI was only introduced in the 1974 York-Antwerp Rules and has been accused of creating more work for General Average adjusters and more expenses for marine property underwriters than almost any other single change to the Rules in the last 50 years. Clearly this must be tackled, but how?

We propose the replacement of Rule VI by a clause along the following lines:

“(a) salvage payments (including legal fees associated with such payments) shall lie where they fall and not be brought into General Average save only that any amounts paid by one party to the general average in respect of the proportion (calculated on salvaged values and not G.A. contributory values) of another party or parties shall be apportioned between the parties to the general average in accordance with these Rules.  
(b) In paragraph (a) of this section references to salvage payments and the like expressions shall be construed as excluding payments under Article 14 of the 1989 Salvage Convention and similar provisions (including SCOPIC)”

Outright abolition of Rule VI would create a situation where a shipowner

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may have to pay the full amount of cargo's contribution and be unable to recover cargo's proportion. In many jurisdictions, such as the Netherlands and Spain, the shipowner is mandatorily or at the option of the salvor the debtor for the salvage remuneration. For this reason it is not felt that it would be practicable or fair to exclude salvage from G.A. completely.

All the foregoing applies only to Article 13 awards: as in Rule VI(b) YAR '94 Article 14 awards special compensation and SCOPIC remuneration should not be allowed in G.A.

*16. Damage to machinery and boilers*

Rule VII York-Antwerp Rules 1994, when read in conjunction with the new Rule Paramount requiring "reasonableness", would appear to be in accordance with the new definition of G.A. We assume that under the proposed re-definition of General Average (and, indeed, under the 1994 YAR) the "Alpha" [1991] 2 Lloyd's Rep 515 would, if heard today, be reversed.

*17. Expenses lightening ship when ashore and consequent damage*

Rule VIII of the York-Antwerp Rules 1994, emphasising, as it does, the fact that it does not apply to environmental liabilities, would once again appear to fall within the new definition of G.A. and, as such, would appear to be unobjectionable.

*18. Cargo, ship's materials and stores used for fuel*

The new Rule IX of the York-Antwerp Rules 1994 would appear on the face of it to be acceptable. Cargo etc. used as fuel will be made good only if used for fuel for common safety while ship and cargo are in actual danger.

*19. Expenses, wages and maintenance of crew and other expenses in the port of refuge*

As already discussed, we recommend Rules X and XI (a), (b) and (c) expenses should be disallowed in G.A. (but see para 33).

*20. Damage to cargo in discharging, etc.*

At present, Rule XII York-Antwerp Rules 1994 reads:

"Damage to or loss of cargo fuel or stores sustained in consequence of their handling discharging storing re-loading and stowing shall be made good as General Average when and only when the cost of those measures respectively is admitted as G.A."

The vast majority of cases where Rule XII allowances apply are in circumstances where cargo is discharged at a port of refuge. However, there are circumstances where damage to or loss of cargo, etc., might occur as a result of, for example, a ship-to-ship transshipment of oil at sea when salvage services are being rendered under a lump sum rather than a "no cure, no pay" contract. In such circumstances, it would appear reasonable to allow cargo losses in

transhipment to be recovered in G.A. However, if cargo losses are allowed, should also losses to the hull be allowed (such as, for example, ranging damage with the transhipment tanker)? We propose that the wording of Rule XII be amended to include wording to the effect that the damage/loss must occur to the cargo, etc., while the ship and cargo are in the grip of peril but not otherwise. The scope of this rule will be thus very substantially reduced.

### *21. Deductions from cost of repairs*

Under the new concept of G.A., some repairs will still be allowed (e.g. repairs consequent upon a deliberate grounding to avoid a worse peril or repairs to boilers and machinery made necessary by a bona fide and reasonable attempt to refloat a vessel aground). However, there seems no reason not to make deductions in respect of “new for old” where old material or parts are replaced. It should not be forgotten that this was the case in the 19th century and because of the difficulty in arriving at a suitable deduction, certain “customary deductions” were applied to all repairs other than to damage sustained on a vessel’s maiden voyage. The customary deductions were fixed at 1/6th for chain cables and 1/3rd for all other repairs and replacements except for anchors and materials and stores that had not been put into use which were allowed in full. A different scale of deductions, depending on the age of the ship, was approved by the A.A.A. in 1887 as a rule of practice with the introduction of iron and steel ships. This was slowly whittled away until we now have the present position.

We tentatively propose the introduction of a modern scale to make the rule operable which will require the input of a hull and machinery surveyor. Alternatively, we could go back to the scale contained in the 1924 or 1950 Rules. We propose that we should consult with the London Salvage Association on this topic.

Although this proposal is in accordance with the laws of many countries (e.g. see Art. 226 Greek Maritime Code) it is contrary to existing hull practice (new for old - no deductions) and could therefore be regarded as inconsistent with market practice but we feel this objection is outweighed by the need to deter “maintenance G.A.’s”.

### *22. Temporary repairs*

The comments relating to permanent repairs above apply equally to temporary repairs. Much of the criticism of Rule XIV arises out of the House of Lords decision in the “*Bijela*” [1994] A.C. which supported the accepted practice of average adjusters that temporary repairs of accidental damage effected at the port of refuge are allowable as G.A. up to the savings in general average allowances resulting therefrom. If temporary repairs at a port of refuge are no longer included in G.A. (as is proposed), there is no need to address this problem in the new Rules, as such temporary repairs will not be recoverable. The only sort of temporary repairs which might be recoverable are those consequent upon a G.A. sacrifice made while the vessel and cargo are in actual danger (such as, for example, deliberately grounding the vessel in order to save

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both vessel and cargo by averting a risk of total loss). Deductions should be made for materials used in temporary repairs and later discarded and sold for scrap or otherwise disposed of and credited to the claimant.

Therefore, the scope of the temporary repairs Rule will be drastically curtailed but not, it is suggested, extinguished altogether.

### *23. Loss of freight*

We think that it is only fair and reasonable that freight arising from damage to or loss of cargo shall be made good as G.A. either when caused by a general average act or when the damage to or loss of cargo is so made good. An example of this might be when cargo is jettisoned for the common safety. It is not felt that this is a loss which should be better borne by freight insurers.

### *24. Amount to be made good for cargo lost or damaged by sacrifice*

We have no particular argument with Rule XVI of the York-Antwerp Rules 1974 and 1994 on this topic. Contributory values and damage to ship will be dealt with in paragraph 25 below.

### *25. Contributory Values*

We cannot recommend any changes to the way in which contributory values are calculated now. Justice demands that G.A. contributory values should be assessed at the end of the adventure as stated in Rule G York-Antwerp Rules; we considered York-Antwerp Rules XVII and XVIII carefully. A number of questions arose including:

- (a) Should cargo value be assessed on the basis of the commercial invoice rendered to the receiver or, if there is no such invoice, from the cargo's shipped value (as at present)? We felt that on balance this is the most workable method of assessing cargo's contributory value.
- (b) Should the cargo value include insurance and freight at risk of "interests other than the cargo"? We decided it should not.
- (c) Should the ship's value be assessed without taking into account the beneficial or detrimental effect of any demise or time charter party to which the ship may be committed (as at present)? We felt the status quo should be preserved in this respect principally due to the difficulty and expense of arriving at a ship contributory value taking these factors into account.
- (d) Should the concept of "made good" be retained? If the concept of "made good" was to be abolished then provision would have to be made to ensure that the owners of sacrificed property only receive a fair proportion of the value of the sacrifice/expense which would otherwise have been "made good" and not 100%.  
This is done by "making good" at present, it is a fair system and should be retained.
- (e) Where cargo is sold short of destination should it contribute upon the actual net proceeds of sale (as at present)? We felt it should.

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- (f) Should cargo's contributory value be assessed only once it arrives at its eventual destination (which may be many hundreds of miles from the discharge port)? It is felt that despite the advantages of such a proposal from a cargo insurers' point of view that G.A., whether based on common safety or common maritime adventure, is primarily a shipping doctrine and that it is more suited to the sea voyage only where common interests face the same peril. Accordingly, contributory values should continue to be assessed at the discharge port.
- (g) Should Passengers' luggage and personal effects contribute in G.A. (at present they do not)? We felt that to ask these interests to contribute would greatly increase the cost of G.A.'s (and in particular, of obtaining security) for very little gain in fairness. Accordingly passengers' luggage and personal effects should not contribute in G.A.

26. *Undeclared or wrongfully declared cargo*

We have no particular argument with Rule XIX York-Antwerp Rules 1994 and recommend no change should be made to this rule.

27. *Provision of funds and interest*

It is proposed that commission on G.A. expenditure and the entitlement to pre-adjustment interest should be abolished.

(a) *Commission*

Historically the position at common law was to allow no commission for advancing funds in G.A.

The best argument we have heard for retaining Rule XX commission is that it is an historic custom in a substantial number of countries (although not the U.K.). For example, in Belgium, Lowndes & Rudolf say that the practice was to allow a commission of 2%, in Germany a customary commission of 1% was allowed on G.A. disbursements, while in the United States the figure was 2.5%. Commission came in before interest was introduced and was described as "the cost of raising funds". When interest was first introduced in 1924, the commission rule was not deleted and thus, in effect, the parties to G.A. are paying twice in respect of the same item. To tackle this criticism, adjusters now attempt to justify commission as being the administrative costs to a shipowner of dealing with a G.A. situation but then, in addition to that, seek sometimes to recover the same expenses under the heading "administration telexes etc." or "agency". This is often abused. We propose that administrative costs, telexes, telephones and other communication charges should be excluded from G.A. completely.

At Sydney an attempt was made to apply the 2% commission to all G.A. expenditure, but this was successfully opposed by observers from IUMI and LUA as being an unwarranted expansion of G.A. and the amendment was withdrawn.



(b) Interest

It is felt that G.A. Adjustments are taking too long to be published and that some incentive must be given to owners to co-operate with their adjusters more actively than at present. This should speed up the production of G.A. Adjustments to the benefit of all parties. It is therefore proposed that no interest shall be recoverable on general average disbursements until the publication of a final G.A. Adjustment. However, interest on general average contributions should from time to time be recoverable at the interest rate applied to judgments in the country of the currency of the Adjustment from the date of publication of the final Adjustment to the date of payment. It is recognised that the abolition of the 7% fixed rate will give rise to uncertainty but it was felt that fixing the new rate by reference to the currency of the Adjustment will be fairer in view of the very wide differences in the interest rates from country to country. In order to avoid "currency shopping" it may be prudent to oblige the Adjuster to publish the Adjustment in the currency in which more G.A. disbursements were incurred than any other.

It is recognised that this provision may give rise to increasing requests for payments on account in circumstances where underwriters may not know whether they are liable to contribute. Although it is not intended that special provision should be made for this situation in the rules, it may be necessary to reconsider the wording of general average guarantees and bonds to provide that payments on account shall only be made in circumstances where there is no doubt that the party demanding the payment on account is indeed entitled to receive his contribution.

28. *Jurisdiction*

At present, the Rules have steered clear on what jurisdiction should govern the adjustment and, in practice, we think this must remain a matter of contract between the parties.

29. *Time bar*

As is well known, there are a vast range of different time bars from jurisdiction to jurisdiction and Rule E of the 1994 York-Antwerp Rules is the first attempt to address this problem. Rule E is a rather watered-down version of the proposal put by LUA representatives at the BMLA G.A. Sub-Committee meetings which was that there should be a contractual time limit of one year within which parties claiming in G.A. should produce their adjustment and, if not accepted, should commence proceedings, failing which the claim becomes time-barred. The period of one year after discharge was chosen by analogy with the Hague and Hague-Visby Rules time limit. The argument against introducing a one year time limit was that frequently repairs were not completed within a year following completion of discharge. If the present proposals are adopted, repairs will form a smaller proportion of G.A. adjustments and so this argument will have less force. ILU statistics show that although 65% of G.A. Adjustments are produced within 2 years of the casualty

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*Appendix B - Eamonn Magee, General Average reform. The IUMI position*

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these comprise only 1/3 of the amounts claimed in G.A. We therefore propose a general contractual time limit for G.A. claims in an attempt to speed up the general G.A. process. A suitable clause might read:

“All parties to the general average and their guarantors (if any) shall in any event be discharged from all liability whatsoever in respect of claims for general average contributions unless judicial or arbitral proceedings have been instituted within a period of one year after the date upon which the general average adjustment has been published or six years after the general average act (whichever is the earlier). These periods may, however, be extended if the parties so agree after the cause of action has arisen.

This rule shall supersede any domestic law which provides for a different time limit to that specified herein for the commencement of suit in respect of claims for general average contribution between the parties to the general average and their guarantors. This rule shall not apply as between the parties to the general average and their insurers (except in so far as such insurers are acting as guarantors)”.

### *30. Currency Devaluation*

No interest should be liable to contribute more than the total contributory value of his property involved in the G.A. as assessed in the currency in which the cargo is insured at the time the Adjustment is published. Any shortfall shall be borne by the claimant(s) in G.A. without recourse to the concerned interest or his insurer.

### *31. Surveyors*

It is suggested that a new rule should be incorporated into the revised rules to the effect that no contribution shall be due from any party whose surveyor or surveyors has/have been refused access to the vessel and its documents and any documents relating to the vessel or its maintenance not on the vessel which are reasonably requested in writing to be inspected by any party or those acting on their behalf, with a view to determining whether or not that party shall be liable to contribute in general average. Whoever appoints the Surveyor should pay for him.

### *32. Drafting*

The Working Group proposes that the re-drafted rules should not be divided into numbered and lettered rules. The distinction is confusing and unnecessary. Views are invited.

### *33. Environment*

It is recommended that the existing position regarding the inclusion of environmental liabilities in G.A. as set out in Rule C and Rule XI(d) of the York-Antwerp Rules 1994 should remain. It is recognised that this will result in property underwriters continuing to bear the environmental liabilities they

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do at present but limited to only those incurred while the ship and cargo are in the grip of a peril. The environmental liabilities currently allowable under the 1994 YAR are:

- Environmental element in salvage awards by virtue of Article 13(i)(b) of the Salvage Convention 1989 - Rule VI York-Antwerp Rules 1974 as amended in 1990 and 1994.
- The four circumstances listed in Rule XI(d) York-Antwerp Rules 1994 which states:
  - “(d) The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:
    - (i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;
    - (ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X (a);
    - (iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI (b), provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;
    - (iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average.”

Because of the overriding proviso that to be allowed in G.A. an expense of sacrifice should be made or incurred “in time of peril” allowances under Rule XI (d)(ii), (iii) and (iv) will be considerably rarer than at present (see also para. 19).

#### 34. *Ballast G.A.'s*

The Working Party has considered whether owners should continue claiming G.A. contributions in respect of ballast voyages. Logically this should not be possible unless of course bunkers belong to someone other than the owner. However, by rule of practice B26 they are accepted as being recoverable by the market. It has been suggested to the Working Party by experienced adjusters that Rule B26 was intended to exclude ballast G.A.'s but unfortunately was incorrectly worded and as a result, for over 50 years the market has been paying up on ballast G.A.'s when the intention originally was that they should not have been doing so. It is therefore recommended a rule should be inserted specifically preventing ballast G.A.'s which would accord with current practice in some markets at present.

#### 35. *Adjusters' fees*

We regard this as outside our remit but we do have some thoughts which another Working Group may wish to consider.

A tariff might usefully be worked out for adjusters' fees to reflect a combination of:

- (a) time spent;
- (b) the number of items in the adjustment; and
- (c) the overall value of the adjustment

so that some way can be found to check that the fees are reasonable. Lawyers' fees can be taxed in accordance with (admittedly pretty complicated) criteria laid down by the courts but until June 1997 there appeared to be no way of reviewing an adjusters' bill without litigation (except by negotiation). We understand the AAA has recently established a costs taxation procedure for adjustments involving the London market which should go some way to addressing this problem. It may be helpful if this procedure could be extended to cover insurers and adjusters worldwide in due course.

### 36. *G.A. Security*

We regard this as outside the remit of this report.

## APPENDIX C

## LET'S BE REALISTIC

**Being a response to the views of certain underwriters who wish to emasculate the institution of General Average**

N. GEOFFREY HUDSON

*1. Introduction - the Golden Age.*

After an unrelenting campaign which began as soon as the doors closed on the Sydney Conference of 1994, the objecting group, having gained the support of the International Union of Marine Insurance (IUMI), have now set out their proposals in a series of papers presented to the Comité Maritime International (CMI). The main objective of the campaigners has been stated as a desire to "revert to the principle of common safety" by excluding all allowances for GA expenditure once the ship and cargo have been released from the "grip of peril". The idea of returning to a Golden Age when General Averages were simple and straightforward, dealing with sacrifices and expenses only when incurred for the safety of the imperilled property is very attractive. It has an immediate appeal to the philosophers among us (and to some academics as well).

I now quote from the CMI prospectus for the forthcoming Singapore Conference: "*General Average* The IUMI has approached the CMI with proposals to modify and simplify the York-Antwerp Rules, restoring the concept of common danger and relegating the current principle of common benefit to history".

I am sorry to disappoint you, but I have to tell you that this is sheer sophistry. There never was a Golden Age with such an international General Average system limited to measures taken for the common safety when in "grip of peril". If the campaigners wish this now to be the criterion, say so by all means, but do not try to occupy the moral high ground by re-writing history.

Here is the proof:

*English Law.*

In principle the position is as stated in the Marine Insurance Act, 1906: "*There is a General Average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure*".<sup>1</sup>

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\* Paper delivered at the Toledo Colloquium in September 2000.

<sup>1</sup> Marine Insurance Act, 1906, s.66(2).

But this has to be read in conjunction with a substantial body of case law. For example, let us examine the position with regard to the expenses of putting into and whilst at a port of refuge:

In *Attwood v. Sellar*<sup>2</sup> the ship put into a port of refuge in order to repair damage caused by General Average sacrifice.. The Court of Appeal unanimously confirmed the decision of the trial judge that the costs of port entry, discharging and warehousing cargo, reloading it and leaving the port “are at all events part of one act or operation contemplated, resolved upon, and carried through for the common safety and benefit and properly to be regarded as continuous” (per Thesiger L.J.). In other words, all those expenses are General Average.

In *Svendsen v. Wallace*<sup>3</sup> the ship put into a port of refuge in order to repair Particular Average damage and the cargo was discharged in order to enable those repairs to be effected (and also, as was established on appeal to the House of Lords, for the common safety of ship and cargo). After differing opinions had been expressed in the Queen's Bench Division and the Court of Appeal, the House of Lords finally decided that the costs of port entry and discharge of cargo were General Average; the cost of warehousing cargo was a Special Charge for its sole benefit, and the cost of reloading the cargo and leaving the port were to be charged to freight.

After these exhausting brushes with the law, it is hardly surprising that neither shipowners nor their underwriters felt inclined to send up any more test cases to trial: instead it was left to the Association of Average Adjusters to extract what principles they could from these judgements and to enshrine them in Rules of Practice<sup>4</sup>

### *The “Grip of Peril”*

As an epilogue to this section of my paper, I would invite you to note that when English law applies to the interpretation of Rule A of the York-Antwerp Rules it is not necessary that a ship should be “in the grip of peril” in order to justify a Master's decision to put into a port of refuge. In *Vlassopoulos v. British & Foreign Marine Insurance Co. (The “Makis”)*,<sup>5</sup> the learned judge said, as regards the application of Rule A generally: “It is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that may arise from a danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a General Average act”.

### *The Law in Continental Europe and The Americas.*

The restrictive practices which finally became established in the United Kingdom in consequence of *Svendsen v. Wallace* had no counterpart in the

<sup>2</sup> (1880) 5 Q.B.D. 286; 4 Asp. M.C. 283.

<sup>3</sup> (1885) 10 App. Cas. 404.

<sup>4</sup> Rules of Practice F8 to F13 inclusive (previously 17 to 21.

<sup>5</sup> [1929] 1 K.B. 187; 34 Com. Cas. 65.

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countries of Continental Europe, or even in the United States of America. The fourth edition of *Lowndes on General Average* (1888) summarised the position in the majority of maritime countries:

*"In most countries other than Great Britain the entire expense incurred by putting into a port of refuge was, and is, treated as General Average, i.e. the pilotage and port charges into the port and coming out, the cost of discharging the cargo, whether for its own safety or that of the ship, or both, the warehouse rent of the cargo so discharged and the cost of reloading it".*<sup>6</sup>

*"In most countries, when the putting into a port of refuge is treated as a General Average act, giving a right to compensation not alone for the bare cost of reaching a place of safety but to all expenses incident to remaining there and coming out again, the law recognises as one of those expenses the shipowner's loss for having to pay and feed the crew during this forced suspension of the voyage. In England it is, in practice, not so."*<sup>7</sup>

It should perhaps be emphasised that these are statements of the law applying in the latter part of the nineteenth century, i.e., prior to the steps taken to achieve uniformity by the adoption of the York-Antwerp Rules.

*So, which law applied?*

In those days before the general acceptance of the York-Antwerp Rules in the 1890's, the basis of General Average adjustment was the law and practice obtaining at the place where the common maritime adventure terminated, i.e., where ship and cargo parted company.<sup>8</sup> Thus, if a ship were regularly trading between Hull and Hamburg, the shipowner would be entitled to recover all his expenses in General Average, including the wages and maintenance of his crew, if the ship had to put into a port of refuge on its outward passage, but only the restricted English law allowances if a resort to a port of refuge occurred on the homeward passage.

*Entr'acte - Statistics*

The IUMI submission was accompanied by a lot of statistical tables which showed that General Average situations occurred when ships sustained serious accidents, and that the incidence of such accidents increased as ships got older; also that as ships got older, their market value became lower, and so cargo's proportion of General Average tended to become higher as ships got older.

These conclusions were supposed in some way to support the IUMI case for the curtailment of General Average allowances, but I have to confess that I am unable to see the connection. What, in my view, would be more beneficial

<sup>6</sup> Lowndes, 4th ed., s.45.

<sup>7</sup> Lowndes, 4th ed., s.57.

<sup>8</sup> In English law, this rule derives from *Simonds v. White* (1824) 2 B.& C. 805, and *Lloyd v. Guibert* (1865) L.R. 1 Q.B. 115.

in this debate, would be an examination of the consequences of such curtailment, not only as regards General Average, but also as affecting marine insurance and the law maritime. Let us now try and fill the deficiency.

### *Port of refuge situations*

First of all, having reminded ourselves that the IUMI proposals assume that General Average allowances will cease on arrival in safety, we need to ask ourselves: *at what point of time is safety achieved?*

There are a lot of English law cases touching on the question when a ship has arrived at a port "in good safety".<sup>9</sup> These are not directly relevant to our present enquiry, but at least they make it clear that safety is not necessarily achieved merely by entering the port of refuge, since if the ship be on fire, or leaking, or in danger of capsize, the danger is just as much present in port as it is when the ship is at sea, at least until the fire is extinguished; the leakage staunched, or the instability corrected. This is, of course, a question of fact, but it is one with which your average adjuster will be competent to deal, having had to decide similar questions throughout his working career.

Depending on the cause and extent of the danger, the next operation after arrival in the port of refuge, be it the discharge or shifting of cargo, or the carrying out of a temporary repair to make the ship watertight, or even the removal of the ship to a drydock for the same purpose, may be an operation necessary for the common safety, and hence the subject of General Average allowance<sup>10</sup> under any system of law.

We have also to recognise that there are instances when a ship with cargo, having arrived at a port of refuge, has to be removed to another port in order to effect repairs, since the necessary repairs cannot be carried out the first port. In such instances English judges in two well known salvage cases have awarded salvage in respect of the cost of towage from the first to a second port of refuge. In the first case, *The "Glancus"*,<sup>11</sup> Willmer J. said: "*Quite apart from the physical danger, there is this to be added, that until somebody got [the ship] to a place where the necessary repairs could be executed she was completely immobilised. It is no use saying that this valuable property.... is safe, if it is safe in circumstances where nobody can use it. For practical purposes, it might just as well be at the bottom of the sea. For these reasons, therefore, I am satisfied that [the ship] must be regarded as being throughout in a position of danger....*" The second case, *The "Troilus"*,<sup>12</sup> is of higher authority, having been appealed to the House of Lords, where Lord Porter said: "*The solution of the question whether a ship has reached a place of safety must, I think, depend upon the facts of each case, one of which is the facility*

<sup>9</sup> These date back to the days of Lloyd's S.G. form, in which the duration of the insured risk was defined by reference to the ship's voyage, terminating when "*she hath moored at anchor twenty-four hours in good safety*".

<sup>10</sup> For instances of (i) cargo handling operations in port, and (ii) temporary repairs in port: necessary for the common safety, see *Hudson: the York-Antwerp Rules*, 2nd ed. pp. 159/162 and 201.

<sup>11</sup> (1948) 81 Ll. L. 262.

<sup>12</sup> [1951] A.C. 820.



*for repairs at the place in question, and another, the possibility of safely discharging and storing the cargo and sending it on to its destination and the danger of its deterioration. It is not a sufficient answer to say that she can lie in a particular position of physical safety. It must be remembered that in every voyage of a merchant ship carrying cargo the interests of both ship and cargo have to be borne in mind."*

So far as General Average is concerned, it is to be noted that both by practice<sup>13</sup> and under the York-Antwerp Rules (Rule X(a), second paragraph) the cost of removing the ship from a first to a second port of refuge is to be allowed as General Average whenever repairs, necessary for the safe prosecution of the voyage, cannot be carried out at the first port

We cannot be sure to what extent the IUMI campaigners will wish to clarify their proposals to take care of situations such as these, but we can at least recognise that there is plenty of room for contention.

## 2. *The likely consequences if the IUMI proposals should be put into effect.*

### A. *Shipowner's expenditures at a port of refuge*

Let us now look at the potential expenses which the shipowner is likely to incur at a port of refuge after that point in time, whenever it may be, when under the IUMI proposals the ship will be deemed to be in safety. How shall we deal with, for example:

#### 1. The cost of discharging cargo?

Except when the voyage is frustrated, or the facts are such that the shipowner is entitled to abandon the voyage (a situation which we examine later), there are generally three possible reasons why it may be necessary to discharge the cargo, or a part of it, at a port of refuge:

- a) For the common safety, as for example, when there is a fire in the cargo, and it is necessary to discharge it in order to get at the seat of the fire and extinguish it.
- b) For the preservation of the cargo which has suffered damage, e.g. by wetting, and it is necessary to discharge it in order to identify the affected cargo and recondition it.
- c) To enable repairs to be effected to the ship. e.g. when the bottom and tank-top plating has been damaged, and it is necessary for the cargo in way to be discharged.

Under the present regime (assuming the Hague-Visby Rules and the York-Antwerp Rules 1994) the cost of discharging in situation (a) will be General Average; in situation (b) a Particular Charge on cargo, and in situation (c) it will also be allowable in General Average, provided that the repairs to be effected to the ship are such as to be necessary for the safe prosecution of the voyage. Of course, there are also instances when the facts could justify an allowance under two or all three of these headings, for example when a ship is

<sup>13</sup> A.A.A. Rules of Practice C3 and C4.

leaking so heavily that the discharge of cargo is necessary for the common safety and for the cargo's own preservation and to enable repairs to be made to the ship's bottom. In these circumstances it has been the invariable practice of average adjusters to charge the cost of discharging to General Average, because both ship and cargo clearly benefit thereby. Indeed, by A.A.A. Rule of Practice F13, "*no distinction [is] to be drawn in practice between discharging cargo for the common safety of ship and cargo, and discharging it for the purpose of effecting at an intermediate port or ports of refuge repairs necessary for the prosecution of the voyage.*"

Now let us consider the position as it may be under the IUMI proposals: In situation (a), when the discharge of cargo is necessary for the common safety, we cannot at this moment be sure what the campaigners have in mind; in situation (b) we may assume that we may still charge the cost of discharging to cargo interests, and in (c), when the discharge of cargo is necessary solely to enable damage to the ship to be repaired, the position is particularly uncertain, since we do not know whether the campaigners will be content to let Rule of Practice F 13 stand.

If (by reason of a change in the policy conditions or otherwise) the effect of this Rule of Practice is abrogated, then we have to look at a situation when the cost of discharging cargo will not be allowable in General Average, even though those repairs, for which the discharge of cargo is required, may be imposed on the shipowner by statute law, the I.S.M. Code or his obligations under the contract of carriage.

So how, if at all, is the shipowner in these circumstances to obtain reimbursement for this expense?

There is no direct authority on this question under English law, but in *The "Medina Princess"*<sup>14</sup> a good deal of thought and argument was directed to the question whether the cost of discharging cargo might be taken into account as part of the "reasonable cost of repairs". However, the facts in that case were different, in that at the time the cost of repairs had to be assessed, the voyage had been properly abandoned and the cargo had already been discharged by cargo interests at their own expense. The shipowner failed in that case. But....

One of the earlier law cases cited in argument was *Field Steamship Co. v. Burr*<sup>15</sup> where it was held that the shipowner could not recover from his hull underwriters the expense he had been obliged to pay for the cost of removing putrid cargo (properly rejected by consignees) at the port of destination, even though the shipowner could not effect damage repairs until the useless cargo had been removed. The judge in the "*Medina Princess*" said: "*I do not regard Field's case as authority for the proposition that in no case where the discharge of cargo is necessary to repair the ship (as for example where the adventure is to continue) can the cost of discharging that cargo be recoverable as part of the cost of repairs to the ship.*"

The matter is admittedly uncertain, but on the basis of this *dictum* I am inclined to think that if the question were fought in the English Courts (as

<sup>14</sup> *Helmsville Ltd. v. Yorkshire Insurance Co.* [1965] 1 Lloyd's Rep. 361 pp. 516/523.

<sup>15</sup> [1898] 1 Q.B. 821; (C.A.) [1899] 1 Q.B. 179.

assuredly it would have to be if the IUMI proposals were put into effect) the ultimate result would be a decision that, absent any basis for allowance of the cost as General Average, the shipowner would be entitled to recover the necessary cost of discharging cargo at a port of refuge from his hull underwriters as part of the reasonable cost of repairing the ship.

## 2. The cost of warehousing the cargo and its insurance whilst ashore

To my mind, the compelling arguments which favour the treatment of the cost of discharging (in the absence of a General Average solution) as part cost of repairing the ship clearly do not apply to the cost of storage and care of cargo (including watchmen, other security measures and insurance) whilst it is ashore. That is a part of the carrier's duties under the contract of affreightment, and as we know English law (in the absence of fault) gives the shipowner or carrier the right to charge the cargo with expenses reasonably incurred for its preservation.<sup>16</sup> Assuming that the shipowner wishes to assert his claim in this respect, he will be protected if he takes security under the usual forms from cargo receivers and/or cargo underwriters, since both LAB 77 and the forms of underwriters' guarantee "undertake to pay...any contribution to General Average and/or Salvage and/or Special Charges which may hereafter be ascertained to be due..."

Consequently in the event of the IUMI proposals taking effect, I would expect shipowners to pursue this source of reimbursement, and if they should fail to recover their reasonable charges in this respect from cargo interests, I have no doubt that they would call upon their P.& I. Clubs to help them out.

## 3. The cost of reloading cargo

Under English law, as we have seen, the cost of reloading cargo discharged at a port of refuge formed a charge on freight. As things were in those days, if freight was at the risk of the shipowner and was insured, then a claim would lie on the policy under the Sue and Labour Clause for expenses (other than normal voyage expenses) incurred by the shipowner to get the cargo to destination and thereby earn his freight.<sup>17</sup> But nowadays insurances are not written on Lloyd's S.G. form, and the Institute Time Clauses, Freight, 1/11/95 does not contain a Sue and Labour Clause. It is, I think, outside the ambit of this paper to consider whether a Sue and Labour obligation might be inferred on the ground of reciprocity,<sup>18</sup> but I have no doubt that if the matter came to be tested, it would be a case of quite unique complexity.

On the other hand, when freight is pre-paid, the party who runs the risk is either the charterer or the concerned in cargo, and in those circumstances the shipowner has the same rights and potential remedies as he has respecting the recovery of the cost of cargo storage - see para. 2.

<sup>16</sup> For a discussion on the nature and extent of Special Charges on Cargo, and their recoverability under policies of insurance, see *Hudson, Special Charges on Cargo*, [1981] 3 LMCLQ 315 (pt. 1) and 471 (pt. 2).

<sup>17</sup> See *Lee v. Southern Insurance Co.* (1870) L.R. 5 C.P. 397.

<sup>18</sup> cf *The Netherlands Insurance Co. Est 1845 v. Karl Ljunberg & Co.* [1986] 2 Lloyd's Rep. 19., a case of cargo insurance subject to the Institute Cargo Clauses, 1/1/63.

#### 4. Outward port charges.

Once again, by English law, in the circumstances that we are considering, the expense of leaving the port of refuge is chargeable to freight.

But here the shipowner may have an alternative argument - more in keeping with present-day practice. In the absence of a General Average situation, most underwriters would accept that when the ship enters a port specifically to effect repairs for which underwriters are liable, then in the absence of any General Average situation and provided the ship does not load a new cargo in the port of repair, the assured may reasonably claim that both the inward and outward port charges form part of the reasonable cost of repairs. Now, under our hypothetical situation when the IUMI proposals have cut off all General Average allowances at the point when the ship arrives "in safety", we may have the following:

Inward port charges \$ 12,000 plus outward port charges	\$10,000
chargeable in full to hull underwriters:	\$22,000
<u>credit:</u> inward port charges allowable in General Average	\$12,000
Net claim on hull underwriters	\$10,000 <sup>19</sup>

This would give the shipowner a full recovery, the inward expenses being allowed in General Average, and the outward as part of the claim on hull underwriters.

#### *B. Frustration/abandonment of the voyage.*

So far we have only touched the surface of the problems which will need to be tackled if the IUMI proposals come into effect. Now we should look at some of the more serious consequences which will undoubtedly follow, affecting the safe prosecution of the voyage and the completion of the maritime adventure.

In the first place the proposed curtailment of General Average allowances will remove the positive incentive which the York-Antwerp Rules provide to encourage a shipowner to take the proper measures to fulfil his obligations under the contract of carriage.<sup>20</sup> If I may adapt an old proverb, I should like to say in this respect that the Law Maritime relies upon the stick, or the threat of it; whereas the York-Antwerp Rules offer a carrot.

But what of the circumstances where the Law Maritime recognises that it is no longer reasonable or practicable to continue the voyage?

The contract of carriage is said to be frustrated when by reason of some supervening event the fundamental purpose of the contract can no longer be achieved, or its performance is rendered impossible. Either party to the

<sup>19</sup> I am indebted to my fellow adjuster Mr. C.S. Hebditch for this suggestion.

<sup>20</sup> These obligations are stated in Abbott on Shipping, viz: "Where a ship is damaged and obliged to put into an intermediate port for repairs, it is the duty as well as the right of the shipowner, if he can repair his ship without unreasonable sacrifice and within a reasonable time, to repair his ship and carry the goods to their destination. This is the purpose for which he has been entrusted with the cargo, and this purpose he is bound to accomplish by every reasonable and practicable method". This statement was approved by Kennedy J. in *Hansen v. Dunn* (1906) 11 Com. Cas. 100.

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contract may claim this to have occurred, on the facts known to him, but unless the other party can be convinced of the correctness of the facts on which the claim is based, the consequence is likely to be that the situation will stultify while the legal arguments multiply.

For his part the shipowner may claim to abandon the voyage on the ground (a) of frustration, or (b) that the ship has become so damaged by an excepted peril that the cost which would be required to rescue her from that peril and to repair her so as to enable her to carry on the cargo would exceed her value when repaired (and some authorities add) plus any freight still to be earned on the current voyage.

Quite apart from destroying the incentive on the shipowner to repair his ship at the port of refuge and to continue on the voyage (which it is his duty to do if he can within the commercial parameters set out in the previous paragraph), the proposed curtailment of General Average allowances at a port of refuge will directly increase the number of valid abandonment cases by reason of the arithmetic involved. Let me demonstrate this by figures:

## EXAMPLE

	Expense	GA/YAR	GA/IUMI
Cost of entry into port of refuge	\$10,000	\$10,000	\$10,000
Cost of discharging cargo	\$250,000	\$250,000	nil
Cost of storage	\$500,000	\$500,000	nil
Cost or re-loading cargo	\$250,000	\$250,000	nil
Cost of repairs (incl. Drydocking)	<u>\$1,000,000</u>		
Totals	<u>\$2,010,000</u>	<u>\$1,010,000</u>	<u>\$10,000</u>

Value of ship, sound (repaired) \$2,000,000

Value of cargo (incl. freight prepaid) \$3,000,000

*GA per YAR apportioned*

Ship sound value	\$2,000,000		
deduct: cost of repairs	<u>\$1,000,000</u>		
	\$1,000,000	pays	\$252,500
Cargo value	<u>\$3,000,000</u>	»	<u>\$757,500</u>
	<u>\$4,000,000</u>	pays	<u>\$1,010,000</u>

So, when General Average is adjusted according to the York-Antwerp Rules, the following expenses are taken into account in order to test whether the ship is a commercial total loss:

Ship's proportion of General Average	\$252,500
Cost of repairs	<u>\$1,000,000</u>
	<u>\$1,252,500</u>

The ship is not a commercial total loss, and the shipowner is not entitled to abandon the voyage.

*Appendix C - N. Geoffrey Hudson, Let's be realistic**GA per IUMI apportioned*

Ship, as above	\$1,000,000	pays	\$2,500
Cargo	<u>\$3,000,000</u>	»	<u>\$7,500</u>
	<u>\$4,000,000</u>	pays	<u>\$10,000</u>

Accordingly, if the IUMI proposals should govern the adjustment of General Average, the expenses to be taken into account are:

Ship's proportion of General Average	\$2,500
Cost of repairs	\$1,000,000
Other expenses (apart from GA)	
to make all ready to proceed on the voyage	<u>\$1,000,000</u>
	<u>\$2,002,500</u>

On these figures the ship is a commercial total loss, and the shipowner is entitled to abandon the voyage.

The other (perhaps more accurate) way of expressing this proposition is by saying that in computing the expenses to be taken into account to ascertain whether he is entitled to abandon the voyage, the shipowner is obliged to give credit for the proportion due from other interests to any of his expenses allowable in General Average.

When the contract of carriage is frustrated, or when the shipowner is entitled to abandon the voyage, cargo-owners have to collect the cargo (discharging it from the ship if necessary) and take it to the intended destination at their own expense. When they are insured, the cost involved may be recovered from their underwriters under the Sue and Labour Clause (at least in principle) or by virtue of Clause 12 - the Forwarding Charges Clause - contained in the Institute Cargo Clauses, 1/1/82.<sup>21</sup>

### *C. Saving the adventure by the forwarding of cargo.*

When a ship sustains a major casualty and puts into a port of refuge to discharge her cargo and carry out the necessary repairs, cargo interests frequently chafe at the delay occasioned thereby. When the York-Antwerp Rules 1950 or 1974 applied it was often possible to overcome this irritation by means of a "non-separation agreement", whereby the cargo could be forwarded to its destination without delay, the cost being charged to General Average in substitution for the expenses saved, viz. the storing and re-loading of the cargo. The advantages to both the shipowner and cargo interests were outlined in a recent case,<sup>22</sup> thus: "*Cargo-owners can promptly recover their cargo in circumstances where substantial delay might otherwise ensue while the shipowners, anxious to earn their freight, store the cargo, carry out repairs and then resume the voyage. From the shipowners' point of view, they are able*

<sup>21</sup> The road to recovery is reasonably clear if the cargo is insured with the Institute Cargo Clauses (A), but may be more rocky with the (B) and (C) forms, for reasons which are explained in *Hudson, The Institute Clauses*. 3rd. ed. 1999. pp. 46/47..

<sup>22</sup> *The "ABT Rasha"* [2000] 1 Lloyd's Rep. 8, per David Steel J.

*to treat the General Average situation as continuing when otherwise it would terminate and recover contribution pro rata for value for post-separation expenses which would otherwise fall entirely on them...."* Under the York-Antwerp Rules 1994, the need to obtain a special agreement was obviated by an addition to Rule G. This was also approved by the judge in the case just cited, thus: "*The automatic adoption of a non-separation agreement (subject to appropriate notification) is obviously convenient*".

The IUMI proposals will do away with all that, since the campaigners will have no allowances in General Average at a port of refuge, and moreover they would abolish the principle of substituted expenses altogether. Furthermore, since the voyage is still in being, the cargo-owners, where they have the right to collect their cargo from the port of refuge (as in the United States and Canada), have to do so at their own expense.

### 3. Conclusions

The honest campaigners from IUMI had, I think, two main aims in view:

- (a) to simplify a system which they saw as archaic, slow and expensive; and
- (b) to save themselves (underwriters) some money

On (a) I believe I have demonstrated that, so far from making matters simpler, their proposals would introduce new complications to the disadvantage of all parties:

- shipowners would lose some of their allowances at a port of refuge, most of which they could obtain by the application of any established maritime law other than that of England
- cargo-owners would have to meet unexpected claims in port of refuge cases, and would be seriously prejudiced whenever shipowners were contemplating the abandonment of the voyage
- all parties (and their underwriters) would find themselves facing new situations and unexpected claims on account of the uncertainties which I have outlined.

Some of the demands for a more speedy procedure have already been met by the changes made to the York-Antwerp Rules at Sydney in 1994. As for the "run-of-the-mill" port of refuge cases, Hull Underwriters have it within their power to remove the need for a General Average apportionment in all but the most serious cases by agreeing to a "General Average absorption clause", undertaking for a nominal premium to pay 100% of all claims for GA expenditure, up to a figure of, say, 5% of the insured value of the ship. No hassle.

On (b), I believe that the under the IUMI proposals the extent of argument (very likely involving heavy legal expense) that could occur in all these instances, and the increase in the number of cases involving frustration of the contract and/or abandonment of the voyage would give any underwriter pause for consideration. But I shall leave them with this thought:

Several years ago, I was talking to a highly respected Lloyd's underwriter. I asked him why he continued to write contentious risks. "My boy", he said, "no underwriter ever became rich by writing restricted conditions."

Let's be realistic.

# **MARINE INSURANCE**

## **THE CMI REVIEW INITIATIVE**

It is over 100 years since maritime lawyers last made a concerted and international attempt to agree the harmonisation of certain basic issues of marine insurance law. That attempt took the form of the Buffalo Conference of the International Law Association in 1899, which in turn led to the adoption of The Glasgow Marine Insurance Rules in 1901. Even the Glasgow Rules, however, appear to have been abrogated by disuse, their significance no doubt dimmed by the appearance of Sir MacKenzie Chalmers' masterly 1906 UK Marine Insurance Act.

Throughout the 19<sup>th</sup> century, marine insurance was practised in most parts of the world under the influence of the 1906 UK Act. Regional initiatives such as those in Scandinavia have made their mark in seeking both certainty and reform. But for many countries that inherited the 1906 Act directly or indirectly, marine insurance law has remained static and relatively stable, and that stability has been reflected in the comparative paucity of reported marine insurance cases in most maritime jurisdictions.

Unfortunately, however, the stability of the law of marine insurance has not been mirrored in a like stability in marine insurance practice. Many sectors of the industry now face survival challenges. Perhaps it was these same hard times that in turn prompted an evaluation of the national legal regimes in which marine insurance operates. In the 1990's, initiatives were started in the USA, Australia, New Zealand, China, and South Africa (to name but a few) to examine domestic marine insurance laws. And in those countries which are closely influenced by the 1906 Act, the evaluation began with a re-examination of whether or not the 1906 Act continued to serve the industry in the changed times and market circumstances of the approaching 21<sup>st</sup> century.

In the knowledge that such national review processes were building momentum, the CMI in 1998 agreed to co-host a Marine Insurance Symposium with the Scandinavian Institute of Maritime Law in Oslo. The symposium took the form of an exploration of common ground and diversity in issues of ship insurance. It did not deal with cargo insurance, nor did it seek answers. It was primarily an academic discussion forum. But it served to identify a number of issues of marine insurance as deserving of further research. These were summed up by CMI President Patrick Griggs at the end of the symposium as:



1. Insurable interest
2. Insured value
3. Ordinary wear & tear and inherent vice
4. Inadequate maintenance, fault in design, construction or material
5. Duty of disclosure, before and during currency of cover
6. Consequence of loss of class, unseaworthiness and breach of safety regulations
7. Warranties - express and implied, consequences of breach and alteration of risk
8. Change of flag, ownership or management
9. Misconduct of the assured during the period of cover
10. Responsibility for conduct of others - identification
11. The duty of good faith
12. Management issues, especially the ISM Code

The upshot of the Oslo Symposium was a decision by the CMI that there was sufficient indication of an emerging national diversity on these and other issues of marine insurance to warrant an international review of the law of marine insurance. An International Working Group ["IWG"] was set up under the chair of Dr Thomas Remé and comprising

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The composition of the International Working Group was designed to represent both underwriters and lawyers, the latter having a good mix of academics and practitioners, drawn from both common law and civilian roots.

At an early stage, the IWG decided to expand its purview from examining only ship (H&M) insurance as had been done in Oslo, and to look also at cargo insurance. Under the guidance of Dr Remé, a CMI Questionnaire was sent out to member associations in 1999. A copy of the questionnaire follows. The daunting task of evaluating the replies was undertaken by Prof Trine-Lise Wilhelmsen. To ensure focus, the IWG resolved to concentrate initially on four items which were identified as the most in need of attention:

- The duty of disclosure
- The duty of good faith
- Alteration of risk, and
- Warranties

Prof Wilhelmssen's report dealing with these issues and analysing the questionnaire replies in relation to them, is published after this short introduction as part of the CMI's source materials for Singapore. The Questionnaire, the replies received, Prof Wilhelmssen's report and the Discussion Paper to be prepared for Singapore will be put on the CMI's website at <[www.comitemaritime.org](http://www.comitemaritime.org)> in the near future, under the section of the site dealing with work in progress.

The review process has benefited enormously from the full replies received from those national associations who have replied, and of course by the comprehensive analysis of Prof Wilhelmssen. It received an unexpected boost from the attendance of delegates from 34 countries at a very worthwhile conference entitled "Marine Insurance at the Turn of the Millennium", convened by the European Institute of Maritime and Transport Law at the University of Antwerp in November 1999. Prof Marc Huybrechts, the organiser *extraordinaire* of that conference, had the conference papers published by Intersentia <[www.intersentia.be](http://www.intersentia.be)>. The two Antwerp conference volumes contain a wealth of research material on marine insurance.

The Australian Law Reform Commission has also added significantly to international scholarship with a comprehensive report on the Australian review of the 1906 UK Act (enacted in Australia in 1909). This report is available on the internet at <[www.alrc.gov.au](http://www.alrc.gov.au)>. The ALRC will be represented at Singapore to share their research experience. They are hoping that the CMI will continue the review process toward the goal of at least providing the fabric for international uniformity in the reform now contemplated by many nations.

The IWG is also very concerned that its efforts should take into account the important role which the marine insurance industry has to play in improving levels of safety at sea. Harmonisation of marine insurance laws would need to ensure that the new law of marine insurance develops close synergy with international safety measures such as the ISM Code and the STCW and other safety conventions.

Any harmonisation process will also have to take into account concerns relating to competition and anti-monopolistic provisions, especially in the arena of the European Community.

### **The way forward - To Singapore and beyond**

The CMI Singapore 2001 Conference will devote two full sessions to marine insurance. The aims of the conference in relation to marine insurance are as follows:

- (a) To present to delegates the results of the investigations of the IWG, focussing initially on the four topics dealt with by Prof Wilhelmssen's report - Disclosure, Good Faith, Alteration of Risk and Warranties.
- (b) To invite discussion on these issues, with input from the appointed speakers representing national associations, and, where possible and appropriate, from the floor.

- (c) To present to delegates goals identified by the IWG as worthwhile and meaningful ends for the process of review now underway.
- (d) To seek guidance from the discussions as to whether there is broad support within the practices of maritime law and underwriting, for the harmonisation of the laws of marine insurance by means of an appropriate international instrument.

Two factors are crucial to this process:

- The IWG is conscious that for any attempt at harmonisation to have even the slightest chance of success, it will need the broad acceptance of maritime lawyers, underwriters and the shipping industry generally.
  - It is highly unlikely that harmonisation will be attempted or is even desirable in relation to all issues of marine insurance.
- (e) To put to the delegates for discussion and approval the mode which the IWG considers appropriate for achieving harmonisation of certain laws relating to marine insurance.

The present view of the IWG is that the way forward may be found not in a convention, but rather in a set of contractual Model Laws on Certain Issues of Marine Insurance, which can be supplemented and or altered far more flexibly than can a convention.

- (f) To submit the expressed wishes of the delegates to the Assembly at the conclusion of the Singapore conference, and there to seek a mandate for the IWG:
  - either to shelve further CMI initiatives to achieve harmonisation in the laws of marine insurance; or
  - to continue the CMI's marine insurance review in a manner which will identify issues of marine insurance that are worthy of harmonisation and those that ought best to be left to national interpretation, and where appropriate, divergence; and
  - to proceed toward such harmonisation by the preparation of draft clauses for CMI Model Laws on Certain Issues of Marine Insurance; and thereafter
  - to circulate such Model Laws to national associations and all interested parties for comment before being taken forward to consideration for adoption by the Assembly of the CMI at its next conference.

The IWG believes that the debate should be fuelled by having a paper on the table for delegates to consider and debate (albeit a paper with very tentative proposals). The group is thus in the process of preparing a discussion paper with proposals relating to the way forward, to the specific content of the issues presently under review, and (very tentative, and early) suggested alternate drafts for Model Law clauses. This discussion paper will be sent out to national associations and to interested persons during December 2000, and will be included with preparatory papers sent to each registering delegate.

All are invited to join the CMI's marine insurance review process by contacting any member of the IWG. The chair of the Singapore sessions, Prof

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*The CMI review initiative*

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John Hare, can be contacted at <jehare@law.uct.ac.za> or by fax to +27(21)761 4953. If any national associations who have not yet replied to the marine insurance questionnaire would still care to do so, they are welcome to send their replies, preferably by e-mail, to Prof Hare who will then ensure that late replies are nevertheless posted on the CMI website.

JOHN HARE, Chairman

**CMI QUESTIONNAIRE ON MARINE INSURANCE - 1999**

1. *Does your country's national law contain rules on marine insurance? If so, are they contained in an act? Please supply a copy of the relevant act.*
2. *If your country's national law contains rules on marine insurance exclusively in the form of court decisions, what is the shortest summing up of the main rules? Please supply a copy of that document.*
3. *If your country's national laws contains rules on marine insurance in the form of an act, does that apply to hull insurance only or to cargo insurance only or to both branches?*
4. *If your country's national laws contains an act on marine insurance, please indicate which rules are obligatory. May we assume that all rules which are not obligatory are directory?*
5. *Has your country's marine insurance market adopted standard insurance conditions (like the English Institute Time Clauses Hulls and Institute Cargo Clauses) If so, please supply a copy of such conditions.*
6. *Does your country's national law or, in the absence of such law, do the Standard Insurance Conditions used in your insurance market*
  - 6.1 *Require that the insured has an insurable interest? If so, is it required when entering into the contract of insurance or at a later stage? Has this to be an economic and legal interest?*
  - 6.2 *Result in termination of cover in the event of a breach of a warranty in the policy, regardless of whether the breach of warranty caused the loss which is the subject of the claim? If not, what is the effect of a breach of warranty?*
  - 6.3 *Impose upon the insured a duty of disclosure and, if so, only before the commencement of cover or during the currency of cover? If so, what is the nature and extent of that duty and what is the sanction for its violation?*
  - 6.4 *Provide a rule on misconduct of the insured during the period of cover; if so, please outline what is considered misconduct and what is the sanction.*
  - 6.5 *Provide that the insured has to take responsibility for the conduct of others including an insurance broker? If so, for whom.*
  - 6.6 *Provide that either the insured or the insurer or both of them have a duty of good faith? If so outline the extent of that duty.*
  - 6.7 *Provide rules on the insured value? If so please state at which time the subject of insurance is to be valued and how.*

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*The CMI Questionnaire*

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- 6.8 *Allow the insured to increase the risk during the currency of cover with or without informing the insurer and with or without obligation to pay an additional premium?*
- 6.9 *Provide for exclusions from cover, in particular*
  - 6.9.1 *For political risks like war, mines, strikes .For nuclear risks.*
  - 6.9.2 *For arrest or detainment.*
  - 6.9.3 *For ordinary wear and tear (or, in cargo insurance, inherent vice).*
  - 6.9.4 *For inadequate maintenance, fault in design, construction or material.*
  - 6.9.6 *In hull insurance for unseaworthiness, loss of class or in hull or cargo insurance breach of safety regulations.*
  - 6.9.7 *In hull insurance for change of flag, ownership or management.*
  - 6.9.8 *For management issues (like non-compliance with the ISM code).*
- 6.10 *Provide cover for total or partial loss or damage to the subject matter insured, contribution in general average and expense for ascertaining or averting or reducing loss or damage.*
- 6.11 *Provide that the insurer is automatically subrogated to any claim against a third party the insured may have because of loss or damage covered or has the insured to assign such claim to the insurer?*
- 7. *What is the period of limitation for a claim under a policy?*

## **DUTY OF DISCLOSURE, DUTY OF GOOD FAITH, ALTERATION OF RISK AND WARRANTIES**

### **AN ANALYSIS OF THE REPLIES TO THE CMI QUESTIONNAIRE**

TRINE-LISE WILHELMSEN\*

#### *I. Introduction*

The background for this paper is the ongoing work in Comité Maritime International (CMI) concerning the harmonization of marine insurance clauses. By marine insurance is here meant insurance for hull and cargo. CMI has identified 12 issues of marine insurance as a basis for this work towards harmonization. The attempt to harmonize marine insurance includes all the nationalities with membership in CMI. The status of the process as of today is that most (but not all) national CMI offices have answered a questionnaire concerning the 12 issues of marine insurance and the legislative framework. These answers are now being analyzed in order to identify areas creating difficulties in the marine insurance markets around the world and to seek to identify either the solution that is most frequently adopted or to suggest a solution which, on analysis, appears practical and sensible.

As a part of the work towards harmonization, four of the 12 issues will be presented on this conference. The issues are duty of disclosure, duty of good faith, alteration of risk and warranties. The presentation of these issues include both the common law and the civil law perspective. The paper thus include the legislation in UK, USA, Canada, Hong Kong, Australia, New Zealand, South Africa, Norway, Sweden, Denmark, Finland (Scandinavia), Germany, Belgium, The Netherlands, France, Spain, Portugal, Greece, Italy, Croatia, Slovenia, Israel, Venezuela, China, Japan and Indonesia.<sup>1</sup>

As mentioned, the synopsis of the issues is based on the material from the different CMI nations. As the extent of the answers to the questionnaires vary substantially, so will the description of the different regulations in this presentation. To the extent that the questionnaires were enclosed with an English translation of the regulation, it has been possible to supplement the questionnaires with the original legal sources. However, as many nations have

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<sup>1</sup> In addition to the CMI questionnaires, the material for this paper was gathered in connection with a marine insurance conference held in Oslo in June 1998. This material was collected with the help of CMI representatives in different civil law countries. I especially wish to express my gratitude to Avv. Francesco Siccardi, Dr. Tom Remè, Dr. P Sotiropoulos, and Dr. Hermann Lange for providing me with the necessary documentation and explanations.

not supplied such translation, the only material available for these nations is the answers to the questions. This material is in no way sufficient to answer the more detailed elements of the issues that will be discussed in this paper.

As a starting point, only public legislation and standard marine insurance clauses will be included in the presentation. Also, it may be pointed out that even if the material covers a lot of legal systems, main focus will be given to the UK and US legislation for common law and to the Scandinavian perspective for civil law. There are several reasons for this. One reason is of course that the material from these countries is easily accessible, and that there are no language problems. Some of the other participants in the work have, as mentioned, not included English translations of their legislation and/or standard clauses. This will of course limit the presentation of their insurance systems. Another reason is that the legislation in UK is adopted more or less unaltered in several other common law countries, and that the legislation in UK and US is fairly similar. A discussion of the regulation in UK and US is therefore relevant for most of the common law countries. As for the Scandinavian systems in general and the Norwegian system in particular, a further reason is that both Norway, Sweden and Finland has revised their insurance conditions during the past few years. These conditions are therefore among the more modern in the material.

The three issues will be dealt with under item 3: duty of disclosure, item 4: duty of good faith, item 5: alteration of risk and item 6: warranties and similar clauses. As an introduction, it is necessary to give a survey of the legislation and conditions dealing with marine insurance in the different countries.

## *2. Overview of the legislation and conditions*

### *2.1. Public legislation*

#### *2.1.1. Civil law countries*

All the civil law countries seem to have some sort of public legislation concerning insurance contracts, either incorporated in a more general commercial act or as a specific act for insurance contracts. This legislation is, however, either directory for marine insurance in general, or directory as a starting point with a few exceptions.

In **Norway** there is a general Insurance Contracts Act (ICA) dated 16 June 1989. As a starting point this Act is mandatory for all insurance contracts, see Norwegian ICA section 1-3. However, there is an exception from this provision concerning insurance of commercial activity performed by ships that have to be registered according to the Maritime Code of 24 June 1994, or commercial activity dealing with international carriage of goods. Except for national carriage of goods, there is thus complete contractual freedom for marine insurance. However, there is some general contractual legislation concerning illegal and unfair contracts that also a marine insurance contract will have to adhere to. It should also be mentioned that the Norwegian ICA contains only general provisions, and no provisions specially concerning hull or cargo insurance.



**Sweden and Denmark** have a common general Insurance Contracts Act from around 1930.<sup>2</sup> The Swedish and Danish ICA contain both provisions that are generally applicable to insurance contracts and provisions that are applicable to marine insurance only. The provisions are directory, unless the Act itself or other legislation imply that the regulation is mandatory, see further below. As provisions may be mandatory even though this is not expressly stated, it is not always clear which provisions are mandatory. The distinction between directory and mandatory provisions may also differ somewhat between the two countries. However, some provisions of special interest for the problems dealt with in this paper are mandatory in both countries. These provisions include duty of disclosure (§ 10 ref. §§ 5, 7, 8 and 9) and increase of risk (§ 50 ref. §§ 45-49). Furthermore, it should be mentioned that Sweden and Denmark similar to Norway have a General Contracts Act with provisions dealing with unfair contracts.

Both the Danish and the Swedish ICA are under revision. The Swedish revision has so far resulted in a draft, which contains no separate provisions that are applicable to marine insurance only. At this moment it is however not possible to say when the new Swedish Insurance Contracts Acts may be adopted.

**Finland** has got a new Insurance Contracts Act dated 28 June 1994, superseding the old common Nordic Insurance Contract Act which is still in force in Denmark and Sweden. The new Finnish ICA is directory in all aspects for marine insurance connected to commercial activity. The only mandatory requirement in Finland is thus the provision in the general Contracts Act dealing with unfair contracts, already mentioned for Norway, Sweden and Denmark.

**In Germany**, there is a general Insurance Contracts Act (VVG, or *Versicherungsvertragsgesetz*), but this Act does not contain provisions for marine insurance. The only legislation on marine insurance is found in sections 778 - 900 in the German Commercial Code (HGB, or *Handelsgesetzbuch*). This legislation is directory and it is in practice no longer applied. Apparently, there is no English translation of this regulation. This may be explained by the fact that the rules of the Commercial Code in practice have been replaced by Standard Insurance Conditions which were introduced into the German Marine Insurance Market in 1919, see further below under item 2.2.

**France** has a general Insurance Contracts Act (ICA), *Loi no 67-522 du 3 juillet 1967 sur les assurances maritime*. The French ICA deals with marine insurance in chapter VII. The provisions apply to both hull and cargo insurance. These rules also apply to the insurance of inland waterways' navigation (hull and cargo). The material does not include a translation of these Acts. The French ICA contains some mandatory rules, but the number of mandatory rules are limited due to the international character of marine insurance. Of interest for this paper is that there are mandatory rules for duty of disclosure, (article L 172-2), and duty of disclosure in case of alteration of the risk, (article L 172-3).

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<sup>2</sup> Danish Insurance Contracts Act dated 15 April 1930 (Danish ICA), Swedish Insurance Contracts Act dated 8 April 1927 (Swedish ICA) (*Försäkringsavtalslagen*; SFS 1927:77). In Sweden, consumer insurance on boats is also regulated by the Consumer Insurance Act (SFS 1980:38).

The **Belgian** Maritime Code (MC) contains under Title VI "Assurances Maritimes", article 191 to 250 special provisions for marine insurance. The provisions of the MC are complementary to the general Law of Insurance dated 11th June 1874 (1874 Insurance Law), which is still applicable. The MC applies to both hull and cargo. Both the 1874 Insurance Law and the provisions of the MC are directory for marine insurance. Thus, the provisions will only be applied if the parties have not agreed otherwise or if they have omitted to regulate certain points. No English translation is enclosed in the material.

In the **Netherlands** rules on marine insurance are contained in the Code of Commerce (C Com), originating from 1838. The Dutch C Com applies to both hull and cargo insurance. In addition, general Dutch contract law is applied to (marine) insurance. However, the provisions in the Dutch C Com do not play an important role in daily practice. Further it should be noted that The Netherlands are facing new legislation on insurance law. The draft of this new legislation does not contain any specific rules relating to marine insurance. Dutch marine insurance law itself does not contain specific rules with a mandatory character. There are however, some mandatory provisions in the general contract law and the general insurance contract law, which are applied also to marine insurance. The Dutch C Com is translated into English, and part of the translation is enclosed in the material.

In **Greece**, rules on insurance contracts were incorporated in the Commercial Code until 1997. The relevant section in the Commercial Code is today superseded by Law 2496/1997. In addition, the Greek Code of Private Maritime Law of 1958 (CPML) chapter 14 contains provisions for marine insurance. According to CPML section 257, sections 189 to 225 of the Commercial Code also govern marine insurance, unless they are incompatible with the nature of marine insurance and insofar as they are not modified by the special provisions. As mentioned, the Commercial Code has been replaced by the Law 2496/1997. The provisions in the CPML are mostly directory, even if there are some mandatory provisions. The mandatory provisions do however not include the issues in this paper. The provisions in CPML are translated into English, and there is also an English presentation of Law 2496/1997.

Under **Italian** law sections 1882-1932 of the Civil Code (CC) regulate insurance contracts. According to section 1885 these provisions also apply to marine insurance insofar as marine insurance is not governed by the Code of Navigation (C Nav).

This rule must be understood with reference to C Nav art. 1, which outlines the sources of navigation law. The relevant sources are (in decreasing order of rank): the C Nav and the other special rules on navigation, i.e. laws, bylaws and customs related to navigation. In case no special provision related to navigation is applicable, the gap is filled by analogy with other special rules on navigation. If no analogy is possible, finally, the rules of civil law will apply.

Read jointly, Art. 1885 Italian CC and Art. 1 Italian C Nav give the insurance provisions of the CC the status of special rules of maritime law. In practical terms this means that they apply to marine insurance as far as they are not specifically departed from in the C Nav. The Italian C Nav contains a section related to marine insurance (Arts. 514-547), which applies to both cargo and

hull insurance. Both the Italian CC and the C Nav is translated into English.

In principle, the parties in the individual contract may depart from the rules contained in the Italian CC. Nevertheless, art. 1932 lists a set of mandatory rules that may only be departed from in favor of the assured. Of relevance for this paper is art. 1898, defining a duty for the person effecting the insurance to notify the insurer of changes causing the increase of risk. Clauses departing from mandatory rules are replaced with the corresponding provisions in the law. In **Spain** marine insurance is regulated by the Spanish Code of Commerce (C Com) of 1885 (sects. 737 to 805). This code follows the criteria already set out in the "Ordenanzas de Bilbao" of 1737. The Spanish C Com applies to hull, cargo and liability insurance. Provisions for marine insurance are also found in Ley del contrato de seguro of 1980, which is the Spanish Insurance Contract Act (ICA), but this act is not mandatory for large risks (sects. 44.2 and 107.2), including marine and transport exposures. In practice, the Spanish ICA is subsidiary to the Spanish C Com, which has status as special legislation. But as the ICA is not mandatory for large risks, and the C Com as a starting point is not mandatory at all, the parties to the contract are free to depart from the regulation. However, there are some rules that are mandatory, including the concept of indemnity and good faith. The Spanish legislation is not translated into English.

It should also be added that the Spanish ICA is a very consumer protective legislation and therefore departs substantially from the Spanish C Com and the contractual conditions. These differences in the legislation and between legislation and contractual solutions seem to have caused some problems, and the legislation is under revision. A draft for a Marine Insurance Act has been prepared under the auspices of the Spanish Maritime Law Association and has been submitted to the "Comisión de Codificación" (Codified Legislation Committee) for further analysis.

In **Portugal** marine insurance is regulated in the Portuguese commercial code and in some other laws. The regulation applies to both hull and goods. The material contains no information about whether the legislation is mandatory or directory, and no English translation.

**Slovenia's** national law contains rules on maritime insurance in the Maritime and the Inland Navigation Act, Official Gazette, No. 22-294 (MA) with subsequent modifications. This act applies to both hull and cargo insurance. Some of the rules are mandatory. These include provisions concerning duty of disclosure. The relevant provisions are translated into English.

The provisions of the Maritime Code, 1994 (Part 8, Paragraph 4, Heading: Maritime Insurance Contract) regulate marine insurance in the Republic of **Croatia** (Croatian MC). It has not yet been translated into English. Provisions of the Maritime code on marine insurance include general provisions and special provisions about hull insurance, cargo and liability insurance. The only mandatory provisions refer to the principle of indemnity.

**Chinese** national rules on marine insurance are contained in the Maritime Code of P.R. China (MC), as the Chapter XII "Contract of Marine Insurance". An English translation exists as reference. The Chapter XII of the Chinese MC

applies both to hull insurance and cargo insurance. (See Art. 218.). None of the rules in this chapter are mandatory.

In **Venezuela** marine insurance is regulated in the Venezuelan Code of Commerce (C Com), which is translated into English. The Code of Commerce applies to both hull and cargo Insurance. Most of its rules are directory and may be substituted by contractual provisions.

**Japan** has rules for marine insurance in the Japanese Commercial Code (Com C), Book 4, Maritime Commerce, Chapter VI, Insurance, art. 815-841. Also applicable is Book 3, Commercial Acts, Chapter X, Insurance, art. 629-664 containing general provisions for insurance against loss. This legislation applies to both hull and cargo insurance, and is translated into English. The legislation for marine insurance is in principle directory, but with a few exceptions. These are, however, not relevant for the issues discussed in this paper.

In **Indonesia** rules on marine insurance is found in the second Book of the code of Commerce part IX and part X. Also, the Indonesian Shipping Act no 2 of 1992 contain several articles of relevance for marine insurance. The regulation applies to both hull and cargo insurance. It is not clear whether this regulation is mandatory.

### 2.1.2. *Common law countries*

The statutory basis of **UK** Marine Insurance Law is the Marine Insurance Act of 1906 (UK MIA) which sought to codify the pre-existing common law of marine insurance. In 1901 it was estimated that there were over 2,000 reported cases dealing with issues of marine insurance. This court material and numerous market usages are reflected in the 1906 Act. The Marine Insurance Act of 1906 covers both cargo insurance and hull insurance.

The UK MIA does not contain a specific provision stating whether or not the act is mandatory. To answer this question, it is necessary to consider each clause. Some clauses contain definitions and may thus not be departed from. Others are mandatory by interpretation. However, some of the provisions in the UK MIA only apply "*subject to any express provision in the policy*" or "*Unless the policy otherwise provides*". If so, the parties are free to depart from them, and frequently do by express contractual terms. The material do not state whether the provisions concerning the issues dealt with in this paper are mandatory or not.

It should be mentioned that whereas UK MIA applies throughout the UK, that is not necessarily true of associated rules of common law.<sup>3</sup>

The national law of the **United States** does contain some rules on marine insurance. They are contained in court decisions, not an act of the legislature. The effect on the national law on marine insurance is subject to the rules enunciated in the United States Supreme Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). This decision implies that

<sup>3</sup> Forte (ed.): *Good Faith in Contract and Property* (Oxford 1999), Ch. 5: *Good Faith and Utmost Good Faith: Insurance and Cautionary Obligations in Scots Law*.

issues of marine insurance are governed by the national law of the United States when there is a well-established rule of federal or national admiralty law, or, if not, the court determines that it should fashion a federal or national rule. Otherwise, marine insurance disputes are governed by the insurance law of one of the 50 states.

As a result, to determine the law with respect to any particular issue of marine insurance, it is necessary to answer the following questions: (1) whether there is a well-established federal or national admiralty rule; (2) if not, determine whether there should be a federal or national admiralty rule; (3) if the answer to both (1) and (2) is no, decide which of the 50 states' law applies; and (4) decide what the law of that state is.

As the national law of US is contained in court decisions, the regulation is not obligatory. It should be noted, however, that some of the states have obligatory provisions in their insurance codes, which, in certain circumstances, may apply to policies of marine insurance. Also, it will be seen in the discussions that some of the principles are claimed to be of a mandatory nature even if they are not expressed in a regulation.

**Canada** is a Federal country with division of powers between the Federal Government in Ottawa and the ten Provincial Governments. Legislatures in seven of Canada's ten Provinces have enacted The Marine Insurance Act of 1906 of the United Kingdom in identical terms. Until fairly recently it was felt that marine insurance could be regulated by both the Federal Government of Canada and by the Provinces. As a result of decisions of The Supreme Court of Canada it is now felt that marine insurance must be regulated by the Federal Government. To accomplish Federal regulation, the Parliament of Canada, in 1993, enacted a new Federal Marine Insurance Act. The new Marine Insurance Act (Ca MIA) was designed to enact the Marine Insurance Act of 1906, but in modern language. The Ca MIA thus contains the regulation on marine insurance in Canada on a federal level. The Federal Marine Insurance Act and The Provincial Marine Insurance Acts apply to both hull and cargo insurance. The rules are directory except for the provisions concerning insurable interest (art. 7.1) and gaming contracts (art. 18).

Because seven Provinces in Canada had enacted the UK MIA, Canadian court decisions follow very closely on those of the UK.

The regulation concerning marine insurance in Australia is contained in Australian Act of Marine Insurance of 1909 (Au MIA). This legislation contains the same provisions as the UK MIA of 1906, without the subsequent minor amendments to the United Kingdom's Act. The first six sections of the Au MIA are additional to those in the United Kingdom's Act, and are concerned with application and interpretation, so that the section numbers in the Australian Act are found by adding 6 to the section numbers in the UK MIA. Although the law was designed to be a code, it does not completely replace the common law in that section 4 provides that the rules of the common law, including the law merchant, apply to contracts of marine insurance "save insofar as they are inconsistent with the express provisions of the Act". This corresponds with sec. 91(2) of the UK MIA. The Au MIA applies to both hull and cargo insurance.

Some of the provisions are mandatory and may not contracted out of by

the parties to the contract of marine insurance. Of special interest for this paper is that the provisions concerning utmost good faith (sec. 23), duty of disclosure (sec. 24-26) and warranties (sec. 39-47) are mandatory. Thus, even though the legal basis for the Canadian and Australian legislation is the UK MIA, the systems differ concerning which provisions are mandatory.

In **New Zealand**, legislation concerning marine insurance is found in The Marine Insurance Act 1908 (NZ MIA); and the insurance Law Reform Act 1977, which specifically applies to the Marine Insurance Act (section 14), and cannot be contracted out of (section 15). Both acts apply to both hull and cargo insurance. The regulation in NZ MIA is directory except for some provisions. The important mandatory provisions for this paper concern duty of disclosure (sec. 18 and 20) and warranties (sec. 37 - 42).

**Hong Kong's** legislation concerning marine insurance is contained in the Marine Insurance Ordinance Cap. 329. This applies to both hull and cargo insurance. Some of the provisions are mandatory. Of interest here is that the provisions concerning duty of disclosure (sec. 18 and 20) and warranties (sections 35 and 36) are mandatory.

**Israel** retains the Ottoman Maritime Trade law 1863. Therefore, almost all marine insurance policies (cargo and hull) contain an express provision providing for English law.

**South Africa** has no legislation dealing specifically with marine insurance. It has a Short-Term Insurance Act, 1998, which includes "transportation" policies and applies to hull and cargo. The Act is mostly concerned with formalities and contains very little of general principles. It does, however, have provisions relating inter alia to the nature and effect of misrepresentations and warranties. As for questions not regulated in the Act, South Africa marine insurance legislation is founded upon and having as its fall-back system, the Roman-Dutch common law. The Roman-Dutch marine insurance law was in turn based upon the developed European marine insurance law of the time, as crystallised in the Dutch city states of the 17th and 18th centuries. Part of this South African common law however is the importation of later English law, primarily through the direct application of English insurance law from 1879 to 1977. The UK MIA was, however, never of direct application in South Africa. To the extent that the UK MIA was largely a restatement of the law of marine insurance of Europe and England as at the 1870's and 1880's, it is to a very large extent also a restatement of the Roman-Dutch law of marine insurance, with certain notable differences.

## *2.2. Plans, conventions, agreed conditions and general policy forms*

### *2.2.1. Scandinavia*

In **Norway, Sweden and Denmark** the conditions for marine insurance traditionally have been incorporated into an extensive private codification. In Norway and Sweden this codification is published as a Marine Insurance Plan, whereas the Danish regulation is called a Convention.

A common feature of this private legislation is that it aims to regulate all practical questions concerning marine insurance, even those questions which

are also dealt with in the public legislation. The Plans and the Convention are meant to be used instead of the governing Insurance Contracts Act. This means that the private legislation regulates questions where the governing Insurance Contracts Act is not mandatory and thus allows other solutions. It also means that mandatory provisions in the governing ICA are incorporated in the Plan or Convention. This technique does not, however, lift the provisions out of the mandatory regime of the ICA. Even if the Plans and the Convention as such are directory, the parties are obligated to follow the regulation taken from mandatory provisions.

Another characteristic feature is that the Plans/Convention partly contain general provisions for all kinds of marine insurance, partly special provisions for special interests.

Even if the legal framework thus is similar in the three countries, the evolution of the Plans and Convention and the extent of the use of this legislation in today's marine insurance market differ a great deal. I will therefore give a brief overview of the history of this private legislation, and of the insurance conditions used to supplement the Plans and Convention in the market.

In **Norway**, the first Marine Insurance Plan (NP) was introduced in 1876. This Plan was amended in 1894, 1907 and 1930. In 1964, there was a new and extensive amendment, triggered by the ship-owners need for a more extensive cover for error in construction and materials.<sup>4</sup> The 1964-revision resulted in the cargo clauses being lifted out of the Marine Insurance Plan. A separate Plan for Insurance for the Carriage of Goods was established in 1967.

The 1967 Carriage of Goods Plan was amended in 1995, resulting in the Norwegian Cargo Clauses: Conditions relating to Insurance for the Carriage of Goods of 1995, Cefor Form No. 252 (Norwegian CC). The amendment was mainly a result of the new Insurance Contracts Act in Norway, which is mandatory for insurance concerning national transport of goods, see Norwegian ICA section 1-3 first and second part. Many clauses thus had to be amended to conform to the ICA's requirements. For the most parts these mandatory requirements are also given effect for international carriage of goods, even if the Norwegian ICA is not mandatory for this kind of insurance, see section 1-3 second part letter (e).

The 1964 Marine Insurance Plan was amended in 1996. Similar to the revision of the Cargo Clauses, this amendment was partly caused by changes in the legislative framework. However, the amendment was also triggered by the evolution in the shipping industry and problems in the marine insurance market. The new 1996-Plan contains general provisions, and special conditions for Hull insurance, Hull Interest and Freight Interest insurance, War insurance, Loss of Hire insurance, insurance for Fishing Vessels and small Freighters, insurance for Off Shore Structures, and Builders Risk insurance.

A characteristic feature of the Norwegian Marine Insurance Plan is that it is drafted by a committee consisting of members of all the different groups or organizations effecting marine insurance contracts. Thus, the 1996 Plan has

<sup>4</sup> See Brækhus and Rein: *Håndbok i Kaskoforsikring*, Oslo 1993, s. 90.

been drafted by a committee with representatives from the Mutual Hull Clubs Committee, the Norwegian Ship owners' Mutual War Risks Insurance Association, The P&I Insurers, The Central Union of Marine Underwriters, the Norwegian Shipowners' Association, the Federation of Norwegian Engineering Industries, Det Norske Veritas, the Fishing Vessel Owners, Sjøtrygdslagene, and the Norwegian Average Adjusters. The Chairman and the Secretary of the Committee were two professors from the Scandinavian Institute of Maritime Law.

Before the introduction of the 1996-Plan the Plan had been supplemented by a set of agreed conditions concerning problems where the provisions in the Plan were outdated or insufficient. The aim of the 1996 Plan is to incorporate such amendments directly into the Plan instead of using separate conditions. To obtain this, the Committee having drafted the Plan has also established a Permanent Revision Committee to make yearly amendments of the Plan to the extent that this is necessary.

An important part of the Norwegian Plan is also the Commentaries to the Plan, written on the basis of the discussions in the Committee drafting the Plan.

In **Denmark** the conditions for marine insurance are incorporated in the Danish Marine Insurance Convention (DC). The first Convention dated 2 April 1850 was amended in 1934. The 1934 Convention is still applied today, and contains general provisions and special conditions for among others Hull, Hull Interest, Builders Risk, Cargo, Freight, Freight Interest and Owners Outfit.

Similar to the Norwegian Plan the Danish Convention was drafted by a Committee consisting of members of the involved organizations, the average adjusters and the University. The organizations represented were Assurandør Societetet, Dansk Skipsrederiforening (Danish Shipowners Union), Foreningen av Danske Sjøassurandører (Danish Union of Marine Underwriters), and Grosserer-Societetets Komité.

To my knowledge there are no efforts being made to amend the Danish Convention.

The Danish Convention is supplemented by rather extensive conditions in the market. A set of conditions for hull insurance is recommended by the Danish Central Union of Marine Underwriters. These conditions concern important general questions and special regulation for Hull, Hull Interest, Freight Interest and Owners Outfit. For cargo insurance the Danish Union of Marine Underwriters has established a set of Limited and Extended Danish Conditions, both dated 1.7.89. These conditions function as a general basis for the insurance conditions used by the individual insurance companies.

The first **Swedish** General Marine Insurance Plan (SP) was introduced in 1891. The 1891-Plan contained the basic conditions applicable to Swedish marine insurance. After being revised in 1896, this Plan remained in force till the end of 1957, i.e. for 61 years. The extensive developments that took place during this relatively long period in the sphere of shipping trade and commerce generally made it desirable to modernize and extend the Plan and its stipulations. A committee consisting of experts on insurance and jurisprudence headed by a master engineer made the revision. A draft of the new Plan was submitted to various parties concerned before the final version was introduced



in the market. The 1957 SP contains general provisions and special conditions for i.a. Hull, Hull Interest, Vessels under Construction, Freight, Freight Interest, Goods and Owners Outfit.

Contrary to the Norwegian Plan, however, the assureds had not been represented in the Committee drafting the Swedish Plan. The conditions of the SP thus are more in favor of the insurers than the Norwegian Plan.<sup>5</sup> The result is that the Plan's conditions on important parts are replaced by agreed standard hull and cargo conditions.

The Swedish Hull Conditions were first introduced in 1966. They were revised in 1976, in 1987 and again in 1999. The version applied today is the General Swedish Hull Conditions of January 2000 (Swedish HC). Similar to the Norwegian Plan, the Swedish Hull Conditions is an agreed document drafted by the Swedish Club and The Central Union of Marine Underwriters in co-operation with the Swedish Ship-owner Association and a representative from the Average Adjusters. The Swedish HC contain both the special rules relating to the hull coverage, and the more general provisions relating to duty of disclosure, safety regulation, premium etc. The conditions are supplied with published commentaries.

Sweden has also adopted standard conditions for cargo insurance. Today's version is General Conditions for transport of Cargo of April 2000 (Swedish CC). These are, however, not agreed between the interested parties, but established by the Swedish Union of Marine Underwriters without cooperation from the cargo interests.

Contrary to the other Scandinavian countries, **Finland** does not have a Plan or Convention. However, they do have General Hull Conditions for Vessels, which are recommended by the Union of Marine Underwriters and the Shipowners Association. These General Hull Conditions were introduced in 1968, and last amended 1 January 1989, with some later additions. The conditions are similar, but not identical to the 1964 Norwegian Plan. The legislative framework in Finland thus seems close to the framework in Sweden, where the Marine Insurance Plan has limited practical importance, and the main areas of marine insurance is regulated by a set of recommended Hull Conditions.

The Finnish Hull Conditions (HC) are made on the basis of the old 1933 Insurance Contracts Act, and the Finnish HC refers to the 1933 Act. After the introduction of the new 1994 Insurance Contracts Act, a "slip" has been added to the Finnish HC maintaining the 1933 Act as governing law. The slip states that the 1994 Insurance Contract Act is not relevant for the Hull Conditions, and that the 1933 Insurance Contracts Act with additions and amendments, and practices connected to this act, should be the relevant governing law. The same technique to depart from the new ICA as governing law was used in the Norwegian marine insurance market under the 1964 Plan after the introduction of the Norwegian Insurance Contracts Act of 1989. One problem with this technique is how to deal with the mandatory provisions in the 1930 ICA.

<sup>5</sup> See Brækhus and Rein l.c. s. 14. Hare: Good faith, disclosure, misrepresentation & the omnipotent warranty: A South African perspective, Paper presented at the BMLA/Tulane Conference London May 2000, (Hare) p. 8.

The Finnish Hull Conditions have caused problems in the market, especially due to lack of commentaries. A committee to revise the Hull Conditions was therefore established some years ago. This committee consists of two groups: one group with members mainly from the insurers was established to revise the hull conditions. Another group is established as an executive group for the hull group. This executive group has representatives from all the interested parties (three different ship-owners' associations, and the association of the underwriters) The chairman of both groups is professor Hannu Honka. The aim of the committee is to introduce new hull conditions as an "agreed document". In connection with this amendment, the view has been expressed by Hannu Honka that the 1996 Norwegian Insurance Plan would obviously function as a sort of guide, but that there was a strong feeling for nationally based solutions maintaining certain distinctive features. This indicates that competition aspects shall be emphasized in the new conditions.

The group established to write the new conditions presented a draft to the executive group to be discussed 3 April 2000. As the result of these discussions is still not available and the draft is not published, it is not possible at this time to include the new Finnish conditions in this presentation.

Finland also has General Conditions for Carriage of Goods dated 1993 (CC) and a newer version for Consumers dated 1995. As the Swedish and Danish cargo conditions these are not "agreed" between the interested parties, but constructed by the insurers. Furthermore, the 1993 conditions are not published as a set of standard-conditions to be directly used in the market, but function merely as recommendations for the insurance companies to be incorporated in the individual insurance contracts from each company according to each company's policy. This method seems to be parallel to the method used in the Danish market. The 1993 cargo conditions are under amendment, but the revision is not yet finished.

### *2.2.2. Separate Standard Conditions developed in other European nations*

Germany, UK, the Netherlands, Belgium and France have developed their own standard conditions for hull and/or cargo insurance.

The present legislation of Marine Insurance in **Germany** is the German General Rules of Marine Insurance, also known as the ADS. The ADS was drafted by the German Marine Underwriters on consultation with German Chambers of Commerce and other competent organizations under the leadership of the Hamburg Chamber of Commerce, and was published in 1919. The sections referring to cargo insurance were modernized in 1947. Particular conditions for hull insurance were introduced in 1957.

The 1919 ADS contains both general provisions concerning for instance insurable interest and value, duties of the assured, and premium, and special rules on the insurance of special subject-matters (Hull, Disbursement and Cargo).

The 1919 ADS was altered in 1973, when sections 88-99 of the 1919 ADS concerning cargo insurance were replaced by separate cargo conditions, the so called ADS Cargo of 1973. The result of this amendment was that sections 88-99 in the ADS were abolished. The aim of introducing new cargo clauses was

to incorporate the broker-made clauses that appeared to be of general interest, and to get rid of most of the other broker-made clauses. The cargo clauses were revised in 1984, partly in order to incorporate practical experience from the past ten years, and partly in order to consider the new Institute Cargo clauses in the London market. The last amendment of the ADS cargo clauses started in 1996, resulting in DTV Cargo Insurance Conditions 2000 (DTV Cargo). The objective of this change was to modernize the structure of the conditions, allow a more flexible product design and secure international acceptance of the conditions, as well as to enhance the qualification of marine underwriters and take account of current market requirements. The DTV Cargo Clauses of 2000 provide uniform rules for all modes of cargo, all types of cargo and all trades.

Another major change of the ADS took place in 1978, resulting in the Deutscher Transport-Versicherungs-Verband e. V (DTV) Hull Clauses 1978. These DTV Hull Clauses replaced previous Hull Clauses in the German market, but did not lead to any alteration in the original ADS concerning Hull Insurance. As with the ADS Cargo clauses the aim was to sort out the best broker-made clauses to be incorporated in the conditions.

The 1978 DTV Hull Clauses were further amended in November 1982. Two later amendments have taken place; first in 1984 and then in 1992. The 1992 amendment, however, only concerned a few clauses. Apart from the 1992 amendment, the ADS, ADS Cargo and DTV Hull Clauses are translated into English.

The material contains no information of ongoing amendments or discussions to start amendments of the ADS or the DTV Hull Clauses.

In **UK**, standard form clauses exist for amongst others, hulls policies (time and voyage), freight policies (time and voyage), cargo policies, war and strikes policies (hulls, cargo and freight) and mortgagee's interest policies. At least 120 separate sets of clauses covering particular trades and approved by The Institute of London Underwriters are published by Witherby & Co Ltd each October. The conditions that will be referred to in this paper is the Institute Time Clauses Hulls of 1.11.95 (ITCH) and Institute Cargo Clauses A, B and C of 1.1.82 (ICC).

In **Belgium** the market developed in the early 1980's hull conditions, known as the Corvette Underwriters Conditions (Corvette Conditions). These conditions have later been amended and the latest version is of 1999. The Corvette Conditions are combined with other traditional clauses such as the English Institute Time Clauses Hull and the U.S. Hull Conditions.

Insurance for cargo is mostly effected on the Police d'Assurance Maritime d'Anvers, ler juillet 1859, supplemented by the "Clauses de 1900 (modifiées en 1931)" and the "Clauses conventionnelles", texte de 1931. Although the two mentioned supplementary clauses are optional, they are normally included. The Belgium cargo conditions are called the Antwerp Marine Policy (Antwerp Policy).

Both the Corvette Conditions and the Antwerp Policy are translated into English.

The **Dutch** standard conditions for cargo is The Dutch Bourse Cargo Policy 1991 (Dutch CC). Apparently, there are no standard hull conditions. The Bourse Cargo Policy is translated into English.

The general hull conditions in **France** are the French Marine Hull Insurance Policy for all vessels (French HC). The original policy form was dated 1 December 1983, and was amended 13 December 1984 and 30 January 1992. These conditions were renewed a couple of years ago, and the new policy is adopted from January 1998. The standard conditions for cargo is French Marine Cargo Insurance Policy “all risks” cover and “major events cover”, both Policy Form dated June 30, 1983, as modified February 16, 1990 (French CC). Both the hull and the cargo conditions are translated into English.

### *2.2.3. European countries combining own standard clauses with foreign clauses*

In **Italy** general Forms of Contract for Hull and Cargo Insurance have been in use since the beginning of this century. Until the 1960's the most popular Policy Forms were the Italian Policy of Marine Insurance on Goods, 1933 Ed. for cargo insurance and Insurance Form of the “Società di Assicurazioni già Mutua Marittima Nazionale”, 1942 Ed. for Hull Insurance (Mutuamar 1942), which is translated into English. The hull policy was gradually replaced by the Form of Italian Policy of Marine Insurance for steel hull ships 1972 Ed. The Cargo Policy was substantially amended in 1978. These newer policy forms are not translated into English.

In later years, the Italian marine insurance market has become more dependant on the reinsurance market, and particularly the London market, with the result that the Italian Policy Forms are used in combination with the Institute Time Clauses for Hulls, Freight and Cargo.

The combination of Italian and English conditions was, however, problematic, especially after the English Marine Policy and the ITCH were amended in 1983. One of the aims of this amendment was to include all the insurance conditions in the ITCH instead of operating with a combination of the Marine Policy and ITCH. As the Italian 1972 Hull Policy also contained a comprehensive set of conditions this caused overlapping and conflicts between the Policy and the ITCH. The most important problem was the combination of the “named peril” system in the ITCH and the all risk system in the Italian Conditions. To remedy these problems, a new Policy Form was produced in the Italian market in 1988, named “Marine Hull Insurance Form”. Ed. 1988. This policy is limited to certain general conditions of cover, and does not include risks covered and exclusions. According to this Policy Form, whenever insurance is effected subject to English Policy Conditions, these must be construed and applied according to the practice in the UK.

For cargo insurance, a totally new Policy was introduced in 1983, and was renewed in 1998. The new edition has now been approved by ANIA (the National Association of Insurance Companies). This new Cargo Policy is structured as a General Terms and Conditions plus Additional Clauses cover. The Additional Clauses can be either marine or land transportation insurance and can be based on either all risks or named perils by incorporating Italian risks/exclusion clauses or the ICC A, B or C. There seems to be no translation of these new cargo clauses.

The **Spanish** marine insurance market has adopted standard marine

insurance conditions named “Condiciones Generales del Seguro de Buques”, for hulls, and “Condiciones Generales del Seguro de Mercancías”, for cargo. These standard conditions were prepared between 1927 and 1934, by the Madrid Marine Insurance Committee. The content of the conditions follows closely the Spanish C Com and is influenced by the ILU Hull and Cargo Clauses in use at that time. In later years Spanish companies have felt it necessary to update and change these conditions and some new conditions have been made known by certain companies.

The Spanish General Conditions of 1927 - 1934, are usually accompanied with clauses, endorsements, special conditions and warranties which are attached to the policy to include coverage for specific risks. Examples are American, English or Norwegian clauses for builder's risk, cargo, hull or oil & gas, or other exposures. All such clauses are fully integrated in the Policy.

The incorporation of foreign clauses to a Spanish marine insurance contract poses serious challenges because the different terms of the contract are based on quite different legal frameworks. It is thus difficult to find a feasible instrument for the construction of the conditions.

#### *2.2.4. Countries with no standard clauses/using only ITCH/ICC or other standard clauses*

**Portugal, Slovenia, Croatia, Greece, Israel, Venezuela, Australia, Indonesia, South Africa and Hong Kong** do not have national standard conditions. A common feature for these countries is a widespread use of the English ITCH and ICC clauses. In **Portugal** there are also individual contracts made by each company. Apparently, the insurance companies have certain General and Special rules, which are contained in the individual Insurance Policy. Also, there are some clauses called “Particulars”, which the parties may agree to include when entering the contract.

**Hong Kong** also uses other standard conditions, as for instance Norwegian and Japanese.

#### *2.2.5. Japan, China and New Zealand*

In **Japan**, standard conditions for hull was established in 1990 (General Clauses of Hull Insurance (Japanese HC). These clauses are widely used. Attached to these clauses will be one out of 6 Special Clauses (Class No. 1 to Class No. 6).

For international transport of cargo there are no standard insurance conditions, and English Clauses (Institute Cargo Clauses) are often used. For national transport of cargo there are, however, standard conditions made in 1989 (General Conditions for Marine Cargo Insurance (Domestic Transportation), or Japanese Cargo Clauses.

**China** operates with two sets of standard clauses. Hull Insurance Clauses (HC) and Ocean Marine Cargo Clauses (CC). Both conditions are translated into English.

The **New Zealand** marine insurance market does not have standard Policy conditions. However there are some clauses promoted by the New Zealand

Insurance Council which are commonly used by insurance brokers and underwriters. Otherwise, New Zealand underwriters rely on English and German (DTV) standard clauses, and their own policy products. The London Institute of Underwriters' standard clauses are most commonly in use.

#### *2.2.6. US and Canada*

There are no standard insurance conditions in use in the **US**, in the sense that a particular type of risk will always be written pursuant to the same form or set of forms. Many insurance companies, as well as brokerage houses, have developed their own forms. Nonetheless, there exist numerous coverage forms that are the product of research and development of the American Institute of Marine Underwriters (AIMU). Some of these forms, such as the "American Institute Cargo Clauses (April 1, 1966)," have common usage. A selection of the more significant AIMU form clauses are published by Witherby & Co Ltd, together with the English Institute Clauses, ref. above. In this paper, reference is made to American Institute Hull Clauses June 2 1977 (American IHC)

In **Canada**, there are some particular Canadian Clauses including the Great Lakes Hull Clauses and Clauses in use in British Columbia. Apart from that, the marine insurance markets in Canada often use the ITCH and ICC. American Clauses are also widely used.

### *3. Duty of disclosure*

#### *3.1. Introduction*

Rules concerning duty of disclosure are found in the Insurance Contract Acts or other contractual legislation, Plans or Conventions of all the different countries in the material. In Sweden and Denmark, the provisions are mandatory in favor of the person effecting the insurance and the assured, ref. above under item 2.1. Similarly, the regulation in France, Slovenia, Australia, New Zealand, Hong Kong and South Africa are mandatory on this point, but the material does not say whether these provisions in general may be departed from in favor of the assured. In UK, the provisions are declaratory except for a fraudulent breach of the duty of good faith and misrepresentation. The position in US is not clear on this point.

The regulation concerning duty of disclosure is closely connected to the provisions concerning duty of good faith, which are discussed under item 4. In the common law countries, the rules concerning duty of disclosure and misrepresentation constitute a part of the broader principle of duty of good faith. In these systems, the rules discussed under this item are therefore a part of the next issue. However, in the civil law countries there is not a similar legal connection between these two issues, and the provisions concerning duty of disclosure is regulated as a separate issue. For the civil law countries it is therefore necessary to treat the provisions concerning duty of disclosure separately. As many of these provisions are similar or fairly similar in the civil law and the common law system, it seems natural to include the regulation of duty of disclosure and misrepresentation in the common law system under item

3. The remaining part of the principle of duty of good faith will be discussed as a separate issue under item 4. This distinction between the two concepts will also shed light over the most important differences between the regulation in the common law and the civil law countries concerning both concepts.

The purpose of the duty of disclosure is to give the insurer the best opportunity to assess the risk he is taking over. The more information the insurer has concerning the risk, the more accurate can his evaluation be. This will in turn make it possible for the insurer to calculate a mathematically correct premium and to draw up an insurance contract accurately fitting the risk. As the person effecting the insurance normally is the person possessing the most information about this risk, it is natural that he should have a duty to pass this information on to the insurer.

From a legal point of view, a principle of disclosure may be explained as a question of fairness; it would not be fair to ask the insurer to evaluate the risk with less information than the information possessed by the person effecting the insurance. This would create a situation of contractual inequality between the parties.<sup>6</sup> But the principle of disclosure may also be explained from an economic point of view. If the person effecting the insurance were not under a duty to disclose information concerning the risk, he would be likely to keep the information to himself in order to get a lower premium. The insurer would then have to spend time and money to get the same information from other sources. The resources spent for this purpose will of course have to be reimbursed through the premium. Also, if the insurer is uncertain whether he has the full information, he may ask for a higher premium for safety reasons. The duty of disclosure is therefore a tool to obtain a more correct premium, and – contrary to what the assured may believe – this premium may also be lower than if there was no such duty.

The regulation of duty of disclosure seems to have caused few problems in the civil law countries. Typically, they were not amended under the 1996 revision of the Norwegian Plan or under the amendment of the Swedish Hull Conditions, and there are small differences in the Scandinavian systems concerning this issue. This also means that the Scandinavian regulation as a whole conforms to the mandatory requirements of the Swedish and Danish ICA. However, this is an area having caused significant problems in the common law countries. It may therefore be interesting to contemplate methods of regulation that seem to function satisfactorily. Furthermore, it is important to look into the mandatory provisions and the differences between these provisions and the declaratory or contractual regulation to see if the mandatory provisions may cause problems in an attempt towards harmonization.

The discussion is divided into four parts. The first part presents the scope or the extent of the duty of disclosure. The second part concerns the time at which the duty of disclosure applies. The third part discusses the sanctioning system. The fourth and last part contains a summary of the main differences

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<sup>6</sup> Hare: Good faith, disclosure, misrepresentation & the omnipotent warranty: A South African perspective, Paper presented at the BMLA/Tulane Conference, London, May 2000, (Hare) p. 8.

between the mandatory and directory provisions and some reflections connected to the presentation.

### 3.2. *The scope of the duty of disclosure*

#### 3.2.1. *Overview*

The scope of the duty of disclosure is defined through four main issues: First, there is a need to define the concept of “disclosure” and the relationship between disclosure and misrepresentation. The second issue is what kind of information the duty of disclosure applies to. The third question is whether the insurer will have to outline this information to the person effecting the insurance through questions, or whether the burden to sort out the relevant information rests with the assured. The fourth issue is the relevance of the knowledge of the person effecting the insurance for his duty of disclosure.

#### 3.2.2. *Disclosure and misrepresentation*

Duty of disclosure means a duty to pass on to the insurer information as defined further below under item 3.2.3. This duty may be described as making full and correct or truthful disclosure of the defined circumstances.<sup>7</sup> Thus, the duty of disclosure is both a duty to pass information to the insurer, and a duty not to misrepresent it. However, some systems have divided these issues in two, with separate provisions for disclosure and misrepresentation.<sup>8</sup> Even if this is the case, it should however be noted that in practice it is difficult to draw a clear line between the two issues.<sup>9</sup>

As a starting point, this division of the regulation seems to have little consequence for the content of the duty. However, the UK MIA and US common law system operates with a special definition of what constitutes an untrue statement. The provisions in the UK MIA on this point virtually equates truth with materiality in the sense that a statement is not untrue if the correct statement would not be considered material by the insurer.<sup>10</sup> This means that the question of truth will add nothing to the duty, as the question of materiality arises also for the duty to disclose. In US, however, the concept of materiality

<sup>7</sup> NP § 3-1 first part, Swedish HC § 9 mom. 1, DC § 21, Finnish ICA 1933 § 4, DTV Cargo 4.1. Greek law 2496/1997 § 3. Italian CC art. 1892, French ICA art L172-2, Dutch C Com art. 251. Belgium 1874 Law art. 9. Slovenian MA art. 694 and 695. Chinese MC art. 222. Venezuela C Com. art. 568 no. 1, Japanese Com C art. 644 and apparently, and Croatian MC. The material from Portugal and Spain is not clear about this point.

<sup>8</sup> UK MIA sec. 20 (1). Ca MIA sec. 22 (1). Hong Kong Ord sec. 20 (1). The Australian answers say nothing about misrepresentation, but as the Au MIA is based on the UK MIA, the same provisions are presumed to apply. South Africa Short Term Insurance Act contains a separate provision concerning misrepresentation in sec. 53. In the civil law systems, ADS 20 has separate regulation of misrepresentation.

<sup>9</sup> This is illustrated in *Pan Atlantic Insurance Co. Ltd. v. Pine Top Insurance Co. Ltd.*, (1994) 2 Lloyd's Rep. 427.

<sup>10</sup> UK MIA sec. 20 (4), Schoenbaum: Key divergences between English and American law of marine insurance, Maryland, 1999 (Schoenbaum), p. 99. On the other hand, Malcolm Clarke argues that this is not correct, as materiality under sec. 20 (4) determines only the difference between (a) truth, and (b) untruth which has consequence in law, i.e. gives ground s for avoidance.



and the concept of truth are two separate concepts. The rule here is that the representation must be substantially true.<sup>11</sup>

Also, there might be a distinction in the definition of what information the duty of disclosure and the duty not to misrepresent apply to, see below under item 3.2.3.

### *3.2.3. What information must be disclosed/not misrepresented*

As mentioned above, the purpose of the regulation of the duty of disclosure is that the insurer shall obtain sufficient information to make a correct risk assessment. The insurer will need information concerning the risk in order to be able to decide whether to undertake the insurance or not, and to assess the necessary premium and contract conditions. Thus, the starting point for the duty of disclosure is for the insurer to get information that is vital or necessary for this evaluation.

The relevant information may be defined in two steps. The first step is to define the information that shall be disclosed as such. This is part of the question of the content of the duty of disclosure. The second step is to qualify the undisclosed information that may give the insurer a right to invoke sanctions against a failure to give the relevant information. In this paper, the second step is treated as part of the sanctioning system, whereas the first step is discussed here as part of the definition of the scope of the duty. As a starting point it may be a matter of taste whether the definition is connected to the duty or to the sanctions; in both cases it will be a requirement to invoke a sanction. However, the division corresponds to how the regulation normally is built up, and it also illustrates clearly that in principle it is two different conditions.

Some systems do not have a definition of the information as such, but only contain a condition of inducement concerning the sanction. This holds for the Scandinavian common ICA, Belgium, the Netherlands, Italy, France, Slovenia and South Africa concerning misrepresentation.<sup>12</sup>

Other regulations contain a separate definition of what kind of information the duty of disclosure applies to. The content of this definition varies, but the core of the provisions seems to be that the information to be disclosed is "material" for the insurer in deciding whether and on what conditions he is prepared to accept the insurance.<sup>13</sup> This holds for both civil law and common

<sup>11</sup> Schoenbaum p. 99.

<sup>12</sup> Danish, Swedish and Finnish ICA § 4 f, Belgium 1874 Law art. 9, Dutch C Com art. 251, Italian CC art. 1892, French ICA art. L 172-2, Slovenian MA art. 694 and 695, South Africa Short Term Insurance Act sec. 53. This condition is discussed further below under item 3.4.

<sup>13</sup> NP § 3-1 first part, Swedish HC § 9 mom. 1, DC § 21, ADS 19 (1), DTV Cargo 4.1, Greek law 2496/1997 § 3, Chinese MC art. 222, Venezuela C.Com. art. 568 no. 1, Japanese Com C art. 644, UK MIA sec. 18 (2), Au MIA sec. 24 (2), Ca MIA sec. 21 (3), Hong Kong Ord sec. 18 (2), NZ MIA sec. 18 (2). The same definition seems to be applied at national level in the US, based on case law, see *M. Lanahan*, 26 U.S. (1 Pet.) at 185, 188, 1998 A.M.C. at 2095, 2099; *Sun Mutual*, 107 U.S. at 509-5 10, 1998 A.M.C. at 1212; *Healy*, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245-250 (1967); *I A. Parks*, *Law and Practice of Marine Insurance and Average*, 219-220, 222-224 (1987).

law systems. However, the further definition of materiality differs on three accounts. The first difference is between an objective and a subjective approach to the question of materiality. The second difference is whether this approach is measured against the assured or the insurer. The third difference concerns how material the information must be.

As for the approach to materiality, the starting point in the common law countries is an objective approach. Further, this objective approach is normally tested against the insurer. The main question thus is how a prudent underwriter would react if he had the correct information.<sup>14</sup> This is similar to the solution in Germany, Greece, Norway and Spain,<sup>15</sup> and seems also to be the approach in China, Israel and Portugal.<sup>16</sup>

An objective approach to materiality measured against the assured is used in South Africa. The main point here seems to be whether a prudent man should understand that the information was material to the insurer.<sup>17</sup> An objective approach to materiality is also common in non-marine insurance in the common law systems.<sup>18</sup>

A subjective approach seems to be used in Denmark, Sweden and Croatia.<sup>19</sup> This will correspond to the requirement concerning inducement which are discussed below under item 3.4.

For Venezuela, Japan and South Africa concerning disclosure the interpretation seems more uncertain on this point.

As to the question of how material the information must be, the normal solution is that the information must be decisive for the insurer's assessment of the risk. In UK, however, this part of the question of materiality has been a matter of heavy struggle in the court cases and debate in the literature. The status today is that it is not required that the information is decisive for a prudent insurer when entering the insurance contract on the established terms. It is sufficient that a prudent underwriter would take the information into account when assessing the risk.<sup>20</sup> US, on the other hand, use a "decisive influence" test, where the minimum requirement is that the risk must be increased so as to enhance the premium.<sup>21</sup>

<sup>14</sup> Schoenbaum p. 107 f. for UK MIA and US. Griggs: Marine insurance – Is the doctrine of "utmost good faith" out of date? in CMI Yearbook 1994. p. 300.

<sup>15</sup> Reme: Duty of disclosure: Scope of duty and sanctions for breach, in: Reports from Marine Insurance Symposium Oslo, 4.-6. June 1998. MarJus no. 242. p. 98. Spaidiotis: Marine Insurance Law in Greece, year 1998, Issaias Law Office (Marine Insurance Law in Greece ), item 17. Commentary NP p. 72. No reference from Spain.

<sup>16</sup> Chinese MC art. 222. Portugal and Israel seem to follow UK on this point.

<sup>17</sup> According to Hare p. 8 f. South Africa traditionally applied the prudent insurer test on this point. However, this solution was rejected in *Mutual & Federal Insurance v Oudtshoorn Municipality* 1985(1) SA 419(SCA), where materiality instead was judged according to a reasonable man or average prudent person, see Hare p. 10. The actions of the assured are thus measured against those of a reasonable person.

<sup>18</sup> See e.g. Australian ICA 1984 sec. 21.

<sup>19</sup> DC § 21. Swedish HC § 9 mom. 1. no reference from Croatia.

<sup>20</sup> Schoenbaum p. 107-117. Griggs p. 300-302. Kirby: Marine Insurance – Is the doctrine of "utmost good faith" out of date? In CMI Yearbook 1994. p. 271. However, it should be noted that at the same time, the judges incorporated a decisive inducement test, see below.

<sup>21</sup> Schoenbaum p. 116. This was the traditional solution in South Africa, but is now rejected, Hare p. 9 f. Hare p. 10-11 also argues that the concept of materiality contains a second part asking whether a prudent person effecting the insurance should have known that the information was material to the insurer.

This is similar to the German cargo clauses,<sup>22</sup> and also to the Norwegian interpretation of materiality,<sup>23</sup> and seems to correspond to the approach used in most civil law countries, even if the material is not clear on this point.

Normally, the requirement of materiality is common for disclosure and misrepresentation. There are however, two exceptions from this. As already mentioned, the South African regulation of misrepresentation have departed from the objective materiality approach and instead operates with a requirement of materiality or inducement for the actual insurer. This seems to imply that South Africa in reality follows the UK MIA solution where objective materiality is added to subjective inducement, but where the objective material information does not need to be decisive for the prudent insurer.<sup>24</sup> The other exception is ADS 20 stating that a circumstances are deemed to be material especially if they were misrepresented by the assured, and he had declared his statement to be correct.

In addition to the general requirement of materiality, some systems highlight the concept of materiality in more detail. One method here is to emphasize that circumstances inquired into are material.<sup>25</sup> Another method is to emphasize certain issues to be specially dealt with by the person effecting the insurance. The French Hull Conditions 8.1 emphasize that the duty of disclosure also applies to the flag, the classification society and the class of the vessel. Similarly, the most recent Italian Forms (the 1983 and 1988 Policy) list a number of circumstances which the insurer considers material, such as whether the subject matter insured is represented by dangerous goods, or the goods have been transhipped or have to be transhipped. Italian Hull Conditions also contain a "classification clause" providing for a duty of the person effecting the insurance to declare if the vessel is classed and what class-category the vessel has been assigned.

Some systems also define matters that need not be disclosed.<sup>26</sup> A main point for both the common law systems and the civil law systems here is that information already known to the insurer need not be disclosed.<sup>27</sup> Further, in the common law systems, it is not necessary to disclose a fact contrary to a warranty.<sup>28</sup> The reason is that the warranty rule makes it unnecessary to apply the disclosure rule, and is simpler to apply since the warranty either establish materiality or makes it irrelevant, see further below under item 6.

<sup>22</sup> DTV Cargo 4.1.

<sup>23</sup> Commentary NP p. 72, Brækhus/Rein p. 119 f.

<sup>24</sup> Hare p. 13-15, Staring/Waddell: *Marine Insurance*, in *Tulane Law Review* volume 73, p. 1655-1656.

<sup>25</sup> DTV Cargo 4.1, Court of Cassation, 4 April 1991, n. 3501 concerning Italian CC art. 1892, ADS 21, Schoenbaum p. 116 concerning US.

<sup>26</sup> UK MIA sec. 18 (3), Au MIA sec. 24 (3), Ca MIA sec. 21 (5), Hong Kong Ord sec. 18 (3), NZ MIA sec. 18 (3). The same solution seems to be used in US, see Parks: *Law and Practice of Marine Insurance and Average*, p. 224-230 (1987), and South Africa, see Hare p. 13.

<sup>27</sup> UK MIA sec. 18 (3), Au MIA sec. 24 (3), Ca MIA sec. 21 (5) (b) Hong Kong Ord sec. 18 (3) (b), NP § 3-5, SP § 15, DC § 27, ADS 20 (2), DTV Cargo 4.3, Slovenian MA art. 694 third part.

<sup>28</sup> UK MIA sec. 18 (3) (d). The position in US is the same, see Cattell p. 22.

### 3.2.4. *Active and passive duty of disclosure*

The question here is what method is used to acquire the material information. Two different approaches are used in this respect. The first approach may be called an "active" duty of disclosure, whereas the second approach is characterized as a "passive" duty of disclosure. With an active duty of disclosure the duty to assess what information is material for the insurer rests with the person effecting the insurance. On the other hand, a passive duty of disclosure implies that the insurer will have to define what information is material through a questionnaire. This is a different approach from the one described above under item 3.2.2, where information specially asked for are deemed to be material. A passive duty of disclosure implies that information not asked for is not material.

Both approaches are used in the civil law marine insurance systems, but an active duty of disclosure is the main solution. The common law systems seem mainly to apply an active duty of disclosure, but elements of a passive duty of disclosure is found in the US, see below.

An active duty of disclosure, viz. the person effecting the insurance has a duty to disclose all (material) facts to the insurer, is the main solution in all the countries.<sup>29</sup> However, this starting point may be modified either in parts of the legislation or in certain conditions. The Dutch solution is to modify the duty of disclosure if the insurer is using a form of proposal. This method is also common in non-marine insurance. If so, it is sufficient for the assured to answer the questions asked correctly. This method makes the question of materiality less important, as the insurer may not claim that information not asked for nevertheless was material. In US, there seem to be a similar regulation: when the insurer makes an inquiry information not asked for will not have to be provided.<sup>30</sup> A more general modification is established in the Spanish ICA and Greek legislation, stating that the assured shall only answer the questions asked by the insurer.<sup>31</sup> To what extent the Spanish provision supersedes the starting point of active duty of disclosure is not explained in the material.

The Spanish and Greek solution is similar to the method used in the Norwegian Cargo Clauses § 12, where the starting point is that the insurer will have to ask for the information he needs to insure the risk. The duty of disclosure

<sup>29</sup> UK MIA sec. 18 (1), Au MIA sec. 24 (1), Ca MIA sec. 21 (1), Hong Kong Ord. sec. 18 (1), NZ MIA sec 18 (1), NP § 3-1 first part, Swedish HC § 9 mom. 1, DC § 21, Finnish ICA 1933 § 4 f, ADS 19 (1), DTV Cargo Conditions 4.1, Dutch C Com art. 251, Slovenian MA art. 694 and 695, Croatian MC, Belgian Law 1874 art. 9, Greek law 2496/1997 § 3, Italian CC1892, Chinese MC art. 222, Venezuela C.Com. art 568 no. 1, Japanese Com C art. 644, French ICA art. L 172-2. The material from Portugal and Spain include no references on this point. This also seems to be the solution in US and South Africa. see further for US *M Lanahan v. the Universal Ins. Co.*, 26 U. S. (1 Pet.) 170, 183, 1998 A.M.C. 285, 294 (1828); *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 1998 A.M.C. 1191, 1213 (1883); Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245 (1967); I A. Parks, *Law and Practice of Marine Insurance and Average*, 216-222 (1987, and for South Africa Hare p. 8.

<sup>30</sup> Schoenbaum p. 116-117.

<sup>31</sup> Spanish ICA art. 10, Marine Insurance Law in Greece item 17.1, where it is stated that it was not the intention of the legislator to release the assured from disclosing material facts that where not put forward in the questions.

of the person effecting the insurance is thus limited to answering the insurer's questions. Only if the person effecting the insurance has knowledge of special circumstances that he realizes are material for the insurer, is he under a duty to disclose these circumstances. This provision is taken from the Norwegian ICA § 4-1, which is mandatory for national carriage of goods, but is given a general application in the Cargo Clauses, including international transport.

### 3.2.5. *The relevance of the knowledge of the person who effects the insurance*

The relevance of the knowledge of the person who effects the insurance rises two questions. The first question concerns the relevance of knowledge of the factual information: Does the duty of disclosure apply to all material information, or only to material information that the person effecting the insurance possesses or ought to possess. If there is a requirement of knowledge, the second question is whether the person effecting the insurance also must realize that the information is material to the insurer. This means that there are four alternatives concerning knowledge: 1) The duty of disclosure is objective regardless of knowledge. 2) The duty only applies to factual knowledge concerning the information. 3) The duty applies to knowledge the assured has or ought to have. 4) The duty is connected to knowledge both of the information and of the materiality.

The strictest definition of the scope of the duty of disclosure is to apply the duty to all material information regardless of whether the person effecting the insurance possesses the information. If so, neither the knowledge of the information nor the understanding that this information is material for the insurer is relevant. This starting point is used in the Norway, in the German Cargo Clauses, where the person effecting the insurance is to give full and correct disclosure of all circumstances which are material to the insurer.<sup>32</sup> The same approach is used in the common law systems for misrepresentation.<sup>33</sup>

A more normal starting point is to apply the duty of disclosure to circumstances the assured knows or ought to know about. In Slovenia, Spain, China, and the systems built on MIA US and South Africa, the duty of disclosure applies to every material fact known to the assured, or which he ought to have known.<sup>34</sup> According to the UK MIA provision "ought to have known" shall be judged in an objective way as what the insured ought to know in the ordinary course of business,<sup>35</sup> whereas the Chinese solution is a

<sup>32</sup> NP § 3-1 first part, DTV Cargo 4.1.

<sup>33</sup> UK MIA sec. 20 (1). Ca MIA sec. 22 (1). Hong Kong Ord sec. 20 (1). The Australian answers say nothing about misrepresentation, but as they use the MIA, the same provisions are presumed to apply. US seems to follow UK on this point, see Cattell et al.: *Marine Insurance Survey: A Comparison of the United States Law to the Marine Insurance Act of 1906*, 20 Tul.Mar.L.J. 1 (1995), (Cattell) p. 23-24.

<sup>34</sup> Slovenian MA art. 694. Chinese MC art. 222. UK MIA sec. 18 (1). Au MIA sec. 24 (1). Ca MIA sec. 21 (1) ref. (6). Hong Kong Ord sec. 18 (1). national US law according to case law. see Cattell p. 21-22. Hare p. 8. Israel claims to follow UK law. The Spanish material includes no references on this point. Japanese Com C art. 644 and Italian CC art. 1893 say nothing about knowledge, but connect the reaction to bad faith or gross negligence, which may lead to the same result.

<sup>35</sup> UK MIA sec. 18 (1). Clarke: *Law of Insurance Contracts* (1994) Ch. 23-8C. Contrary, see Arnold's *Law of Marine Insurance and Average*, 1981, no. 640, who seems to follow the Chinese solution. see below.

subjective approach asking for what the assured ought to have known in his actual business practice.<sup>36</sup>

The third alternative, actual knowledge concerning the information, is a condition in Denmark, Germany (ADS), France, the Netherlands, Belgium, Greece, and also it seems, Venezuela.<sup>37</sup>

The fourth and most favorable starting point is applied in Sweden, where the contracting party must disclose all circumstances that might influence the insurers in assessing the risk, as far as he is aware of this possible influence.<sup>38</sup> This seems to imply that the duty of disclosure presumes knowledge on the part of the person effecting the insurance; if he does not possess knowledge of the factual information he cannot know that this information is material for the insurer. A similar provision seems to be used in the French hull and cargo conditions.<sup>39</sup>

The last method may be compared to the solution in South Africa for disclosure, but here the approach to the knowledge of materiality is objective, and not subjective. This implies that the duty of disclosure applies to information the assured knows or ought to know about, and which a prudent man would have realized was decisive for the insurer.<sup>40</sup>

The significance of the difference in approach depends on the sanctioning system. It matters less that the duty of disclosure is objective if the insurer in the case of good faith is only allowed a limited reaction. On the other hand, some of the provisions requiring knowledge give the insurer the right to cancel the contract even if the person effecting the insurance gives wrong or incomplete information in good faith. In these instances, the difference in approach does not seem to lead to any difference in practical result, see further below under item 3.4.

### *3.3. The time at which the duty of disclosure is in effect*

The purpose here is to discuss at what period of time the duty of disclosure applies. One may here distinguish between two separate questions. One question is when the factual circumstances that shall be disclosed must be evident. The other question is at what point in time the person effecting the insurance must be without knowledge of the information or the materiality to be able to claim that he has not breached his duty of disclosure or at least that the breach was done in good faith. If there is no breach of the duty, the starting point will be that the insurer may not invoke a sanction. Also, a breach of the

<sup>36</sup> Chinese MC art. 222.

<sup>37</sup> DC § 21, ADS 19 (1), French ICA art. L 172-19-3 ref. art. 172-2, Dutch C Com art. 251, Belgium Law 1874 art. 9 (according to Rohart p. 310-311 ref. p. 309-310, and von Ziegler: The "utmost good faith" in Marine Insurance Law on the Continent. in: Huybrechts (Ed). Marine Insurance at the turn of the Millennium, volume 2 p. 28), Greek law 2496/1997 § 3, Venezuela C Com art. 568 no. 1.

<sup>38</sup> Swedish HC § 9 mom (1).

<sup>39</sup> The wording in French HC art. 8 (1) and French CC art. 14-1 is "all circumstances of which he is aware that would influence the insurers", and departs somewhat from the wording of the French ICA, where only knowledge of the information is required according to the text. The conditions may therefore be interpreted similar to the ICA.

<sup>40</sup> Hare p. 8-10.

duty of disclosure in good faith generally activates a less serious sanction from the insurer than if the person effecting the insurance is acting negligently or deliberately.

As for the first question, the main solution in the material is that the factual events that the person effecting the insurance has a duty to disclose are circumstances existing at the time the contract is entered into. This solution is used in Norway, Sweden, Denmark, Finland, Germany, the Netherlands, UK, Israel, Canada, Australia, Hong Kong, China, Japan, Slovenia, Portugal, Spain, France, South Africa and China.<sup>41</sup> In Sweden, however, this main rule is supplemented with a special duty of disclosure during the insurance period concerning defined issues, i.e. change of management.<sup>42</sup>

On the other hand, not all countries seem to distinguish between the duty of disclosure and a duty to notify the alteration of risk. In Venezuela, the duty of disclosure is not limited, and thus seems to apply both before and during the currency of cover.<sup>43</sup>

It should also be noted that many of these countries have special rules for duty of notifying the insurer about alterations of the risk after the contract has been effected. As alteration of risk is a separate concept with separate regulation in most of the countries, this duty of notification will be dealt with under item 5 concerning alteration of risk.

The German solution concerning open cover for cargo insurance seems to be a border case between the duty of disclosure and the alteration of risk. In Germany, rules for open cover in cargo insurance provide that the assured has a duty to declare all risks coming under the open cover. If he fails to do so, or he makes an incorrect declaration, the insurer will not be liable. New cargo may be seen as an alteration of the risk under the original contract, or as extending the contract to include more insured goods. The first view will lead to an alteration of risk perspective, whereas the second solution will mean that the duty of disclosure is postponed until the time when the cargo is included in the cover.

If the duty of disclosure applies to the whole insurance period, the question of knowledge and good faith will of course also be relevant for the whole period. In systems where the duty of disclosure only applies to circumstances existing at the time the contract is entered into, the question of knowledge and good faith must as a starting point be connected to the same period in time. The Norwegian, Swedish and Finnish systems, however, have a special rule concerning duty to correct wrong information.<sup>44</sup> This duty applies if the person effecting the

<sup>41</sup> NP § 3-1 first part, SP § 12, Swedish HC § 9 mom. 1, DC § 21, Finnish ICA 1933 §§ 4 and 5, ADS 19 (1), Dutch C Com § 251, French ICA art. L 172-19.3, UK MIA sec. 18 (1), Au MIA sec. 24 (1), Ca MIA sec. 21 (1), Hong Kong Ord sec. 18 (1), Chinese CM art. 222, Japanese Com C art. 644, Slovenian MA art. 694 and 695, No references from Portugal, Spain and Israel. The solution seems to be applied in the US based on case law. *Staring/Waddell, Parks, Law and Practice of Marine Insurance and Average*, 230-231 (1987). The same solution seems to be presumed by Hare p. 13 for South Africa.

<sup>42</sup> Swedish HC § 10, ref. further below under item 8.

<sup>43</sup> Venezuelan C Com art. 568.

<sup>44</sup> NP § 3-1 second part, Swedish HC § 10 mom. 1, Finnish HC § 35 no. 2. The DC contains no similar provision, and it may be argued that the Swedish solution is contrary to the mandatory regulation in the Swedish ICA § 4 f.

insurance, after the contract is effected, becomes aware of having given wrong information concerning facts existing at the time the contract was entered into. It is important to emphasize that this is not a duty of disclosure of facts happening during the insurance period, but limited to a duty to correct a misunderstanding of the factual circumstances existing at the time the contract is effected.

### *3.4. The sanctioning system*

#### *3.4.1. Overview*

The sanctioning system raises four main issues. The first question is what sanctions the insurer may invoke. One may here distinguish between a right to cancel the contract, a right to claim additional premium, a right to claim freedom of liability for an incurred casualty, a right to partial reduction in the liability, and avoidance of the contract. The second question concerns the relevance of knowledge and the degree of fault on the part of the person effecting the insurance. The main solution is that the sanctions will vary depending on the assured's knowledge and the degree of fault. However, the combinations between the sanctions and the knowledge and degree of fault, and also the number of different solutions, vary. It should also be remembered that the scope of the duty of disclosure influences the question of fault. If the scope of the duty of disclosure is defined without any reference to the knowledge of the person effecting the insurance, incomplete or wrong information because of lack of knowledge will constitute a breach of the duty. On the other hand, if the duty of disclosure only applies to factual circumstances known by the contracting person, or even is conditioned on knowledge of the information being material, lack of knowledge will imply that there is no breach. However, the discussion will illustrate that this difference in approach not always corresponds to a similar difference in result.

The third question is the relevance of causation between the undisclosed or misrepresented circumstance and the casualty. The main solution is that such causation is not required, but there are some exceptions to this rule. A fourth question is whether there is a condition that the undisclosed or misrepresented information has in any way influenced the insurer's acceptance or assessment of the risk. This condition is closely connected to the requirement that the duty of disclosure only applies to information that is material to the insurer. For systems using a subjective materiality concept, the question of inducement and materiality will be identical. With an objective approach to materiality, the requirements will be different. The question of materiality concerns normally whether the information was relevant for an imaginary reasonable or prudent underwriter. The question of influence concerns the actual insurer and is an inquiry into reliance and the causal connection between the misrepresentation or omission and the effecting of the insurance.<sup>45</sup>

In the following, the starting point for the discussion is the different degrees of fault. To illustrate the connection between the description of the duty

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<sup>45</sup> Schoenbaum p. 117.



and the sanctions, it is natural to start with the relevance of knowledge under item 3.4.2, continue with breach of the duty of disclosure in good faith under 3.4.3, and thereafter discuss negligence in 3.4.4 and fraud and breach of honesty and good faith under 3.4.<sup>46</sup>

### *3.4.2. Knowledge as condition for breach*

In systems where the duty of disclosure is defined as a duty to disclose information that the assured possesses knowledge about, no knowledge will as a starting point imply that there is no breach, and that the insurer may not invoke any sanctions. This is the case in Denmark, Germany (ADS), France, the Netherlands, Belgium, Greece, China, and also it seems, Venezuela, see above under item 3.2.5. Similarly, in systems requiring knowledge both of the circumstances and of their influence on the insurer, no such knowledge will as a starting point render the insurer fully liable. Such provisions are found in Sweden and apparently the French hull and cargo conditions, see above under item 3.2.5. And in systems where the duty to disclose applies to circumstances the assured knows or ought to know about, the assured will be fully covered if he neither knew nor ought to know these circumstances. This will then be the general starting point in Slovenia and Spain, and for duty of disclosure in the systems built on UK MIA, US and South Africa, see above under item 3.2.5.<sup>47</sup>

However, the Swedish and Danish solution is that even if there is no defined duty to disclose unknown information, the insurer may cancel the insurance if he has got wrong or insufficient information, and the assured did not know and cannot be blamed for not knowing that the information was not correct.<sup>48</sup>

### *3.4.3. Breach in good faith*

#### *3.4.3.1. The concept of good faith*

The concept of breach of the duty of disclosure in good faith is closely connected to the question of knowledge as a condition for breach. If no knowledge implies that there is no breach, the concept of breach in good faith will relate to lack of understanding of the significance of the information. On the other hand: If the duty of disclosure is defined as an objective duty regardless of knowledge (knew or ought to know), the concept of breach in good faith will relate to both knowledge concerning the factual circumstances, knowledge concerning the materiality, and any excuses the assured may have. It is therefore necessary to distinguish between these two situations.

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<sup>46</sup> It should be noted that the definitions of fraud, bad faith, negligence and good faith may vary in the different systems. It is, however, outside the scope of this report to analyze these concepts in further detail. The discussion is therefore based on the terms used in the material without a more detailed interpretation.

<sup>47</sup> The result will here depend on how strict "ought to be known" by the assured is interpreted. According to Schoenbaum p. 104 "knowledge is required but a person is deemed to know every fact which in the course of his business ought to be known to him".

<sup>48</sup> Swedish HC § 9 mom. 4, DC § 23.

### 3.4.3.2. *The sanctions*

The strictest sanctions against wrong or incomplete information in good faith is that the contract is null and void, or that it may be avoided by the insurer. Avoidance is used in UK, Hong Kong, Canada and South Africa for misrepresentation.<sup>49</sup> Good faith will here also include the situation where the assured did not possess the correct information. Avoidance may also be claimed in France,<sup>50</sup> whereas the Belgian and Dutch expression, and apparently also the Spanish solution, is that the contract is “null and void”.<sup>51</sup> However, in these provisions, good faith relate to the assured’s understanding of the significance of the information as all the mentioned systems protects an assured without knowledge, see above under 3.4.2. A general condition to invoke such sanction is that the insurer proves that he would not have concluded the contract or concluded it on other conditions if he had been duly informed.<sup>52</sup> Also, the premium may be returned.<sup>53</sup>

The normal solutions in this instance, are however, less strict against the person effecting the insurance. In Norway, Sweden, Denmark, Germany, Japan and apparently Croatia, the insurer will be fully liable for incurred casualties if there is a breach of the duty of disclosure in good faith. In Norway, Denmark and Japan good faith relates to knowledge both of the information and the significance of it.<sup>54</sup> In Sweden and Germany on the other hand, good faith relates to knowledge of the information.<sup>55</sup> This solution thus corresponds to the situation where the duty of disclosure is conditioned on the assured’s knowledge, see above under item 6.4.2. Such liability will, however, often be combined with a right to cancel the contract,<sup>56</sup> or a right to call in additional premium.<sup>57</sup>

An alternative solution is that the insurer is entitled to reduce the

<sup>49</sup> UK MIA sec. 20 (1), Ca MIA sec. 22 (8), Hong Kong Ord sec. 20 (1). The same solution will be found in Au MIA, but there is no reference in the material. US seems to follow the UK solution as a main rule on federal level, see Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245, 251 (1967), Cattell p. 24, Staring: *Marine insurance – Is the “duty of good faith” out of date?* In CMI Yearbook 1994, p. 293-294. However, some courts have departed from this, stating that negligence and good faith will not be sufficient for the insurer to claim avoidance, see Schoenbaum p. 100 and Staring p. 293. In South Africa, innocent misrepresentation will give the insurer a right to avoidance if the misrepresentation is not fundamental, see Hare p. 16.

<sup>50</sup> French ICA 172-2.

<sup>51</sup> Belgian Law 1874 art. 9, Dutch C Com art. 251 and apparently the Spanish C Com art. 381, see Von Ziegler p. 23-24 and p. 27-28 and Rohart p. 310-313. A similar solution is used in South Africa if innocent misrepresentation is fundamental, see Hare p. 16.

<sup>52</sup> Belgium Law 1874 art. 9 and 10, Dutch C Com art. 251, French ICA 172-2 (decisive for concluding the contract), Spanish C Com art. 381, South African Short Term Insurance Act sec. 53, (misrepresentation). UK MIA sec. 20 are as mentioned interpreted to contain such a condition, see Batz: *Utmost good faith in marine insurance contracts*, in: *Marine Insurance at the turn of the millennium*, volume 1, 1999 (Batz1999) p. 17, Schoenbaum p. 117 f. US admiralty rule is the same, see Schoenbaum p. 118.

<sup>53</sup> Belgian Law 1874 art. 9 and 10, French ICA 172-2, UK MIA sec. 84 and South Africa, see Hare p. 16.

<sup>54</sup> NP § 3-4, DC § 23, Japanese Com C art. 644.

<sup>55</sup> Swedish HC § 9 mom. 4, ADS 20 (2), DTC Cargo 4.2 and 4.3.

<sup>56</sup> NP § 3-4, DC § 23, Swedish HC § 9 mom. 4.

<sup>57</sup> ADS 20 (3), DTV Cargo 4.4.

indemnity proportionally to the premium paid. This solution is used in France for good faith concerning the significance of the information if the insurer would have accepted the insurance, but on other conditions had he known about the undisclosed fact.<sup>58</sup> The similar Italian provision is connected to good faith concerning both the information and the materiality, and combined with a right to cancel the contract.<sup>59</sup>

### 3.4.4. *Negligence*

#### 3.4.4.1. *The concept of negligence*

Some systems operate with the concepts of good and bad faith, and include no special regulation for negligence. This is the case in France, Belgium, and the Netherlands, where the solutions described above for good faith will be applied also against the negligent assured with knowledge of the undisclosed information. Apparently, lack of knowledge will in these systems result in no breach even if the assured can be blamed for this lack of knowledge. This means that negligence in these systems will follow the regulation for no knowledge (negligence concerning lack of knowledge) or breach in good faith (negligence concerning materiality).

In the other systems, negligence is either given a separate regulation, or will follow the solution for intent<sup>60</sup> or fraud/bad faith,<sup>61</sup> or gross negligence is treated similarly as fraud (or bad faith).<sup>62</sup> In systems where negligence is expressly regulated, three different approaches are used. One approach is to connect negligence to lack of disclosure in general, which seems to imply that negligence is evaluated against both knowledge and materiality.<sup>63</sup> The other approach is to connect negligence to the question of lack of knowledge only.<sup>64</sup> The third approach is a combination of the two, mentioning both negligence concerning disclosure and negligence concerning lack of knowledge.<sup>65</sup>

#### 3.4.4.2. *The sanctions*

As with a breach in good faith, a negligent breach of the duty of disclosure may render the contract null and void,<sup>66</sup> it may be avoidable at the option of the

<sup>58</sup> French ICA art. L 172-2. The same solution is used in Spanish ICA see Rohart p. 317-318.

<sup>59</sup> Italian CC art. 1893.

<sup>60</sup> NP § 3-3.

<sup>61</sup> ADS 20 (1), Spanish ICA sec. 10.3, UK MIA sec. 18 (1) (disclosure) and sec. 20 (1) (misrepresentation), Ca MIA sec. 21 (7) (non disclosure) and 22 (8) (misrepresentation), AU MIA sec. 24 (1) (disclosure), Hong Kong Ord sec. 18 (1) (non disclosure) and sec. 20 (1) (misrepresentation).

<sup>62</sup> Italian CC art. 1892, Japanese Com C art. 644, Slovenian MA art. 695, ADS 20 (1) (gross negligence concerning lack of knowledge leading to failure of disclosure).

<sup>63</sup> Italian CC art. 1892, Japanese Com C art. 644, NP § 3-4, DC § 23.

<sup>64</sup> UK MIA sec. 18 (1) (non disclosure), Ca MIA sec. 21 (7) (non disclosure), AU MIA sec. 24 (1) (disclosure), Hong Kong Ord sec. 18 (1) (non disclosure), Swedish HC 9 mom. 4, ADS 20 (1).

<sup>65</sup> Slovenian MA art. 695, DTV Cargo 4.2-2 and 4.3-2.

<sup>66</sup> Belgian Law 1874 art. 9, Dutch C Com art. 251 and apparently the Spanish C Com art. 381, see Von Ziegler p. 23-24 and p. 27-28 and Rohart p. 310-311 and p. 313, and South African law when there is a fundamental mistake, see Hare p. 16.

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insurer,<sup>67</sup> or he may claim that the contract is not binding.<sup>68</sup> An alternative sanction is freedom of liability for incurred casualties.<sup>69</sup> If this is combined with cancellation of the contract, see below, the solution is very similar to avoidance. Also, this remedy may be combined with a refund of premiums paid.<sup>70</sup>

A more favorable solution is reduction in indemnity. Two alternative methods for reduction is used: Reduction in proportion to the ratio of the premium paid to the premium that would have been calculated if the breach had not taken place,<sup>71</sup> or reduction according to an evaluation based on the influence of the undisclosed information on the insurance contract and the casualty, the degree of fault or other circumstances.<sup>72</sup> The last solution is to call for additional premium. This solution is conditioned on the undisclosed circumstances being decisive for the evaluation of the risk, and entitles the insurer to require the difference between the premium paid and premium that would have been quoted on the basis of full information.<sup>73</sup>

In situations where the contract is binding in spite of the breach of disclosure, the insurer may also have a right to terminate the contract.<sup>74</sup> A combination of claiming freedom for liability for casualties incurred and termination will mean that the insurer will not have any liability under the contract. If cancellation is combined with a right to call in additional premium, the insurer will on the other hand be liable for casualties having occurred before the cancellation.<sup>75</sup>

In addition to a combination of termination for future coverage and other sanctions, there may be a combination of sanctions connected to variations in the degree of fault, or the influence of the undisclosed circumstance on either the coverage or the casualty. One solution is to limit the sanction to gross

<sup>67</sup> Spanish ICA sec. 10.3, Italian CC art. 1892, French ICA art. L 172-2, French CC art. 14-1 and 18, French HC art. 8-1 and 14, Slovenian MA art. 695, UK MIA sec. 18 (1) (disclosure) and sec. 20 (1) (misrepresentation), Ca MIA sec. 21 (7) (non disclosure) and 22 (8) misrepresentation, AU MIA sec. 24 (1) (disclosure). Avoidance is also claimed to be the solution in Croatia, but here there are no references in the material. US seem to follow the UK solution as a main rule on federal level, see Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245, 251 (1967), *Staring: Marine insurance – Is the “duty of good faith” out of date?* In CMI Yearbook 1994, p. 293-294. However, as mentioned above, some courts have departed from this, stating that negligence and good faith will not be sufficient to render the contract void. This holds for both misrepresentation and disclosure, see Schoenbaum p. 100 and 101. According to Hare p. 16, avoidance is used when there is not a “fundamental” mistake.

<sup>68</sup> NP § 3-3 first part, DC § 24.1 and § 25, SHC § 9 mom. 5 ref. SP § 13.

<sup>69</sup> NP § 3-3 second part, DC § 24.2 and § 25, SHC § 9 mom. 5 ref. SP § 13, ADS 20 (1), DTV Cargo 4.2.

<sup>70</sup> UK MIA sec. 84, South Africa, see Hare p. 16.

<sup>71</sup> French ICA art. L 172-2 (negligence concerning materiality, right information would have lead to other conditions), Greek Law 2496/1997 § 3, Italian CC 1893 (ordinary negligence concerning knowledge and materiality).

<sup>72</sup> Norwegian ICA § 4-2, which is applied for the Norwegian CC.

<sup>73</sup> Slovenian MA art. 694, Croatia MC (no reference), Chinese MC art. 223.

<sup>74</sup> Italian CC art. 1893, Greek Law 2496/1997 § 3, Chinese MC art. 223, NP § 3-3 third part, Swedish HC § 9 mom. 4 and § 22 no. 2 (a), Japanese Com C art. 644, Japanese HC art. 17, Japanese CC art. 11.

<sup>75</sup> Chinese MC art. 223.

negligence,<sup>76</sup> or to the contracting person being more than a little to blame.<sup>77</sup> If so, ordinary negligence renders the insurer liable. In some systems the sanctions are different for gross negligence and ordinary negligence. This is the case in Italy and Slovenia, where avoidance is used for gross negligence and reduction in liability or additional premium for ordinary negligence.<sup>78</sup> Further, the reaction may depend on the undisclosed or misrepresented circumstances having caused the insurer to withhold his consent to the contract or entered it on different terms.<sup>79</sup> Also, this distinction may lead to different reactions. If knowledge of the circumstances would have lead the insurer to refuse the contract, this will result in a stricter reaction (avoidance<sup>80</sup> or the contract not being binding<sup>81</sup>), whereas if the circumstances only had effected the conditions of the contract, a less strict sanction will apply (calling in additional premium,<sup>82</sup> pro rata reduction of liability,<sup>83</sup> or freedom of liability for losses caused by the undisclosed risk<sup>84</sup>).

On the other hand, a general feature of the sanctioning system in case of negligence is that causation between the circumstances not disclosed and the casualty is no issue. An exception from this is the Scandinavian solution in case the insurer would have effected the insurance, but on different terms had he known of the undisclosed or misrepresented circumstances. In this case the insurer will be responsible for casualties that are not caused by the undisclosed circumstance. The person effecting the insurance has the burden of proving no causation.<sup>85</sup>

### 3.4.5. *Fraud and bad faith*

#### 3.4.5.1. *The concepts*

By "fraud" is here meant that the person effecting the insurance intentionally gives wrong or incomplete information in order to get an insurance contract he would otherwise not be able to get, or to get the contract on better condition. This implies that the person effecting the insurance must have knowledge about the factual circumstances and also about the significance of these circumstances for the insurer. Also he must act in order to obtain a gain.

<sup>76</sup> Japanese Com C art. 644, Japanese HC art. 17, Japanese CC art. 11.

<sup>77</sup> Norwegian ICA § 4-2, which is applied for the Norwegian CC.

<sup>78</sup> Italian CC art. 1892 and 1893, Slovenian MA art. 694 and 695.

<sup>79</sup> Italian CC art. 1892 and 1893, Belgian law 1874 art. 9, Dutch C Com art. 251, Dutch Cargo Policy art. 19, Slovenian MA art. 694 and 695 and Croatian MC. UK MIA sec. 18 and 20 are as mentioned interpreted to contain such condition. see Batz 1999 p. 17, Schoenbaum p. 117 f. US admiralty rule is the same, see Schoenbaum p. 118.

<sup>80</sup> French ICA art. L 172-2, Croatian MC.

<sup>81</sup> NP § 3-3 first part, DC § 24.1 and § 25, SHC § 9 mom. 5 ref. SP § 13.

<sup>82</sup> Croatian MC.

<sup>83</sup> French ICA art. L 172-2.

<sup>84</sup> NP § 3-3 second part, DC § 24.2 and § 25, SHC § 9 mom. 5 ref. SP § 13.

<sup>85</sup> NP § 3-3 second part, DC § 24.2 and § 25 (not cargo-insurance), SHC § 9 mom. 5 ref. SP § 13. A similar provision is stated in DTV Cargo 4.2-2 if the assured can prove that the undisclosed information did not influence the premium. It may also be mentioned that some American cases have rejected the rule of utmost good faith as federal US law and instead applied state law, and thereby included a condition of causation, see Schoenbaum p. 101.

The concept of "bad faith" is less clear, but seems normally to be equalized to intent. This implies that the person effecting the insurance possesses knowledge about the information, and may be also that he understands the significance of this for the insurer.

### 3.4.5.2. *The sanctions*

Fraud and bad faith activate the strictest sanctions. However, also fraudulent behaviour or bad faith on the part of the person effecting the insurance may activate very different sanctions. If the person effecting the insurance fraudulently or in bad faith has breached his duty of disclosure, the contract may be void,<sup>86</sup> it may be voidable at the option of the insurer,<sup>87</sup> he may claim that the contract is not binding,<sup>88</sup> or he may be free of liability for an incurred casualty.<sup>89</sup> The sanction may be conditioned on the information being decisive for the insurer in deciding whether to accept the risk or on which conditions the insurance should be effected.<sup>90</sup> Further, it may be stated that there is no return of premium.<sup>91</sup> The insurer may also be given the option to claim additional premium.<sup>92</sup>

Normally, the sanction against fraud will be applied regardless of whether there is causation between the undisclosed or misrepresented circumstance and the subsequent casualty. An exception here is the Japanese solution, where lack of causation will lead to liability for the insurer for casualties having occurred before the contract is cancelled.<sup>93</sup> The same holds for the German cargo clauses

<sup>86</sup> Belgian Law 1874 art. 9, Dutch C Com art. 251, Spanish C Com art. 381, see Von Ziegler p. 23-24 and p. 27-28. The same holds for South Africa if there is a "fundamental" mistake, see Hare p. 16.

<sup>87</sup> Spanish ICA sec. 10.3, Italian CC art. 1892, French ICA art. L 172-2, French CC art. 14-1 and 18, French HC art. 8-1 and 14, DTV Cargo 4.5, Slovenian MA art. 695, UK MIA sec. 18 (1) (disclosure) and sec. 20 (1) (misrepresentation), Ca MIA sec. 21 (7) (disclosure) and 22 (8) (misrepresentation), AU MIA sec. 24 (1) (disclosure). This is also claimed to be the solution in and Croatia, but here there are no references in the material. The same seems to be the solution in US, see Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245, 251 (1967), Staring 1994, p. 293-294. According to Hare p. 16, this is also the solution in South Africa if there is not a "fundamental" mistake.

<sup>88</sup> NP § 3-2, DC § 22, SP § 11 ref SHC § 9 mom. 3.

<sup>89</sup> ADS 20 (1), DTV Cargo 4.2-1, Greek Law 2496/1997 § 3, Chinese MC art. 223, Japanese Com C art. 645.

<sup>90</sup> Italian CC 1892, Belgian law 1874 art. 9 and 10, Dutch C Com art. 251, Dutch Cargo Policy art 19, French ICA art. 172.19.3, Slovenian MA art. 695. This is also claimed to be the solution in Croatian MC. UK MIA contains no such condition, but inducement is in UK interpreted to follow from the requirement of materiality, see Batz p. 17, Kirby p. 271-273, Griggs p. 301-302, Schoenbaum p. 117 f. US admiralty rule of utmost good faith follows the UK solution on this point, but the distinction between materiality and inducement is not always made clearly in the cases, see Schoenbaum p. 118. The question seems to be undetermined in Australia, see Kirby p. 273-275.

<sup>91</sup> French ICA, art. 172-2, French CC art. 14-1 and 18, French HC art. 8-1 and 14, UK MIA sec. 84 (1). This seems to be the solution in South Africa as well, see Hare p. 16.

<sup>92</sup> Slovenian MA art. 695 and Croatia (no reference).

<sup>93</sup> Japanese Com C art. 645. It may also be mentioned that some American cases have rejected the rule of utmost good faith as federal US law and instead applied state law, and thereby included a condition of causation, see Schoenbaum p. 101.

in case of disclosure if the policy holder can prove that the undisclosed information did not influence the premium.<sup>94</sup>

In some countries the sanction against fraud is also applied when the person effecting the insurance is guilty of intent, or of having breached honesty and good faith. This seems similar to the concept of "bad faith". Thus, the Greek and Chinese reaction freedom of liability is used for both fraud and intent.<sup>95</sup> In Denmark, Sweden and Finland the reaction that the contract is not binding also applies if the person effecting the insurance has acted against honesty and good faith.<sup>96</sup>

If the reaction is freedom of liability instead of avoidance or the contract not being binding for the insurer, there is also a question of termination. In Greece, China and Japan the insurer is thus given a right to terminate the contract when the person effecting the insurance is guilty of fraud or intent.<sup>97</sup>

### *3.5. Some conclusions*

According to the discussion in item 3, some main issues may be identified for the purpose of harmonization. As a starting point, one will have to look into the relationship between disclosure and misrepresentation, and the need for separate regulation. A second main issue is what kind of information the regulation shall apply to (the questions concerning materiality and inducement, and the difference between active and passive duty of disclosure). A third issue is the relevant point of time. The fourth issue is the very important question of the relevance of the assured's knowledge or degree of fault. The fifth issue is the question of causation and the sixth issue the sanctions to be applied.

However, it also follows from the above that the duty of disclosure is regulated by a variety of approaches and material solutions. The total picture is thus very confusing, and it is difficult to point out main solutions, even if the main issues may be identified. Also, the differences in approach and material solutions may be of various degree of importance. Some differences seem to be more a matter of terms or construction than of difference in material solutions.

The differences in approach to the scope of the duty of disclosure between a duty to disclose all (material) facts and a duty to disclose (material) facts that is known may have limited practical importance. A duty to disclose all (material) facts is of limited consequence if the sanctioning system is limited to a negligent breach, or no knowledge/good faith activates a very limited sanction, i.e. a right to cancel the contract. On the other hand, to connect the duty of disclosure to knowledge both of the circumstances and the significance for the insurer give little meaning if the insurer may sanction against the assured who ought to have possessed the relevant knowledge. However, as the relationship between the description of the duty and the sanctioning system is

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<sup>94</sup> DTV Cargo 4.3. In case of fraudulent misrepresentation the contract is avoidable, see 4.5.

<sup>95</sup> Greek Law 2496/1997 § 3. Chinese MC art. 223.

<sup>96</sup> Swedish HC § 9 mom. 3, DC § 22, Finnish ICA 1933 § 4.

<sup>97</sup> Greek Law 2496/1997 § 3. Chinese MC art. 223. Japanese Com C art. 644, Japanese HC art. 17, Japanese CC art. 11.

not always clear, some efforts should be made to clarify the connection between different levels of knowledge and different sanctions.

Another difference that may be of less importance concerns the conditions of materiality as a part of the definition of the information that is to be disclosed and the condition of inducement as part of the sanctioning system. If the concept of materiality is subjective, it will be equivalent to the condition of inducement. In this instance, it will not matter whether the condition is part of the definition of the information to be disclosed or part of the sanctioning system. On the other hand, if the definition of materiality is objective (i.e. MIA-based systems, US, Germany, Norway) there is a distinction between the two issues. As a condition of inducement seems to be a general requirement, the main question will be whether one also is in need of a condition of materiality.

The discussion also shows that the mandatory requirements in the Danish, Swedish French and Slovenian legislation in general and the Norwegian ICA for national cargo insurance give the person effecting the insurance more protection if he passes wrong or insufficient information over to the insurer than the mandatory and directory legislation in some of the other countries. As a starting point, both the mandatory and the declaratory systems are based on an active duty of disclosure. The only exception here is the passive duty of disclosure for carriage of cargo within Norway. However, national carriage of goods should not pose a serious problem in an international attempt of harmonization.

There also seems to be a rather homogenous approach to the time the duty of disclosure applies, where the main solution is that both the factual circumstances and the knowledge or good faith of the contracting party shall be evaluated at the time the contract is entered into. However, the provision in Norway, Sweden and Finland concerning the duty to correct information later seems to be contrary to mandatory regulation in Denmark, France and Slovenia, and probably also the Swedish ICA. The common law systems also depart from this provision, but the principle of good faith may open the door for this solution, see below under item 4.

As for the sanctioning system, the difference between avoidance and the contract not being binding when the contracting party has acted fraudulently seems to be a matter of term more than a difference in result. The mandatory provisions in Denmark and Sweden stating that the contract is not binding upon the insurer<sup>98</sup> should not be problematic as the insurer is allowed to provide for a less strict solution. These systems may therefore adopt a less strict sanction if that should be preferred. However, a more lenient sanction may be stopped by the French mandatory legislation, providing for (optional) avoidance of the contract in case of bad faith. Apparently, the insurer is not free to deviate from this rule in favor of the assured. The same seems to be the situation with some MIA-based systems (in UK only for fraud), South Africa and US, where the insurer's right to avoid the contract is the only remedy.

More serious problems concern the sanctioning system for negligence and good faith. According to UK MIA based legislation the insurer may avoid the

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<sup>98</sup> DC § 22, SP § 11.



contract if the assured knew or ought to know that the information he passes on to the insurer is either insufficient or wrong, if the information concerns circumstances that would have influenced the insurer's risk assessment. This holds also if the assured does not realize the significance of the information. These provisions are as mentioned above under 3.1. mandatory for some common law countries (but not in UK except for fraud). According to Danish and Swedish legislation a similar sanction is conditioned on the insurer having refused the insurance if he had known about the undisclosed circumstance. If he had entered the contract, but on other conditions, the insurer will only be free of liability for casualties caused by the undisclosed circumstance.<sup>99</sup> Slovenia's legislation is even more protective, as avoidance is limited to gross negligence on the part of the person effecting the insurance. For ordinary negligence, including the situation where the assured ought to have known about the undisclosed information, the insurer may only call for additional premium.<sup>100</sup> The French ICA art. L 172-2 seems to be even more favorable with protection for the assured who does not know, but should have known, about the information. Also, if the assured knew about the information, but thought it was insignificant (good faith), he will get pro rata indemnification if the information only was decisive for the insurance conditions, and not for the contract.

A more limited mandatory regulation is found in the Norwegian ICA § 4-2 for national trade, providing for a broad evaluation of reduction in liability if the contracting person is more than a little to blame.

The mandatory systems thus operate with different levels of protection for negligence. If all the mandatory solutions are respected in favor of the assured, but one may choose more favorable provisions, ordinary negligence may only lead to additional premium. On the other hand, if more favorable solutions for the assured are not allowed, it is not possible to find solutions that combine the mandatory restrictions in the mentioned regulations.

There are also differences in the systems when the person effecting the insurance does not possess knowledge about the information or the significance of the information for the insurer. Again, the French ICA art. L 172-2 seems to be most favorable, with full protection for the assured who has no knowledge about the information even if he ought to have known. This is contrary to all the other mandatory systems, where the insurer may sanction against an insurer who ought to have possessed the knowledge. On the other hand, Sweden, Denmark and Slovenia protect the assured if he cannot be blamed for not having the relevant knowledge. The same holds for the Norwegian legislation for cargo insurance.<sup>101</sup> This is contrary to systems where the insurer may avoid the contract also if the assured did not possess the information, viz. UK MIA based legislation (not mandatory in UK on this point), US and South Africa in case of misrepresentation. This conflict between the mandatory systems may be a substantial problem for harmonization. Also, many of the directory provisions

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<sup>99</sup> SP § 13, DC §§ 24 and 25.

<sup>100</sup> Slovenian MA sec. 694 and 695.

<sup>101</sup> DC § 23, Swedish HC § 9 mom 4, Norwegian ICA § 4-2, Slovenian MA sec. 694.

follow the strict solution where the contract is null and void or the insurer may avoid the contract even if the assured has acted in good faith concerning the significance of the information (Belgium, Netherlands and Spain). An agreement for this issue may therefore prove difficult.

Even if there may be agreement as to what is the purpose of the regulation of duty of disclosure, it is obvious that this purpose does not lead to a common solution. Some of the solutions may however be explained by the reasoning behind the regulation. As the purpose of the regulation is to give the insurer sufficient information to assess the risk, information not needed for this purpose should not invoke any reaction. This may therefore explain a condition of inducement or a condition of subjective materiality, which exists in most of the systems.

A flexible sanctioning system dependent on the degree of fault of the part of the assured may be explained in terms of economic efficiency and legal fairness. If fraudulent behaviour were to be accepted, the insurer would be forced to take measures as a defense against being deceived. As a matter of social efficiency such costs are wasted, and should be avoided.<sup>102</sup> The risk for fraud should therefore clearly rest with the assured. The same may be said for behaviour against honesty and good faith. However, as this concept is difficult to define, it may be wise to avoid using it.

With lesser degree of fault on the part of the assured, the reasoning becomes more uncertain. From an economic point of view it may be argued that the risk for lack of information should rest with the person who had the easiest access to the information in question.<sup>103</sup> As for specific information concerning the risk, this will normally be the assured, being the owner of or at least having some sort of interest in the risk. On the other hand, the insurer is the professional risk carrier. This implies that he will have better access to more general information, and also that he will know what information to look for. Efficiency arguments thus favor that the assured carries the risk for information concerning the particular risk he wants to insure, whereas the insurer carries the risk for more general information. Also, the latter part of this reasoning may explain a requirement of objective materiality, lifting the risk for a more uncommon risk assessment back to the insurer. If the insurer wants particular information, he also has the opportunity to make inquiries. If the risk for more special information rests with the assured, this may induce him not only to give the insurer a lot of unnecessary information, but also to do a lot of unnecessary research to gain information in order not to breach his duty.

As a starting point, efficiency arguments concerning the risk for lack of information holds whether the party with easiest access to information is negligent or in good faith.<sup>104</sup> Legally, however, there are arguments in favor of treating an assured in good faith better than an assured acting negligently.

<sup>102</sup> Cooter and Ulen: *Law and Economics*, 1988, p. 259-260.

<sup>103</sup> Posner: *Economic Analysis of Law*, 4 ed. (1992) p. 95 and 102, Kronman: *Contract Law and Distributive Justice*, in: *Yale L.J.* Vol. 89 (1979/80), p. 4, Trebilcock: *The Limits of Freedom of Contract*, 1993, p. 105-106.

<sup>104</sup> Trebilcock p. 105-106, Kronman p. 4.

Loosing coverage for losses having occurred when the lack of information is discovered is a sanction that may amount to a substantial sum of money, and may thus be difficult to handle for the assured. It seems to be a very harsh punishment against an assured having acted in good faith. The insurer, on the other hand, has been paid to carry the risk, and even if his risk assessment was wrong, he has the possibility to finance his loss over future premiums. He may even be able to calculate future premiums on the bases that there will always be a risk of some information deficiency. It may therefore be argued that the insurer will have a sufficient remedy if he has a right to cancel the contract and/or call for additional premium. This is a solution followed in most of the civil law countries.

A more substantial sanction is called for when there is a negligent breach of the duty of disclosure. If the insurer would not have accepted the risk if he had known about the unknown circumstances, it seems logical that the contract should not be binding or that the insurer may claim avoidance. This seems to correspond with the main stream of solutions in both common law and civil law, even if some systems have a more favorable solution.

On the other hand, if the insurer would have accepted the risk, but on other conditions, it is difficult to see why he should be able to claim such a harsh sanction. Logically, there is therefore a good reason to follow the distinction between these two situations that are applied in many of the civil law countries. However, it is difficult to point out a logically "correct" reaction in the latter situation. Economically it may seem correct to operate with a pro rata liability, or to call for additional premium. An example of pro rata liability is found in the French ICA art. L 172-2 if an assured with knowledge of the information but in good faith concerning the significance of it fails to disclose circumstances that was significant for the insurer's risk assessment. The solution is criticized in the French market for creating practical problems as there are no official rating scheme in the marine insurance market. The French Marine Underwriters therefore tried to escape it by stating in the hull and cargo conditions that any non-disclosure (of facts known by the assured) shall render the contract null and void.<sup>105</sup> The proportionality principle has also been heavily criticized in the common law countries. The UK Law Commission advised against a principle of premium adjustment because the assessment of the additional premium would be too difficult, and this view seems to be accepted also in Australia and US. It has also been argued that this solution would encourage non-disclosure and misrepresentation because the assured would know that in the event of a claim, the worst that would happen will be that he is required to pay the premium he would have paid if the risk had been properly presented in the first case.<sup>106</sup>

An alternative solution is to let the insurer be liable for the claim if there is no causation. This solution is may be less logical than proportionality from an economic point of view, but it corresponds to other clauses used to limit the insurer's liability. A requirement of causation also has an equitable ring to it. It

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<sup>105</sup> Rohart p. 319, with reference to the 1983 French HC and CC.

<sup>106</sup> Griggs 1994 p. 307, Kirby 1994 p. 276-277, Staring 1994 p 295-296.

should also be mentioned that this has been the solution in the Nordic countries throughout this century without having seemed to cause problems, and these provisions were kept unaltered under the Norwegian 1996 amendment of the Plan and the 2000 amendment of the Swedish conditions. There is therefore no factual evidence to suggest that this solution will cause problems for the insurers, even if one may claim that no liability regardless of causation gives a sharper encouragement for full disclosure.

If this reasoning is compared to the mandatory systems, five main obstacles occur. One main problem will be the common law solution for misrepresentation in good faith (no knowledge of the correct information). The second obstacle is the common law solution for negligent breach of the duty of disclosure/truthful representation when the insurer would have accepted the risk on other terms had he known about the undisclosed circumstances. A third problem is that the French legislation fully protects an assured who did not know, but should have known the information. The fourth obstacle is that the French and Slovenian systems use a proportionality principle instead of a causation principle. And the fifth obstacle is that an objective materiality requirement may meet some problems, both compared to UK case law concerning the materiality requirement, and compared to mandatory provisions in the civil law systems which only require subjective inducement. The material is however not totally clear on this point.

#### 4. *Duty of good faith*

##### 4.1. *Common law countries*

###### 4.1.1. *Introduction*

In the common law countries the duty of disclosure is a part of the broader concept of duty of good faith. The purpose here is to discuss the remaining part of this principle. Although there are minor variations in the way the principle of good faith is practiced in the different common law countries, the basic features of the concept seems to be the same. In marine insurance systems based on the UK MIA, the general doctrine of utmost good faith is enunciated in Section 17 of the UK MIA.<sup>107</sup>

“A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by either party”

New Zealand, South Africa<sup>108</sup> and US<sup>109</sup> use the same concept based on

<sup>107</sup> See also Au MIA sec. 23, Hong Kong Ord sec. 17, Ca MIA sec. 20.

<sup>108</sup> *Videtsky v Liberty Life Insurance Association of Africa Ltd* 1990 (1) SA 386 (W), *Mutual & Federal Insurance v Oudtshoorn Municipality* 1985(1) SA 419(SCA), *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (SCA).

<sup>109</sup> In US the view of the majority of courts is that the United States national law considers policies of marine insurance to be contracts of utmost good faith. See Healy, *The Hull Policy: Warranties, Representations, Disclosures and Conditions*, 41 Tul. L. Rev. 245-246 (1967); Goldstein, Joel K., *The Life and Times of Wilburn Boat M Critical Guide (Part 11)*, 28 J. Mar. L. & Com., 555, 576-577 (1997). A significant exception is *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 822, 1991 A.M.C. 2511 (5th Cir.

common law and equity. It is not clear to what extent the principle is mandatory.<sup>110</sup>

The principle of good faith applies to all policies whatever the risk or the subject-matter insured. In order to illustrate the relationship between the duty of good faith and the duty of disclosure, the discussion here is divided between pre contractual obligations, obligations while the contract is running and the consequences of breach.

#### 4.1.2. *Pre-contractual obligations*

As mentioned, the duty of utmost good faith embraces the duties connected to disclosure and misrepresentation as these are spelled out in UK MIA sec. 18-21. These obligations apply prior to the initial formation of the contract and at renewal, and are discussed in more detail above under item 3. However, the pre contractual obligations inherent in the duty of good faith are wider than these two provisions in the Act.

One extension is that sec. 17 contrary to the provisions concerning disclosure and misrepresentation contains no requirement that the information should be material. The duty of utmost good faith embraces not only circumstances material to the subject matter insured (the physical hazard), but also any other circumstance material in any way to the risk presented to the insurer (the moral hazard), such as the assured's claims record. However, it is not clear exactly how far these obligations reach. In *Banque Keyser Ullmann v. Skandia*<sup>111</sup> at p. 93 it was held that the duty is

*"... not only to abstain from bad faith but to observe in a positive sense the utmost good faith".*

The more detailed content of the principle of "utmost good faith" is however difficult to grasp.

As mentioned above under item 3.2. UK case law has interpreted materiality in a very limited fashion, stating that it is not necessary that the undisclosed matter was decisive for a prudent insurer. On the other hand, a condition of inducement is read into sec. 18 and sec. 20, even if this is not an express condition. How far art. 17 may deviate from materiality and inducement concerning disclosure and misrepresentation before the contract is entered into seems uncertain. On the other hand it is argued that this is not a problem because the only sanction for breach of the duty of good faith expressed in sec. 17 is avoidance under sec. 18 and sec. 20, and for avoidance under these provisions there must be both materiality and inducement.<sup>112</sup>

Another extension of the principle compared to the duty of disclosure is

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1991), in which the United States Fifth Circuit Court of Appeals distinguished statements from earlier cases as dicta, and held that utmost good faith would not apply in all cases. Accordingly, the application of good faith will vary depending on the court of appeals district in which the case arises.

<sup>110</sup> The only answer stating this expressly is Australia concerning Art. 23. However, the same seems to hold for US, see Schoenbaum p. 97, even if *King v. Allstate Insurance Co* comes to another result.

<sup>111</sup> [1987] 1 Lloyd's Rep 69.

<sup>112</sup> Clarke with reference to the *Pan Atlantic* case cited above.

that it is mutual and thus also applies to the insurer.<sup>113</sup> In Hong Kong, however, the common law has established that an insurer is under a pre-contractual duty of disclosure to his insured only in respect of matters which are material to the risk or to the recoverability of a claim.<sup>114</sup> Also, both in UK and US the duty is normally claimed against the assured.<sup>115</sup>

#### *4.1.3. Obligations while the contract is running*

The duties of disclosure and to make correct representation are obligations prior to the initial formation of the contract and at renewal. The duty of good faith is, on the other hand, not confined to those obligations and may to some extent continue after the contract has been concluded. The starting point is that this holds both for the assured and the insurer. However the position in US seems to be that the duty of good faith after the contract is entered into is only relevant for the insurer, and is not invoked against the assured.<sup>116</sup>

In UK three issues seem to be included in the duty of good faith after the contract is effected. The first issue is that the duty of good faith attaches to the giving notice under held covered clauses, ref. *The Litsion Pride* case.<sup>117</sup> The insurance policy in this case contained a held covered clause which expressly stated that the assured would be held covered for the voyage in question even without prior advice to the insurer. However, the court held that if the assured wished to obtain the benefit of a held covered clause, he must give the information required by the contract in good faith.<sup>118</sup> A held covered clause is a legal tool to reinstate coverage for a risk which would otherwise be excluded through an express or implied warranty, see further below under item 6. A notification requirement concerning coverage under a held covered clause thus seems to have parallels to the notification requirements that in the civil law countries are inherent in the provisions concerning alteration of risk, see below under item 5. Whether this solution is adopted in the other countries with legislation based on MIA or common law is not addressed in the material.

The second issue is that the assured, if he wishes to vary the terms of the cover, must disclose all circumstances relevant to the variation at the time the variation takes place.<sup>119</sup> Again, the situation in the other MIA based countries is unclear.

The last issue is that the doctrine of good faith is used to deal with fraudulent claims.<sup>120</sup> This solution is also followed in New Zealand. This

<sup>113</sup> In US the duty imposed by the national law applies to both the insured and the insurer, (Sec. Staring, *Marine Insurance - Is the Doctrine of Utmost Good Faith "Out of Date?"* - 2 CMI Yearbook 1994, 288). However, there is a trend toward applying state law of bad faith and punitive damages against insurers of marine policies. Clann, Brown, and Sydow, *Judicial Interpretation of Insurance Contracts in Maritime Law: the Duty of Good Faith in Handling Claims*, 66 Tul. L. Rev. 479 (1991).

<sup>114</sup> The House of Lords approved the Court of Appeal's decision in *Banque Financiere De La Cite S.A. v Westgate Insurance Co. Ltd.* (1991) 2 A. C. 2049.

<sup>115</sup> Schoenbaum p. 103.

<sup>116</sup> Schoenbaum p. 122, Staring/Waddell p. 1659 and p. 1665-1670.

<sup>117</sup> *Black King Shipping Corporation v. Massie (The Litsion Pride)*, (1985) 1 Lloyd's Rep 437.

<sup>118</sup> Batz 1999 p. 19-20.

<sup>119</sup> *Fraser Shipping Ltd. v. Colton (The Shakir III)* (1997) 1 Lloyd's Rep. 586, Batz 1999 p. 19.

<sup>120</sup> *The Star Sea* (1997), 1 Lloyd's Rep. 360. The same solution seems to be accepted in South Africa, see the Videtsky case.

implies that the presentation of claims must be made in good faith. On the other hand, innocent non-disclosure in the claims context is not a breach of the duty of good faith.<sup>121</sup> The same holds for a negligent statement in a claim.<sup>122</sup>

In South Africa, the assured's duty to avert or minimize a loss is also claimed to be part of the duty of good faith.<sup>123</sup>

The US solution is as mentioned somewhat different from the other common law countries as focus is here directed towards the insurer. Apparently, both state law and federal law impose a rather strict duty of good faith on insurer's handling of claims.<sup>124</sup>

It follows from this that the precise scope of the post-formation doctrine of good faith, its remedial structure and its relation to Section 17, are still not clear. A pending appeal to the House of Lords may provide some answers.<sup>125</sup>

#### 4.1.4. *Consequences of breach*

The remedy according to UK MIA when there is a breach of the duty of good faith is that the contract may be avoided. Avoidance is not triggered automatically, but happens after the insurer so elects.<sup>126</sup> The same solution is followed in US.<sup>127</sup>

Contrary to the provisions for duty of disclosure or misrepresentation there is as already mentioned no condition in sec. 17 that the breach concerns a fact that was material and would have induced the insurer not to accept the insurance or to accept it on other conditions. Neither is there any condition that the assured in a case of non-disclosure knew about the undisclosed fact or ought to have known about it. The right to avoid the contract according to sec. 17 does not in any way depend on fault of the party in breach of the duty. Thus, even if the insured is wholly innocent in failing to disclose a fact prior to the conclusion of the contract, the insurer will have no liability whatsoever, as he may avoid the contract.<sup>128</sup> This means that fraudulent behaviour is treated the same way as negligence and good faith.

It should be noted that there is no remedy in damages for breach.<sup>129</sup> The only remedy is for the party prejudiced to avoid the contract.

If the breach is connected to the formation of the contract, the result is that

<sup>121</sup> Batz 1999 p. 21.

<sup>122</sup> *Alfred McAlpine v. BAI* (2000) Lloyd's Rep. IR 352.

<sup>123</sup> Hare p. 17-18. To what extent South Africa will follow the UK notion of good faith concerning held covered clauses, variation of cover and claims, is not clear, see Hare p. 2 f, particularly p. 5. There are no reported cases in Australia

<sup>124</sup> See further Staring/Waddell p. 1659 and p. 1665-1670.

<sup>125</sup> The *Star Sea* mentioned above.

<sup>126</sup> Batz 1999 p. 24.

<sup>127</sup> Schoenbaum p. 125.

<sup>128</sup> Batz: Duty of disclosure: Scope of duty and sanctions for breach, in: Reports from Marine Insurance Symposium, Oslo, 4-6 June 1998 (Batz 1998), p. 87. Clarke: *The Law of Insurance Contracts* (2000), Ch. 27-2B4, disagrees, claiming that conditions of inducement and materiality follow from the underlying common law.

<sup>129</sup> Schoenbaum p. 127-128 regarding negligence. The question of damages for deceit is more uncertain, see ALRC p. 123-124, *London Assurance v. Clare* (1937) 57 Ll.L.Rep. 254, 270.

the whole contract may be avoided. The contract will then be treated as if it never existed. The extent of the sanction is less clear when the breach is made while the contract is running. If the breach is connected to a held covered clause it is uncertain whether the insurer may avoid merely the cover for the additional premium area, or the whole contract. Similarly, if there is a breach of the duty to notify a variation in the cover, it is not certain whether the insurer may avoid only the variation or the whole policy. If there is a fraudulent claim the question is whether the whole policy may be avoided, or just the part of the policy the claim concerns. This issue is particularly relevant if the policy is a fleet policy for many ships and the claim is for one of them.<sup>130</sup>

#### 4.2. *Civil law countries*

Whereas all the civil law countries in the material operate with a duty of disclosure, a duty of good faith as an additional concept is not generally inherent in the marine insurance system in these countries. The Scandinavian insurance legislation does not include a regulation of this concept except for what already follows from the regulation of duty of disclosure. The same holds for the Netherlands, Slovenia, Japan and apparently for Portugal.

However, some systems also include the concept of duty of good faith. The duty may be defined explicitly in the insurance legislation or the contract clauses, it may be included in general contract legislation, or it may be inherent in the system without any special provision. Also, more specific clauses may be seen as an example of the more general principle of good faith.

Direct regulation of a duty of good faith **both in the insurance legislation and in general contract legislation** is used in Germany and France. In Germany, the principle is stated in both the ADS clauses and in the Civil Code, stating that "All parties concerned shall act in the utmost good faith".<sup>131</sup> However, this rule does not provide for a sanction in case the duty of utmost good faith is not complied with. German courts have thus not come to a uniform interpretation of this rule. Similarly, the French provision is placed in both the general legislation and in the insurance legislation.<sup>132</sup>

In Italy, Spain and Argentina, the principle is **established in general contract legislation**.<sup>133</sup> Belgium, China and Venezuela, on the other hand, state that good faith is a **general requirement for all contracts**, but not defined through an explicit provision in the law

Similar to the common law version of the principle, the general good faith principle in civil law seems to be applied both to the time when the contract is entered into and when the insurance period is running. The concept of duty of

<sup>130</sup> Batz 1998, p. 89, Batz 1999 p. 25-30. The effect of the policy of a fraudulent claim is debated in UK, see Clarke: Law of Insurance Contracts (2000) Ch. 27-2C and ALRC p. 124-125.

<sup>131</sup> ADS 13, ref. also § 242 BGB.

<sup>132</sup> French Code Civil art. 1134, French ICA art. L 172-19.

<sup>133</sup> Italian CC art. 1366 and 1375, and Spanish Civil Code art. 1258 and 1288, the Spanish C Com art. 57 and the Argentinian Civil Code art. 1198, see Rohart: The doctrine of utmost good faith in the marine insurance law of some civil law countries, CMI Yearbook 1994, p. 308.



good faith thus seems to overlap both the regulations concerning duty of disclosure and the regulation concerning alteration of risk. Another similarity seems to be that it applies both to the insurer and to the assured. As a starting point, the provisions for duty of disclosure and alteration of risk do not prescribe any duties for the insurer. But as mentioned above under item 3.2.3 the insurer may normally not claim a breach of duty of disclosure concerning facts that he knew or should have known when the contract was concluded.<sup>134</sup> This may be seen as an element of good faith for the insurer.

Also, some countries refer to **special provisions in the insurance contract as an example of the principle of good faith**. An example is that Italy claims that the duty of the assured to do everything in his power to avert or minimize the loss is a part of this principle.<sup>135</sup> This is parallel to the South African attitude, see above under item 4.1.3. Similarly does Croatia state that the duty to document a loss must be seen as part of a principle of good faith. This corresponds to the practice in UK.

#### *4.3. Some conclusions*

The principle of good faith seems partly to embrace the rules concerning duty of disclosure, partly to have a wider applicability.

The connection between the principle of good faith and the duty of disclosure is strongest in common law. Compared to the regulation concerning disclosure and misrepresentation, the regulation concerning duty of good faith creates two main problems. One problem is the question of how far the duty of disclosure may be extended as far as conditions for materiality and inducement are concerned. These conditions are a main part of most of the other systems on this point, and it is difficult to see how the civil law systems can manage without these elements in the regulation. It is also difficult to see a reason for extending the duty of disclosure like this. Another problem concerns the inflexibility concerning the sanction compared to the degree of fault. This problem arises also concerning UK MIA sec. 18 and 20, see above under item 3.5, but is even more prevalent here.

The rest of the principle also contains some problems. One problem is that the principle of good faith is a very indistinct concept. This holds whether the principle is expressly provided for in the marine insurance legislation (MIA-based legislation, France, Germany), in general contract law, or in common law and equity. The wording good faith or utmost good faith does not say what the good faith should be referred to. The principle may therefore be used to impose duties upon the parties to the contract in any area where there is a lack of more express regulation. Interestingly enough, this feature of the concept has been criticized by common law judges.<sup>136</sup>

However, the vague meaning of the concept has also been defended as a

<sup>134</sup> See i.a. NP § 3-5, SP § 15, DC § 27, ADS 20 (2).

<sup>135</sup> Italian CC art. 1914.

<sup>136</sup> See *Mutual & Federal Insurance v Oudtshoorn Municipality* 1985(1) SA 419(SCA) for South Africa.

necessary part of the common law system to obtain fairness.<sup>137</sup>

It should be noted that most of the defined areas in the common law countries where the principle of good faith are applied (held covered clauses, claims for losses and sue and labor), are under specific regulation in most civil law systems. The problems concerning this part of the duty of good faith is thus not the need for regulation, but the legal device of using a common and very open standard to deal with all of them. Even if some of the civil law countries with such provisions see these provisions as an example of the duty of good faith, it is, however, difficult to see that anything is gained by defining such rules as part of a general principle of good faith.

On the other hand, it may be argued that the duty of good faith is a flexible tool because of this broadness, and therefore may fill in gaps in need of regulation. But the price of such flexibility is a total lack of predictability for the parties to the contract, especially for the assured. Instead of a clearly defined duty to notify the insurer in certain circumstances, or to use sufficient care when making a claim for a loss, he has to deal with a very indistinct standard of behaviour that may come as a total surprise for him. With the value of the ship at stake, it seems fair that his duties toward the insurer should be outlined in a more precise manner. The fact that many civil law systems manage without this principle also clearly illustrates that it is fully possible to regulate the mentioned areas more precisely in the contract conditions.

Another problem is that the principle as applied in common law seems unfair. Instead of creating equality between contracting parties, which is a goal for the rules concerning duty of disclosure, the duty of good faith seems to tip the balance back in favor of the insurer. Why should he be able to avoid a contract because of circumstances that was not material for his acceptance of the risk? This seems to create an undeserved gain for the insurer on account of the assured. Another point is that the provision in its traditional version does not divide between fraud, negligence, accidents or good faith. Even in the core areas of the principle concerning duty of disclosure it may be debated whether it is wise to treat such different behaviour the same way. When the principle is used in other areas, the logic behind this attitude is even harder to understand.

It follows from this that the problem is the principle of good faith will cause in a development towards harmonization will vary depending on what part of the principle is discussed. The problems concerning duty of disclosure is already mentioned above under item 3.5, and concerns mainly the inflexibility of the reaction compared to the degree of fault by the party effecting the insurance. A further part of the principle seems to correspond to the regulation concerning notification of alteration of risk, which is discussed in more detail below under item 5. Held covered clauses and loss statements, on the other hand, are not part of this report, and will thus not cause problems for this process.

## 5. *Alteration of risk*

### 5.1. *Introduction*

When entering into an insurance contract the insurer will normally base his calculation of the premium and the policy conditions on certain

<sup>137</sup> Kirby p. 285-287.

presumptions concerning the risk. When these presumptions are altered, he may therefore either want to terminate the coverage or to change his insurance conditions. One tool to obtain this change is provisions concerning alteration of risk, providing for what changes the assured may make on his own, and in what circumstances he will need to communicate with the insurer and if necessary, alter his insurance conditions.

This kind of regulation is found in most of the civil law countries in the material, which are further described below under item 5.2. The legislative situation in the common law countries is different, and discussed below under item 5.3.

## *5.2. The civil law countries*

### *5.2.1. Introduction*

Similar to the duty of disclosure, rules concerning alteration of or increase in risk are traditionally an inherent part of a marine insurance policy in the civil law countries. Most of the systems in the material include provisions concerning this problem. The regulation in some countries is very similar to the regulation of duty of disclosure. In Denmark, Sweden, France and Italy, it is a mandatory part of the public legislation.<sup>138</sup> This must of course be taken into consideration in a process of harmonization. The provisions do not seem to have caused specific problems but they are important as a background for the discussion concerning warranties and more specific clauses concerning classification, seaworthiness, management issues and similar topics.

The Dutch and Chinese legislation do not seem to use the concept of alteration of risk, but do contain certain similar provisions for specific problems, see below under item 6. The Spanish system seems as a main rule to follow the English clauses, which are dealt with under item 6, but also include some material concerning alteration of risk.

The discussion will start with the concept of alteration of risk under item 5.2.2, move on to the duty to notify under item 5.2.3, whereas the sanctioning system will be dealt with under item 5.2.4.

### *5.2.2. The concept of alteration of risk*

The definitions of what constitutes an alteration or increase of the risk vary, but the definitions seem to be based on four different approaches. The first approach is that the risk must be increased compared to the written or implied conditions of the insurance contract.<sup>139</sup> The second approach is that the risk must be altered or increased in such a way that the insurer would not have accepted the insurance at all,<sup>140</sup> or would not have accepted the insurance on the

<sup>138</sup> See Danish ICA 1930 and Swedish ICA 1927 §§ 45 f, Italian CC 1932 ref. 1898 and French ICA art. L 172-3.

<sup>139</sup> NP § 3-8.1, Swedish HC § 18.1 ref. SP § 41, Finnish HC § 35 (1) with reference to Finnish ICA 1933, see § 45.1, DC § 42. The same approach seems to be used in Venezuelan C Com art. 559, using the term "essential circumstances" that were "taken into consideration in estimating the risk".

<sup>140</sup> Belgian Law 1874 art. 31.

same conditions if he had known about the increase.<sup>141</sup> A third method is to say that the risk is “substantially” altered.<sup>142</sup> The last approach is to connect the sanction to circumstances affecting or altering the risk after the contract is concluded without any further definition.<sup>143</sup>

In addition to these approaches, some systems define certain risks to represent an increase of risk.<sup>144</sup>

The main content of this seems to be that the concept of alteration of risk only includes circumstances that were in some way relevant for the insurer when the contract was entered into. Contrary to the provisions concerning duty of disclosure the relevance criteria, however, seems to be connected to the actual insurance contract, and not to an objective materiality concept. There is no indication in the material that alteration of risk is built on a prudent insurer test. Rather, alteration of risk seems to be based solely on a subjective approach to materiality.

It also follows from the presentation above that one way to define the relevance of the alteration of risk is to connect the concept of alteration to the insurer’s hypothetical attitude to the changes if he had known about them at the time the contract was entered into. In other systems, the question of the insurer’s attitude is an issue in the sanctioning system, ref. below under item 5.2.4. The practical result of both solutions will be that the insurer may not react against an alteration of risk that would not have had any influence on the contract if he had known about it at the time the contract was effected.

The Portuguese system has provisions concerning alteration of risk, but the material contains no definition of the concept.

### 5.2.3. *Duty to notify the insurer*

An increase of risk as defined under item 5.2 will normally activate a duty to notify the insurer. Three different situations may activate the duty of notification. One solution is that the duty will be activated by the assured’s knowledge of the increase, regardless of whether he is responsible for the increase himself.<sup>145</sup> In these regulations, the duty to notify the insurer also applies to the situation where the risk is increased due to circumstances outside the control of the assured. A second alternative is that a duty to notify only applies if the assured is responsible for the increase.<sup>146</sup> The third solution is that the duty to notify only applies if the alteration is not caused by the insured.<sup>147</sup>

<sup>141</sup> Italian C Nav section 522 ref. CC art. 1898, Greek Law 2496/1997 § 4.

<sup>142</sup> Japanese Com C art. 656, Slovenian MA art. 710, Croatian MC (no reference).

<sup>143</sup> French HC art. 8(2) ref. French ICA art. L 172-3. ADS 23 seems to use the same approach, but further defines some circumstances that constitute an alteration of risk. See also DTV Hull 11 and Cargo 5.

<sup>144</sup> NP § 3-8.2, DTV Hull 11.5 and Cargo 5.3. These provisions will be dealt with insofar as they are relevant for the issues discussed in this paper.

<sup>145</sup> NP § 3-11, French ICA art. L 172-3, French HC art. 8 (2), Greek Law 2496/1997 § 4, Japanese CC art. 8, Italian CC art. 1898, and apparently Portuguese legislation (no reference).

<sup>146</sup> Belgium Law 1874 art. 9, Venezuelan C Com art. 559.

<sup>147</sup> DC § 43, Swedish HC § 19 ref. SP § 42, Finnish ICA § 46, Japanese Com C art. 657.2, Japanese HC art. 14-3.

The implication of this solution seems to be that the assured will not have to notify the insurer of alterations caused by the assured himself. However, in order to keep his coverage, he will have to notify, because otherwise the insurer may be free of liability for subsequent casualties.<sup>148</sup>

If the insurer accepts the alteration of risk, whether made by the assured or a third party, the increase will cause no problems for the coverage of future claims, but the insurer may be entitled to additional premium.<sup>149</sup> On the other hand, the insurer may as a main rule also have the option to terminate or cancel the contract when he is notified.<sup>150</sup> This is, however, not always the case.<sup>151</sup> The right to cancel may also depend on the alteration being due to the assured,<sup>152</sup> or limited to the situation where the alteration is due to a third party.<sup>153</sup>

#### 5.2.4. *The sanctioning system*

##### 5.2.4.1. *Overview*

If there is a duty of notification, a breach of this duty may activate a sanction from the insurer. The same holds if there is no duty to notify the insurer, but the assured is responsible for the alteration of the risk. The sanctioning system raises two main questions. The first question is what sanction the insurer may apply. Four methods are used in this situation: the insurer may avoid the contract or the contract loses its effect, the insurer may be free from liability for an incurred casualty, and he may have the right to a pro rata reduction of the liability. Some systems are using only one solution, others are using a combination.

The second question is what conditions must be fulfilled for the insurer to be able to invoke the sanctions mentioned. These conditions seem to be connected to three different issues. The first issue is the question of fault of the part of the assured. The second issue is the question of how the insurer would have reacted had he known about the alteration of risk when the contract was entered into. The third issue is how the alteration of risk has influenced the casualty or the extent of the loss. The systems vary however as to whether all the issues are relevant, and how the issues will influence the insurer's liability.

In the following, the starting point for the discussion is the degree of fault on the part of the assured. Contrary to the discussion concerning duty of

<sup>148</sup> DC § 42, Swedish HC § 18, Japanese Com C art. 656, Japanese HC art. 14-1-(8), ref below under item 5.4.

<sup>149</sup> DTV Hull 11.4, DTV Cargo 5.5, French ICA art. L 172-3, Greek Law 2496/1997 § 4, Japanese HC art. 14-3 and CC art. 8, and apparently Spanish ICA art. 12. This seems to be the solution in Portugal as well, but no reference is given.

<sup>150</sup> Italian CC art. 1898.2, Greek Law 2496/1997 § 4, French ICA art. L 172-3, NP § 3-10, DC § 44, SP § 43, Swedish HC § 22 no. 1 (f) and no. 2 (b), Finnish HC § 35 no. 1 ref 1933 ICA § 47, Japanese Com C art. 657.1, HC 14-2-(2), Spanish ICA art. 12, Portuguese regulation (no reference).

<sup>151</sup> The starting point in DTV Hull 11 and DTV Cargo 5 is that the assured is entitled to alter the risk.

<sup>152</sup> French ICA art. L 172-3, Japanese HC 14-2-(2).

<sup>153</sup> Japanese Com C art. 657.1. However, the reaction against alteration of risk due to the assured is that the contract loses its effect, which seems to imply that the contract is not binding, and cancellation thus not needed, see art. 656. Swedish HC § 22 no. 2 (b) is also conditioned on the alteration being due to the assured or accepted by him.

disclosure, the degree of fault will here be related to two different questions, namely whether the assured is responsible for the alteration of risk, and whether he has notified the insurer about the alteration when he became aware of it. It is therefore necessary to distinguish between three different situations. The first situation is where the alteration is due to the assured, and he has not notified it in the prescribed way. The second situation is that the assured fails to notify an alteration not due to him, but that he knows about. The last situation is when the alteration is not due to the assured, and he has no knowledge about it.

#### 5.2.4.2. *No notification of alteration due to the assured*

If the assured is responsible for the alteration, and has not notified the insurer, he will either have breached a duty not to alter the risk, or breached the duty to notify. None of the systems operating with a concept of alteration of risk allow the assured to act like this without some kind of sanction, but the extent of the sanctions and the conditions to invoke it vary.

The strictest sanction when the alteration is due to the assured is that the insurer may **avoid** the contract. This sanction is only used in Belgium. The condition for this sanction is that the insurer would not have accepted the insurance if he had known about the increase.<sup>154</sup> However, a very similar sanction seems to be that the contract loses its effect, which is applied in general Japanese insurance legislation.<sup>155</sup>

The most common sanction where the assured is responsible for the alteration without notifying it seems to be **total freedom of liability** for an incurred casualty, which is used in Japan, Spain, Croatia, Slovenia, Venezuela, Germany, Italy, and the Scandinavian systems. However, the conditions to apply this sanction vary. The simplest regulation is prescribed in Japan, Spain and Croatia where the insurer is free of any liability if the assured alters the risk without the insurer's consent.<sup>156</sup> The same may apply if the risk is increased with the assured's consent.<sup>157</sup> This solution does not distinguish whether the increase would result in the insurer's refusal to accept the cover, or would have led him to alter the insurance conditions. Nor is there any requirement concerning causation between the alteration of risk and the casualty.

The starting point in Venezuela is similar: the insurer is discharged from liability under the contract if the assured alters the risk without the insurer's consent. However, an additional condition here is that the insurer would not have accepted the insurance or accepted it on different conditions had he known about the increase when the contract was entered into.<sup>158</sup> Causation between the alteration of risk and the casualty is not an issue here.

<sup>154</sup> Belgium Law 1874 art. 31.

<sup>155</sup> Japanese Com C art. 656. However, the regulation for marine insurance is more favorable, see below.

<sup>156</sup> Japanese HC art. 14-1-(8), Spanish ICA art. 12. Croatian and Slovenian legislation (no reference). According to the Japanese Com C art. 825 this will not apply if the increase has in no way influenced the casualty.

<sup>157</sup> Croatian legislation (no reference).

<sup>158</sup> Venezuelan C Com art. 559.

The German ADS Clauses operate with a different combination of requirements. The starting point is that the insurer is free from liability if the assured causes an alteration of risk and deliberately (hull and cargo) or by gross negligence (cargo) breaches the duty to notify the insurer. However, the insurer may not react if the increase in risk had no effect on the occurrence of the casualty or the extent of it.<sup>159</sup> A similar solution is found in Slovenia, stating that the insurer is free from liability from loss caused by an alteration of risk attributable to the insured.<sup>160</sup> Here there is a combination of fault and influence of the alteration of risk on the casualty, but no requirement connected to the insurer's attitude towards the alteration of the risk.

A combination of all three issues is found in the Scandinavian system. The regulation is here very similar to the duty of disclosure. A common condition for freedom of liability is that the assured has increased the risk by intent or agreed to such increase. If this condition is fulfilled, two alternative provisions apply. The first provision regulates the situation that the insurer would not have effected the insurance if he had known about the increase. In this instance, he will be free from liability irrespective of any causation between the increase of risk and the casualty. The second provision regulates the situation when the insurer would have accepted the insurance if he had known about the increase, but on other conditions. In this situation, he is only liable to the extent that the loss is not caused by the increase of the risk.<sup>161</sup>

In Greece, Italy and France there is a **combination of freedom of liability and proportionate reduction of the indemnity**. However, the conditions activating the different solutions vary. The starting point in Greece and Italy is that alteration of risk is defined as a change that would have caused the insurer not to have accepted the insurance at all or on the same conditions had he known about the alteration. In Italy, the sanctioning system is connected to this difference. The insurer will be free of liability in the first case. In the latter case he may reduce the liability in the same proportion as the proportion of the premium paid and the premium that should have been paid had the alteration of risk been taken into consideration when the contract was entered into.<sup>162</sup> The Greek sanctioning system is dependent on how much the assured is to blame for not having notified about the alteration, and follows the regulation of duty of disclosure. Negligent non-disclosure leads to a reduction of indemnity, whereas intentional non-disclosure leads to freedom of liability.<sup>163</sup>

In the French system, alteration of risk is on the other hand not connected to the insurer's attitude. However, similar to the Greek system, the sanction will depend on how much the assured is to blame. If the assured can prove his good faith, which seems to imply that he cannot be blamed for not having notified the

<sup>159</sup> DTV Hull Clauses 11.3 and DTV Cargo 5.4.

<sup>160</sup> Slovenian MA art. 710 second part.

<sup>161</sup> NP § 3-9, DC § 42, Swedish HC § 18 ref. SP §§ 41. See also Finnish HC § 35 (1), which is based on the similar regulation in the Finnish ICA 1933. The Danish regulation has a separate provision for insurance for cargo, stating a pro rata reduction in the liability when the insurance would have been accepted on other conditions.

<sup>162</sup> Italian CC 1898.

<sup>163</sup> Greek Law 2496/1997 § 4.

insurer, the insurer is entitled to reduce the indemnity proportionally to the premium paid. In a situation where good faith cannot be proved, the starting point in the legislation is that non-disclosure of an alteration made by the assured will result in termination of the insurance three days after the assured got aware of the alteration.<sup>164</sup> This seems to imply that the insurance will automatically terminate at this point in time, and that the insurer will be free of liability. However, the French Hull Conditions seem to be more favorable, stating that a breach of the duty of disclosure of an alteration of risk will result in proportionate reduction of indemnity.<sup>165</sup> Causation between the alteration of risk and the casualty is not an issue in either regulation.

If the insurer can claim that the contract is void (Belgium), loses its effect (Japanese general insurance regulation) or terminates (French ICA), there is no need to cancel the contract. On the other hand, a right to freedom of liability or reduction in the claim will normally be combined with a right for the insurer to cancel the contract.<sup>166</sup> The right to cancel may therefore both be a defense measure against alteration of risk that is notified by the assured, ref. above under item 5.2.3, and a sanction against alteration without notification. An exception from this is found in the German conditions, where the starting point is a right for the assured to alter the risk, and cancellation of the contract is not an option for the insurer.<sup>167</sup>

#### *5.2.4.3. Failure to notify an alteration due to a third party, but which the assured is aware of*

Alteration of risk that is not due to the assured will normally in itself not activate a sanction from the insured. However, this situation may activate a duty to notify the insurer, ref. above under item 5.2.3. A breach of this duty may have similar results as if the alteration was due to the assured.

In some systems the insurer's sanction is connected to the breach of the duty to notify an alteration of the risk, and not to the alteration itself. This is the case in Germany, France, Italy and Greece.<sup>168</sup> This implies that it does not have any bearing on the sanctioning system whether the alteration of the risk are caused by the assured or a third party. The sanctioning system under this item is thus the same as described under item 5.2.4.2.

In other systems a breach of a duty to notify about an alteration not caused by the assured activates the same sanctions as if the assured was responsible for the alteration. This is the case in Japan<sup>169</sup> and Scandinavia.<sup>170</sup> However, an

<sup>164</sup> French ICA art. L 172-3.

<sup>165</sup> French HC art. 8 (2) ref. art. 14.2.

<sup>166</sup> Italian CC 1898.2, French HC art. 14.2, Greek Law 2496/1997 § 4, NP § 3-10, DC § 44, Swedish HC § 22 no. 1 (f) and no. 2 (b), Finnish HC § 35 no. 1 ref. 1933 ICA § 47, Japanese HC 14-2-(2), Portuguese regulation (no reference).

<sup>167</sup> DTV Hull 11 and DTV Cargo 5.

<sup>168</sup> DTV Hull 11.3 and DTV Cargo 5.4, French ICA art. L 172-3 and French HC art. 8 (2) ref. art. 14.2, Italian CC art. 1898, Greek Law 2496/1997 § 4.

<sup>169</sup> Japanese Com C art. 657.2, HC 14-3.

<sup>170</sup> NP § 3-11, DC § 43, Swedish HC § 19 ref. SP § 42. See also Finnish HC § 35 (1), which is based on the similar regulation in the Finnish ICA 1933.



additional condition may be connected to the breach of the duty to notify. The Scandinavian regulation on this point is conditioned on the assured having breached the duty to notify about an increase without justifiable reason.

In Belgium, Slovenia, Croatia and Venezuela, there seem to be no sanctions against alteration of risk not due to the assured.<sup>171</sup> However, in Venezuela, the duty of disclosure in C Com art. 568 will also be applied during the insurance period, and it is stated in the material that the assured must inform the insurer about an increase in the risk.

#### *5.2.4.4. The assured is not aware of the alteration*

If the assured is not aware of the alteration of risk, he cannot notify the insurer about it. In this instance the assured has not breached a duty not to alter the risk, and there is no duty for the assured to notify the insurer. This implies that the insurer is fully liable for an incurred casualty, and that the insurer does not have a right to cancel the contract. However, according to the Scandinavian regulations, the insurer may in this instance cancel the contract.<sup>172</sup>

#### *5.3. The situation in the common law countries*

Contrary to the civil law countries, the common law countries do not seem to share a general concept of alteration of risk. There is no general regulation in UK MIA on this problem, and the concept is not contained in the US or South African case law. However, elements that are covered under the concept of alteration of risk in the civil law countries are found in other provisions in the MIA. Three such provisions may here be pointed out. One is that some of the risks that might otherwise be defined as an alteration of risk are provided for under the concept of warranties, see below under item 6. Two is that the duty of good faith as applied to notification under held covered clauses may be compared to the notification requirements for alteration of risk, ref. above under item 4. A third set of provisions that might otherwise be dealt with under the concept of alteration of risk is UK MIA sec. 42-49 concerning "The Voyage". As deviation and similar issues is not part of this paper, provisions concerning the voyage will not be discussed in further detail.

The total result of these provisions in MIA seems to be that most of the material risks under a marine insurance policy are dealt with, and thus preventing the assured from alteration of a material risk without the insurers knowledge, unless otherwise is stated in the policy. On the other hand, there are no general rules preventing the assured from increasing risks not particularly dealt with in MIA or the policy. Neither is there any general common law duty to notify the insurer concerning an alteration of risk. This seems to hold for UK, Canada, Australia, and New Zealand.

A similar starting point seems to follow from US case law. The courts have stated that alterations of the risk which would result in a loss of coverage should

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<sup>171</sup> Belgium Law 1874 art. 31, Slovenian MA art. 710 first part, Venezuelan C Com art. 559. No reference from Croatia.

<sup>172</sup> NP § 3-11, DC § 44, SP § 43, Finnish ICA 1933 § 47.

be treated in the terms of the policy, its conditions and warranties. Accordingly, it is doubtful whether, under the national law, an increase in the risk which is not specifically proscribed by the policy would result in a loss in coverage.<sup>173</sup>

In South Africa, however, the starting point is the opposite: the assured may not increase the risk without notifying the insurer, who may then decide whether he wants to continue the contract at the same terms. No legal sources are identified as a reason for this.

On the other hand, alteration of risk might be dealt with in the policy. Such clauses may take different forms. In Hong Kong it is not uncommon to add clauses concerning notification and liability for "increase of risks". However, these clauses only operate when the increase is permanent and habitual.<sup>174</sup>

Another type of clauses is used in Canada and US and provides for automatic coverage, subject to notification to the insurer and/or additional premium for deviation, change of voyage or delay.<sup>175</sup>

#### 5.4. *Some conclusions*

As the concept of alteration of risk seems to be a civil law concept, and the problems concerning alteration of risk in the common law countries are dealt with mainly as warranties, this item will mainly concentrate on the civil law regulation. Problems concerning warranties as compared with mandatory provisions concerning alteration of risk will be discussed below under item 6.

The main impressions from this discussion are that most of the civil law countries operate with a concept of alteration of risk, and that there are some main common features in this regulation. One main feature concerns the concept, which seems to presume that the risk is changed in a way that is material to the insurer's acceptance of the contract or its conditions. Another main feature is that an alteration of risk activates a duty to notify the insurer, and gives the insurer a right to cancel the contract or call for additional premium. A third main feature is that if the assured is responsible for the alteration, he will lose his cover or get a reduction in the indemnification. A fourth characteristic issue is that the same applies if the assured is not responsible for the alteration, but fails to notify the insurer about it.

However, even if there are some common features the details of the regulation varies considerably. This is in especially true for the combinations of different sanctions and different conditions to invoke them. This variation may imply that it is difficult to define the logic behind the regulation. On the other hand, it is difficult to see the need for such variation.

The variation in itself may cause difficulties in a process of harmonization. However, the main obstacle against harmonization is of course the mandatory regulations in Sweden, Denmark, France and Italy, which contain several

<sup>173</sup> *Navegacion Goya, S.A. v. Mutual Boiler & Machinery Insurance Co.*, 411 F.Supp. 929 (S.D. N.Y. 1975).

<sup>174</sup> *Shaw v Robberds* (1837) 6 A. and E. 75

<sup>175</sup> *Windward Traders v Fred S. James & Co. of N E*, 855 F. 2d 814, 817 (11 th Cir. 1988); *New York Mar. & Gen. Ins. Co. v. Gu~C Marine Towing, Inc.*, 1994 A.M.C. 976 (E.D. La. 1993).

different provisions. One aspect concerns the concept of alteration of risk, where three different approaches are in operation. Sweden and Denmark compare the alteration of the risk to the risk defined or implied in the contract, the Italian concept is connected to the insurer's attitude to the alteration if he had known about it, whereas France has no specific definition. Whether this difference in approach results in a difference in practice is however difficult to say without knowledge of how the French provision is interpreted.

Another difference concerns the sanctioning system. The French sanctioning system for alteration of risk is not quite clear, but it seems to open for automatic termination three days after the risk is altered if the assured does not notify the insurer. An alternative solution is reduction in liability. In Italy, the solution seems to be that the insurer will be free of liability if he would not have accepted the insurance had he known about the alteration of the risk. Acceptance on other conditions leads to proportionate reduction.

The Swedish and Danish legislation is somewhat different. If the insurer would not have accepted the insurance, the solution is freedom of liability, viz. the same as in Italy, but somewhat more strict than in France. Would the insurance have been accepted on other conditions, the insurer will be fully liable for losses not caused by the alteration of risk. In case of causation, this is stricter than the Italian solution, resulting in a proportionate reduction. If there is not causation, on the other hand, the Sweden and Danish solution is more favorable.

The Swedish, Danish and the Italian mandatory requirements may be departed from in favor of the assured. It is not clear if the same is the case for France. But if so, it should be possible to select the most favorable solution. However, even this approach may meet some difficulties because of the differences in the details in the regulation and the fact that it is not always possible to say what solution is most favorable.

Also, the mandatory provisions are more favorable for the assured than provisions resulting in avoidance and total freedom of liability in situations where the alteration of risk might have led the insurer to accept the insurance on other conditions. To obtain harmonization these countries must therefore be willing to follow the less strict regime of the mandatory regulation. The same holds for common law countries solving the requirement of notification under a hold covered clause through the principle of good faith. Breach of this principle gives the insurer a right to void the contract whether the increase was material or not.

On the other hand, Germany has a more lenient approach, which seems to be better for the insured than any other system.

As a starting point for an attempt towards harmonization, it may be wise to compare the reasoning behind the duty of disclosure with the provisions for alteration of the risk. The duty of disclosure gives the insurer a tool for maximum information when the contract is entered into; the duty not to alter the risk or to notify such notification gives him a tool to keep the presumptions for cover unaltered. As with duty of disclosure, this reasoning imply that to sanction against alteration of risk, it should be a condition that the alteration would have induced the insurer not to have accepted the contract or accepted in on other terms had he known about the alteration. Also similar to disclosure, the right to

total freedom of liability should only be an option for the insurer in the first case. If the insurer would have accepted the insurance on other conditions, the most logical solution is reduction of liability or to call in more premium. However, liability in case there is no connection between the risk increase corresponds more closely to alternative methods to limit the insurer's liability. Whatever solution is chosen, it may, however, be argued that the close similarity between the reasoning behind the regulation for duty of disclosure and the regulation for alteration of risk calls for similarity also in the methods chosen.

## 6. *Warranties and similar conditions. General presentation*

### 6.1. *Overview*

Similar to alteration of risk, warranties may be seen as a tool for the insurer to regulate what kind of presumptions or conditions the cover is based on, and what kind of alterations the insured may make without losing his cover. However, even if the aim is the same, there are substantial differences between these two tools.

The concept of warranties is first and foremost a common law concept, but some civil law countries have adapted the principle as well. This concept will be discussed below under item 6.2.

Most of the civil law countries in Europe do not have a concept of warranties in their insurance legislation. This is the situation in the Scandinavian countries, Germany, Belgium, the Netherlands, France, Italy and Croatia. Among the non-European countries Japan has the same general attitude.

On the other hand, except for what may follow from the mandatory provisions concerning alteration of risk in Sweden, Denmark, France and Italy, the legislation in these countries does not forbid the use of warranties. However, it should be noted that the legislators in the preparatory documents for the Norwegian ICA pointed out that they were very sceptical to the use of warranties. They further pointed out that such clauses according to the individual circumstances might be set aside by the court according to the Scandinavian Contract Act section 36.<sup>176</sup> This warning has, of course, influenced the attitude of the market towards such clauses, ref. below.

Even if the concept of warranties is not used, the contractual freedom on this point has resulted in the use of conditions that may be compared to the common law concept of warranties. However, the problems that are dealt with in these clauses are different in the different systems, and also it seems that the clauses are characterized differently. Two main areas that may be regulated by clauses similar to warranties in the civil law countries are classification, seaworthiness and safety regulation, and change of flag, ownership and management. These two issues are however treated as separate issues under the CMI project, and thus dealt with under item 7 and 8. As these issues also may be dealt with under the common law system, it is natural to include the relevant part of the warranty regulation here.

<sup>176</sup> Ot prp nr 49 (1988-89) Om lov om forsikringsavtaler s. 32.

In addition to the problems discussed under 7 and 8, some countries are using a more general approach similar to warranties called “specially stipulated conditions”. Also, some countries in the material are characterizing certain other clauses as “warranties”. These two problems are discussed under item 6.3.

## *6.2. Warranties*

### *6.2.1. Introduction*

The concept of warranties is first and foremost a common law concept based on UK MIA and case law, and is applied to systems having adapted UK MIA as part of their marine insurance legislation. Furthermore, it is inherited as part of the South African common law. The concept seems also to be applied in Portugal, Spain, Slovenia, Venezuela and China.

The starting point for the use of warranties is UK MIA sec. 33, which reads:<sup>177</sup>

“(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date the breach of warranty, but without prejudice to liability incurred by him before that date.”

The concept of warranties itself raises three main issues. The first is what constitute a “warranty” as provided for in UK MIA sec. 33 (1) and (2), see below under item 6.2.2. The second question is the meaning of the term “exactly complied with” in sec. 33 (3), see below under item 6.2.3. The third issue is the sanction, ref. item 6.2.4. As the regulation is considered very harsh, there are certain legislative efforts in the common law systems to soften the regulation. This calls for a fourth issue (6.2.5) concerning developments away from the traditional warranty principle. Also, policy conditions may give the assured a better cover through a so-called held covered clause, see below under item 6.2.6. A last issue concerns the insurer’s waiver of breach of a warranty, item 6.2.7.

### *6.2.2. What constitutes a warranty*

According to UK MIA sec 33 (1) a warranty is a condition whereby “the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the

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<sup>177</sup> See also Hong Kong Ord sec. 33, Ca MIA sec 39, Au MIA sec. 39, NZ MIA sec. 34. Warranties are also defined in the Spanish C Com sects. 755.5 and 7. 756, 760, 764 and 781. 7. A translation of these provisions is however not included in the material.

existence of a particular state of facts".<sup>178</sup> A similar definition is used in US,<sup>179</sup> and apparently also in South Africa.<sup>180</sup>

According to this definition, there are two different kinds of warranties. The first kind is an affirmative, factual warranty that is a stipulation that certain facts exist. An example is a statement that a vessel is classified with a particular Classification society at the time the proposal for insurance was submitted. The second is a promissory or continuing warranty that is a true promise that pertains to the future as well as the present. A promissory warranty binds its maker to a promise to do or refrain from doing something during the currency of the policy, or that a certain state of affairs shall exist during the currency.<sup>181</sup> An example here will be that the vessel's class shall be maintained throughout the insurance period. The first kind of warranty thus seems to be closely connected to representation, which also may be described as a stipulation of a certain fact. The second kind of warranty seems similar to alteration of risk, but instead of connecting the assured's duty to an alteration of the risk, the assured's duty is expressed as an undertaking or a guarantee which is not necessarily connected to the risk.

In addition to the distinction between affirmative factual (representation) warranty and a promissory warranty, UK MIA sec 33 (2) makes a distinction between express and implied warranties.<sup>182</sup> Express warranties are those written in the policy. Several kinds of express warranties typically are found in standard clauses, such as the Institute clauses. Some common express warranties are 1) warranties establishing geographical trade limits, 2) warranties as to date of sailing, 3) warranties as to number of crew, 4) warranties against towage, 5) warranties as to additional insurance and 6) warranties as to acting with reasonable dispatch in all circumstances under the assured's control. As none of these provisions are issues included in this paper, they will not be dealt with in further detail.

Three types of implied warranties are recognized in marine insurance; 1) The warranty of seaworthiness of the vessel, MIA sec. 39, 2) the legality of the marine adventure and, MIA sec. 41, and 3) warranty against deviation during the voyage, MIA sec. 46. The question of seaworthiness is discussed separately below under item 7.3. The warranty of legality is treated as part of the question of safety regulations in item 7.4. The question of deviation is not a separate issue, and will not be dealt with in detail.

MIA sec. 37 further excludes an implied warranty of nationality of the ship or that nationality will not be changed during the currency of the policy. Some of the Institute clauses however, contain an express warranty of nationality, see further below under item 8.

As the implied warranties are defined in MIA itself, there is no question of form concerning these warranties. Express warranties are further regulated

<sup>178</sup> See also Hong Kong Ord sec. 33 (1), Ca MIA sec 39 (1), Au MIA sec. 39 (1), NZ MIA sec. 34 (1).  
<sup>179</sup> Schoenbaum p. 140.

<sup>180</sup> Hare p. 19.

<sup>181</sup> Schoenbaum p. 140, Hare p. 19.

<sup>182</sup> See further Schoenbaum p. 131-132.

in UK MIA sec. 35. This provision does not require any particular form or use of words to express a warranty, but merely states that an express warranty "may be in any form of words from which the intention to warrant must be inferred". Also, an express warranty must be included in or written upon the policy or referred to in the policy.

### 6.2.3. *The compliance requirement*<sup>183</sup>

According to UK MIA sec. 33(3) "a warranty .... must be exactly complied with". This implies that warranties in marine insurance contracts must be strictly performed. There is no question of fault on the part of the assured. The cause of the breach of a warranty does not matter. Neither is the question of materiality an issue. A warranty must be strictly performed whether the actual condition is material to the insurer or not.

In UK this strict compliance rule has been practiced for more than two hundred years. It also seems to be adapted in countries using the MIA and in South Africa.<sup>184</sup>

The same solution was traditionally applied in US as federal law. However, the Supreme Court in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.* ruled that state law should apply to warranties under marine insurance. This resulted in three different approaches to the rule in lower US courts. One approach is to apply state law to warranties in marine insurance contracts, and to hold that the strict compliance rule is applicable as state law. A second approach is to apply the strict compliance rule as federal law, ignoring the ruling of the Supreme Court. A third approach is to apply the strict compliance rule as both federal and state law. As a result, the strict compliance rule survived the *Wilburn Boat* decision.

The strict compliance rule implies that an affirmative warranty that certain facts exist stated in the policy or referred to in the policy is treated differently than misrepresentation at the time the contract is entered into. According to UK MIA sec. 20 (1) the insurer may only react if the misrepresentation is "material". If the misrepresentation is expressed as an affirmative warranty, there is no requirement of materiality or inducement. It is difficult to see the reason behind this difference in the regulation. This solution is also heavily criticized in common law.<sup>185</sup>

In South Africa this result has led to a provision in the Short Term Insurance Act sec. 53 concerning misrepresentation, which includes affirmatory warranties, and which contains a condition of materiality.<sup>186</sup> The materiality concept in this section is a subjective requirement of inducement, similar to the interpretation of UK MIA sec. 20 (1).

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<sup>183</sup> This item is based on Schoenbaum p.130-131 and p. 142-145 for US and UK.

<sup>184</sup> Hare p. 19-20 for South Africa.

<sup>185</sup> See Hasson (1971) 34 MLR 29 and Birds: *Modern Insurance Law* (1977) p. 140 for UK, Schoenbaum p. 140-141 and 145 for UK and US, and Hare p. 20 for South Africa, who points out that the Roman-Dutch law would have required that the warranty was an essential term.

#### 6.2.4. *The sanction*

UK MIA sec. 33(3) further provides that in the event of breach, “the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date”.<sup>187</sup>

If a promissory warranty is not complied with, the insurer is discharged from liability as from the date of the breach of warranty, for the reason that fulfillment of the warranty is a condition precedent to the liability or further liability of the insurer. As mentioned above there is no requirement of fault on the part of the insured. Neither does it matter whether the breach of the warranty is the cause of the loss.

However, the insurer is liable for casualties having incurred prior to the breach. Also, the insurer is entitled to retain premium up to that date. On this point, the regulation differs from the regulation concerning misrepresentation, where the premium will be returned unless the misrepresentation is fraudulent, see above under item 3.4.

Discharge of the insurer from liability is automatic and is not dependent upon any decision by the insurer to treat the contract or the insurance at an end. In countries based on MIA the provision is treated literally. As this differs from the sanction concerning misrepresentation, where the contract may be avoided by the insurer, breach of an affirmative factual warranty in the policy will render a different sanction than misrepresentation.

Slovenia and Venezuela seem to follow the approach in UK MIA concerning the sanction, stating that the breach of a warranty leads to termination of cover regardless of causation between the breach and the subsequent casualty. The same holds for South Africa.<sup>188</sup>

The US solution concerning the sanction is somewhat different.<sup>189</sup> Breach has two different consequences. The majority view holds that breach merely suspends coverage, which can be reinstated, if the assured corrects the breach. Under this view, the policy remains in effect and the insurer does not even have an option to terminate the policy. The assured gets a chance to reinstate the policy unilaterally by curing the breach.

A second line of American cases declares that the insurer is “discharged” or the policy is “void” without going into detail on what this means. However, presumably what is meant is that the insurer has the right to choose to be discharged from liability. This seems to correspond to Spanish legislation, where the insurer when there is a breach of warranty has a right to choose between termination of the policy and waiver of the breach with or without the payment of any additional premium.<sup>190</sup> The parties may however agree otherwise. A

<sup>186</sup> See Hare p. 14 and 19-20.

<sup>187</sup> See also Hong Kong Ord sec. 33 (3). Ca MIA sec 39 (2), Au MIA sec. 39 (3), NZ MIA sec. 34.

<sup>188</sup> Hare p. 18 use the term “cancellation”, but apparently this means automatic termination, see p. 20.

<sup>189</sup> See further Schoenbaum p. 148-149. Some cases do however apparently follow the solution in MIA on this point, see *Drake Fishing v. Clarendon Am. Ins. Co.*, 136 F.3d 851 (1<sup>st</sup> Cir. 1998); *Lexington Ins. Co. v. Cooke's Seafood*, 835 F.2d 1364, 1366 (11<sup>th</sup> Cir. 1988); *Graham v. Milky Way Barge*, 824 F.2d 376, 383 (5<sup>th</sup> Cir. 1987).

<sup>190</sup> Spanish ICA art. 12. These are the same rules that are applied to alteration of risk after having



similar regulation is found in China, but here the insurer's options are connected to a notice from the assured about the breach of a warranty.<sup>191</sup>

#### 6.2.5. *Legislation to soften the strict concept of warranties*

Even if several countries have adapted the UK MIA concept of warranties, there is also a movement in the legislation away from this strict concept. This is partly achieved by regulation (New Zealand and South Africa), partly by court decisions (US and Canada). Three different methods are used to soften the principle. One technique is to include a condition of causation for the insurer to be able to avoid liability.<sup>192</sup> Another method is to let the insurer react only if the provision materially affects the risk.<sup>193</sup> A third method is the one already mentioned above, to suspend coverage instead of avoiding the contract.<sup>194</sup>

#### 6.2.6. *Held Covered clauses*<sup>195</sup>

In order to protect the assured from the harsh consequences of a breach of warranty, marine policies in many of the countries using this concept contain so-called "held covered" clauses which allow the policy to continue even after a breach of a warranty. This is expressed to be the situation in UK, US,<sup>196</sup> Canada, Spain and China. On the other hand, such clauses are not common in Australia.<sup>197</sup>

An example of a held covered clause is ITCH Hulls 1995 form 3 stating that given "any breach of warranty as to cargo, trade, locality, towage, salvage services, or date of sailing", the assured shall be held covered "provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed". A similar clause is found in the Spanish Policy and in the Chinese Hull and Cargo Clauses.<sup>198</sup>

To take advantage of these clauses, the assured must fulfill two requirements. First, adequate notice must be given to the insurer. Failure to give notice will terminate the extension of cover. Second, the assured must pay an additional premium to retain the cover.

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notified the insurer. Alteration of risk without the knowledge of the insurer results in no liability for a subsequent casualty. Portugal merely states that the policy is void.

<sup>191</sup> Chinese MC art. 235.

<sup>192</sup> New Zealand Insurance Law Reform Act of 1977 sec. 11. This provision is not mandatory in marine insurance, and marine insurance policies may therefore follow the MIA concept. The same solution is followed by some US courts, stated to be state law or even federal US law, see Schoenbaum p. 155.

<sup>193</sup> South African Short Term Insurance Act sec. 53 concerning affirmatory warranties, and US court cases, see Schoenbaum p. 155-156.

<sup>194</sup> Schoenbaum p. 154.

<sup>195</sup> See Schoenbaum p. 157-158.

<sup>196</sup> *Hilton Oil Transp. v. Jonas*, 75 F.3d 627, 620 (11<sup>th</sup> Cir. 1996); *Kalmbach v. Insurance Co. of Pa.*, 529 F.2d at 555 (9<sup>th</sup> Cir. 1976); S.B. Long, "Held Covered" Clauses in Marine Insurance Policies, *Ins. Counsel J.* 401 (1957).

<sup>197</sup> The Australian Law Reform Commission Discussion Paper 63, Review of the Marine Insurance Act 1909, July 2000. (ALRC) p. 65.

<sup>198</sup> Chinese HC VI no. 3 and CC IV no. 3.

### 6.2.7. *Waiver*

According to UK MIA sec. 34 (3), a breach of a warranty may be waived by the insurer. A waiver is a voluntary and express decision to forego a contract right. The same solution is applied in US.

The concept of waiver has been subject to legal controversy. One difficulty is that, as the remedy of avoidance of the contract is automatic, there would appear to be nothing for the insurer to waive.<sup>199</sup> However, in the *Good Luck* case it was held that the effect of a waiver was simply that to the extent of the waiver, the insurer cannot rely upon the breach as having discharged him from liability.<sup>200</sup>

### 6.3. *Similar provisions*

Some systems operate with a concept called “specially stipulated conditions” which are claimed to be similar to the warranty concept, see below under 6.3.1. Also, some of the civil law countries in the material characterize certain clauses as “warranties”, see 6.3.2. Some clauses that are often expressed as warranties in the civil countries will be discussed under items 7 and 8.

#### 6.3.1. *“Specially stipulated conditions”*

The Croatian and Slovenian marine insurance regulation include a system that they compare to the warranty concept and call “specially stipulated conditions”. The consequences of breaching these conditions will depend on whether the condition was important for the insurer’s acceptance of the risk, or only for the evaluation of the risk. If the condition was decisive for the acceptance of the insurance, a breach of the condition will give the insurer a right to avoid the contract. A breach of a condition that influenced the evaluation of the risk, will, on the other hand lead to a proportionate deduction of the indemnity.<sup>201</sup>

As a concept, these specially stipulated conditions seem to be similar to the concept of alteration of risk, where Croatia and Slovenia do not link the question of alteration of risk to the influence on the insurance contract, but rather to whether the risk increase was substantial or not.

#### 6.3.2. *Other clauses claimed to have a similarity to warranties*

In Germany, ADS section 42 providing for a time limit to notify the insurer about a loss is compared to a warranty. The time limit is as a main rule 15 months from the termination of the insurance, and the assured will lose his claim if this condition is not complied with. Negligence on the part of the assured is no condition. Apparently, this is the only condition in the German

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<sup>199</sup> ALRC p. 64, with further reference in note 13.

<sup>200</sup> *Bank of Nova Scotia v. Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)*, 1992 I AC 233, 263. For a further discussion on how to reconcile the reasoning in this case and the doctrine of waiver, see Clarke: *Law of Insurance Contracts* (2000) Ch. 20-7A.

<sup>201</sup> Slovenian MA art. 722. No reference from Croatia.

system that will result in no liability for the insurer regardless of whether the assured is to blame.

Similar time limit clauses are found in the other civil law systems. In my opinion, it is more relevant to evaluate these clauses as part of the question of time barring or limitation than to compare them to the concept of warranty.

France and Sweden compare the obligation of disclosure to the concept of warranties. Systematically, however, these conditions are normally treated as special concepts. Sweden also mentions the similarity to the regulation of alteration of risk. It follows from the discussion above that the concepts of alteration of risk and of warranties are indeed closely related. However, as a general rule, it may be said that the concept of warranties is a stricter approach to make exceptions from the cover than alteration of risk.

#### *6.4. Some conclusions*

To the extent that the concept of warranties is used, there seems to be a fairly common approach. The concept is based on the provisions in UK MIA sec. 33, and thereby followed by countries with legislation based on MIA. It is also adopted by South Africa, thus overriding Roman-Dutch law, and by some civil law countries making use of English insurance conditions. US seem to follow the same principles, except for some minor differences concerning the sanction. Also, US State law is not necessarily as harsh as federal law. It should be noted that one of the differences concerns the sanction, where there seems to be a division between automatic discharge according to MIA, whereas the US solution is either suspension or that the insurer may avoid liability.

The concept of warranties seems to raise problems at three different levels. One is that the provisions themselves are very confusing, and that it is difficult to grasp what is the true nature of the regulation. As Shoenbaum remarks at page 151, the provision tangles together four different concepts: warranty, promise, condition and representation. The part of the concept overlapping the regulation concerning misrepresentation is very confusing, and it is not easy to define which misrepresentations are regulated under MIA sec. 20, which are provided for under sec. 17 concerning good faith, and when sec. 33 concerning warranties should be applied to misrepresentations. It is also difficult to see why promise and condition are used together in the same provision, as these two concepts normally have different functions and a breach will result in different sanctions.

The second problem is that the regulation seems to be unfairly harsh. It gives the insurer a tool to avoid liability even if the warranty was not material to the insurers decision to accept the risk, without any requirement of causation, and without regard to any kind of fault on the part of the assured. The best illustration of the harshness of the regulation are the attempts within the common law legislation to soften the regulation, and the use of held covered clauses. In spite of this, however, the principle is kept as a starting point, giving the insurer a tool to avoid liability, and to keep the premium, even if the warranty was immaterial and there was no causation. It is difficult to see any logical reason for this result, even if it may be explained by analyzes of the concept of conditions in ordinary contract law.

Particularly for affirmative warranties it is beyond reason why the insurer needs the protection in UK MIA sec. 33 concerning these warranties when he already has UK MIA sec. 20 and 17. As mentioned above, the relationship between these provisions seems unnecessary confusing.

A third problem is the use of warranties compared to mandatory regulation in civil law countries. The mandatory provisions in Danish and Swedish ICA concerning alteration of risk do not seem to permit the far more harsh regulation of warranties. Also, the French and Italian legislations are more favorable towards the assured than the common law principle of warranties. In an attempt towards harmonization, this implies either that the common law systems are willing to soften their regulation, or that a double set of clauses are suggested. It does not seem realistic that the legislators in the four mentioned civil law countries will open the door for the stricter principle of warranties, ref. the Norwegian political attitude on this point. Also, it would seem to be to go backwards into the future to adopt legal principles from 1906 instead of the principles of the far more modern insurance legislation in the civil law countries.

It should, however, be noted that some problems that under the UK system are dealt with as warranties in other systems are given a very similar regulation, even if the concept of warranties are not expressly used, see further under items 7 and 8. Even if the principle of warranties is abolished, this will therefore not mean that the material solution inherent in the principle will not be kept for certain issues.

## *7. Warranties continued; loss of class, seaworthiness and safety regulation*

### *7.1. Introduction*

The regulation dealt with under this item is different from the regulation described under items 3-6 in two aspects. Firstly, the duty of disclosure, duty of good faith, alteration of risk and warranties are general concepts that may be used to map out the risk before the insurance commences and to keep the risk under control during the insurance period. The regulations for loss of class, seaworthiness and safety regulation, on the other hand concern special problems of great importance when the insurance is effected and while the insurance is running. In some systems the general provisions concerning alteration of risk and warranties deal with these problems, but in other systems they are provided for in separate provisions. This chapter may therefore be seen as an extension of the chapters concerning duty of disclosure, alteration of risk and warranties, but may on the other hand also be seen as an individual chapter dealing with special problems.

A second difference between this chapter and the more general provisions dealt with earlier concerns the type of insurance that is the focus of the discussion. Whereas the general provisions are common for hull and cargo insurance, the questions discussed here are mostly important for hull insurance. However, some cargo clauses contain regulation concerning one or more of the issues discussed under this item.

A main feature for classification, seaworthiness and safety regulation is

that these concepts all have to do with the safety of the ship and cargo and the efforts to avoid damage or loss covered by insurance. As such, this regulation is an important part of the insurer's ability to ensure that the ship is in all respects in an acceptable condition to meet the perils insured against, and that the necessary precautions have been taken to keep the ship in this condition. As a starting point, these safety aspects may as mentioned be dealt with through the general policy provisions. However, in some systems special provisions, underlining that the general rules are not considered to be sufficient to deal with the safety problems, emphasize the focus on safety.

This aspect of classification requirements, seaworthiness and safety regulation touches upon a question of the systematic approach to this regulation. Exclusions for loss of class, unseaworthiness and breach of safety provisions may be seen as excluded perils as compared to objective limitations of liability as for instance exclusions for war risk, nuclear risks, wear and tear etc. However, a characteristic feature of the safety provisions is that the assured can avoid the risk materializing by acting in a prudent manner. It is therefore an element of the assured's acts or omissions in these provisions that is not inherent in the exclusions mentioned. This distinction may be emphasized by the structure of the regulation,<sup>202</sup> but this is not necessarily so.

To the extent that the regulation for loss of class, seaworthiness and safety regulation touches upon mandatory provisions, the distinction between the subjective and objective approach to these provisions becomes more important. In Sweden and Denmark, the ICA contains mandatory provisions for safety regulation which limit the insurer's right to be free of liability. Furthermore, the mandatory provisions for increase of risk in the same countries and in France and Italy may be seen as a barrier to rules concerning unseaworthiness and loss of class. In this perspective, mandatory provisions may restrict the insurer's approach to these problems.

### *7.2. Loss of class and change of classification society*

MIA contains no implied warranty concerning loss of class or change of classification society. However, this question is regulated in Institute Time Clauses Hulls 4 and 5. According to 4.1 and 4.2 in this clause

"4.1. It is the duty of the Assured, Owners and Managers at the inception of and throughout the period to ensure that the vessel is classed with a Classification Society agreed by the underwriters and that her class within that society is maintained, any recommendations requirements or restrictions imposed by the Vessel's Classification Society which relate to the Vessel's seaworthiness or to her maintenance in a seaworthy condition are complied with by the dates required by that society.

4.2. In the event of any breach of the duties set out in Clause 4.1 above, unless the Underwriters agree to the contrary in writing, they will be discharged from liability under this insurance as from the date of the breach provided that if the Vessel is at sea at such date the Underwriter's discharge from liability is deferred until arrival at her next port."

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<sup>202</sup> See NP chapter 2 as compared to chapter 3.

Further, it is stated in clause 5 of the ITCH that the insurance will automatically terminate at the time there is a change of the vessel's classification society, or change or cancellation of the class.

This clause is not characterized as a warranty, but it is expressed in a form similar to warranties, with a combination of an affirmative warranty connected to the inception of the insurance and a promissory warranty connected to the insurance period. The duty is further divided into two: the assured has a duty to keep the vessel classed as agreed with the insurer, and to fulfill recommendations, requirements, or restrictions imposed by the Classification society.

The reaction is also similar to a warranty: Discharge from liability as from the day of the breach. Fault on the part of the assured is no issue, and there is no requirement of causation between the breach and the casualty. Neither is there any requirement that the loss of or change of Classification society or the fulfillment of recommendations are material for the insurer. Even if the assured can prove that the insurer would have accepted a new Classification society if he had been asked, the insurer will be discharged from liability. The result is also the same if the recommendations that are not fulfilled are of minor importance.

Contrary to several other express warranties, there is no "held covered clause" for the Classification Clause. It is thus a stricter approach than the similar approach connected to other problems.

The solution in ITCH is adopted directly in countries using the ITCH clauses as standard clauses because they do not have their own clauses, viz. Portugal, Slovenia, Croatia, Greece, Israel, Venezuela, Australia, Indonesia, South Africa and Hong Kong. Spain and Italy, who combine the ITCH with their own standard clauses seem to follow the ITCH warranty approach on this point. Also Canada and New Zealand have a widespread use of the ITCH clauses. A similar solution is also found in the American Institute Hull Clauses, which contain a Change of Ownership Clause corresponding to clause 5 in ITCH, and results in automatic termination of the insurance where there is a change in the Classification society or loss of class.

An identical or similar regulation is used in the hull clauses in Norway, Sweden, Finland, Denmark, Belgium and China. The starting point is that the ship is to be classified in a classification society approved by the insurer.<sup>203</sup> If the ship loses its class or changes Classification society without the approval of the insurer, the insurance will automatically terminate.<sup>204</sup>

The approach to establish this condition, however, differs. In China, the provision is placed under the heading "Termination", which also includes breach of a warranty. The Belgian clause is placed under "Underwriters warranties". A somewhat similar approach is used in Sweden and Denmark, where the provision is seen as a rule to shorten the insurance period through

<sup>203</sup> NP § 3-14 first part, Swedish HC § 11 mom. 1, Finnish HC § 14 (2), Belgian Corvette Policy 4.1.1. The same provision is presumed in Danish HC 2.3 (1) and apparently in Chinese HC V1 no. 2.

<sup>204</sup> NP article 3-14 second part, Danish HC article 2.3 (1), Finnish HC § 14 (2), Swedish HC § 4 second part, Belgian Corvette Policy 4.1.3 and 4.2.1, Chinese HC V1 no. 2.

automatic termination.<sup>205</sup> This, of course, emphasizes the parallel between the provisions concerning class and the warranties.

In Norway, the classification provision is part of the regulation of alteration of the risk in chapter 3 concerning duties of the assured. However, it is clear that the regulation is far stricter than the general rules for alteration of risk. The clause caused a lot of discussion during the revision, and some members of the Plan Committee were of the opinion that the regulation was unnecessary harsh. It also follows from the Commentary to the Plan that the Plan Committee was aware that the provision could be misused. This would be the result if the assured changed Classification society without notifying the insurer, but it was clear that the insurer would have accepted the new Classification society had he been asked. It is thus stated in the Commentaries that in this situation the court might put the provision aside according to the Scandinavian Contract Act section 36.<sup>206</sup> This conforms to the attitude of the legislators when constructing the Norwegian ICA of 1989, and illustrates the point made above under item 6.1.

In Finland, the classification requirement is a part of the regulation of safety measures, but with a stricter sanction than the ordinary rules on this point.

In the Finnish and Belgian conditions, non-compliance with periodic surveys is treated as loss of class.<sup>207</sup> This solution is similar to the regulation in the Norwegian market before the revision of the Plan. However, in the new Plan, periodic surveys are treated as a safety measure.<sup>208</sup> The reason for this is partly that it was difficult to define what was included in the concept of "periodic surveys", partly that the reaction with automatic termination was considered too harsh.<sup>209</sup>

The German approach is to treat the classification requirement as a part of the regulation of seaworthiness. This implies a less strict regulation than the special classification requirements mentioned above. The underwriters are not liable for loss or damage resulting from the vessel having put to sea in a state of unseaworthiness, especially without the highest class of a recognized classification society (and some other circumstances, see further below). Contrary to the warranty approach described above, the provision is not applied if the breach of the classification requirement, and thus the unseaworthiness, is due to reasons beyond the control of the assured. Also contrary to the stricter regulation, there is a condition of causation for the insurer to react.<sup>210</sup>

Under the German system change of classification society and breach of class recommendations will have to be dealt with as an ordinary alteration of the risk, see above under item 5.

<sup>205</sup> It may be argued that this kind of provision is contrary to the mandatory regulation in the Swedish and Danish ICA. A detailed discussion of this problem falls, however, outside the scope of this paper.

<sup>206</sup> Commentary to Norwegian Marine Insurance Plan 1996. Version 1999 p. 87.

<sup>207</sup> Finnish HC § 14 (3) third part, Belgian Corvette Policy 4.1.2 and 4.1.3.

<sup>208</sup> NP § 3-24.

<sup>209</sup> Commentary to NP p. 86 and p. 107-108.

<sup>210</sup> DTV Hull Clauses 23.1 and 23.2.

The French regulation is again different, connected to a combination of duty of disclosure and alteration of risk. Under the duty of disclosure the duty to disclose the classification society and the class of the vessel is specially mentioned.<sup>211</sup> A breach of this duty may lead to the policy being void.<sup>212</sup> Further, the assured is under a duty to disclose any change in the vessel's classification society, and any alteration, cancellation or withdrawal of her class, and is also under a duty to comply with recommendations, requirements and restrictions imposed by the class.<sup>213</sup> The penalty for breaching these duties is cancellation of the insurance with a three days notice, or proportionate reduction in the indemnity.<sup>214</sup> The French policy conditions on this point thus conform to the mandatory regulation in French ICA as described above under item 3 and 5, and illustrate that mandatory provisions restrict the warranty approach.

In cargo insurance, there is normally no classification requirement. However, the French and German Cargo conditions contain clauses stating that insurance cover will only apply to transport on ships fulfilling certain classification requirements.<sup>215</sup>

### 7.3. Seaworthiness

#### 7.3.1. Introduction

The regulation of seaworthiness is less common than the classification requirement. In systems operating with separate provisions for seaworthiness, two different approaches are used. One approach is the warranty approach, where there is an expressed or implied warranty of seaworthiness (item 7.3.3). The other approach is to have a special exclusion for losses caused by unseaworthiness that may be attributed to the assured (item 7.3.4). Contrary to the general warranty regulation, however, the common law countries in this instance use both approaches, depending on the kind of policy.

A common question for these two approaches is the concept of seaworthiness, which will be discussed in item 7.3.2.

On the other hand, some systems do not have separate provisions concerning this question. In these systems the problem will have to be dealt with through other more general provisions, see below under item 7.3.5.

#### 7.3.2. The concept of seaworthiness

The concept of seaworthiness is normally not defined in detail in the provisions concerning this question. Some systems use the word "unseaworthiness" without any qualification at all.<sup>216</sup> If so, the exclusion from liability is connected to the ship being in an unseaworthy condition without

<sup>211</sup> French HC art. 8.1.

<sup>212</sup> French HC art. 14 first part. According to French ICA, which is mandatory on this point, such reaction is conditioned on the assured being in bad faith.

<sup>213</sup> French HC art. 8.3 and 9.1.

<sup>214</sup> French HC art. 14 second part.

<sup>215</sup> French CC art. 2 and DTV Cargo 7.1 second part.

<sup>216</sup> NP § 3-22, Swedish HC § 12, Danish HC 4.4, Finnish HC § 5.



trying to define the express meaning of this. It seems, however, to be a general agreement that seaworthiness is not an absolute standard, but a relative term that must be evaluated according to the ship in question, the trading area, time of the year, cargo shipped etc.. The requirement is less demanding of a vessel while in port than when putting to sea. So, too, it varies with the particular perils of a voyage, such as its length, the cargo to be carried, the seas to be navigated and ports of call and the season. Also, it seems to be a general approach that seaworthiness as a term extends not only to the physical condition of the vessel, but also to other aspects of the ship such as adequacy of fuel, sufficiency of the crew and even stability.<sup>217</sup>

The German, Slovenian and Chinese provisions on the other hand give more detailed guidelines as to what constitute unseaworthiness by adding a list of weaknesses to the general description, so that the listed defects will imply that the ship is unseaworthy. All these provisions include that the ship is not properly equipped, manned, or loaded.<sup>218</sup> The German provision also includes that the ship is without the documents necessary for the vessel, the crew, or her cargo, or without the highest class of a recognized classification society and without the sailing permission certificate of the competent authority.<sup>219</sup> The Slovenian legislation adds technical defects and more passengers than permitted.<sup>220</sup>

### 7.3.3. *The warranty approach*

A warranty approach to the question of seaworthiness is applied in the MIA based regulation concerning voyage policies.<sup>221</sup> This warranty states that the ship at the commencement of the voyage shall be seaworthy for the purpose of the particular adventure insured. As voyage policies are not much used except when a ship is on a voyage to a scrap yard, this provision is not very practical. For time policies, neither the UK MIA nor the ITCH contains a warranty of seaworthiness.

The same warranty is also applied for the ship under a voyage policy for goods.<sup>222</sup> However, the implied warranty of seaworthiness for a policy for goods is waived in the Cargo Clauses.<sup>223</sup>

On this point, the US solution departs from the solution in UK. In US, there may be an express warranty in the policy concerning seaworthiness.<sup>224</sup> In

<sup>217</sup> For US and UK see C Staring: A warranty of seaworthiness in Time Hull Policies, p. 3, with references, Schoenbaum p. 160-161. For NP see Comments to the NP p. 99-101. For Italy see Court of Cassation, 2 March 1973, No. 572 confirming Tribunale of Genoa, 31 December 1968. For Australia, see The Australian Law Reform Commission Discussion Paper 63, Review of the Marine Insurance Act 1909, July 2000. p. 82.

<sup>218</sup> DTV Hull Clauses 23, Slovenian MA art. 733, Chinese HC II, 1.

<sup>219</sup> DTV Hull Clauses 23.

<sup>220</sup> Slovenian MA art. 733.

<sup>221</sup> UK MIA sec. 39 (1), Au MIA sec. 45 (1), NZ MIA sec. 40, Ca MIA sec. 37 (1), Hong Kong Ordinance sec. 39 (1). Spain seems to follow the UK MIA on this point.

<sup>222</sup> UK MIA sec. 40, NZ MIA sec. 41.

<sup>223</sup> ICC A B and C Clauses 5.2.

<sup>224</sup> Schoenbaum p. 160.

addition, there is a special “American Rule”, which some courts have applied, while other courts and commentators have criticized. The “American Rule” is stated to consist of two different warranties, but according to the systematic approach in this paper, it consists of one warranty and one condition which is similar to an ordinary limitation of liability and the civil law approach to this problem.

The first part of the “American Rule” is a warranty of seaworthiness upon attachment of coverage.<sup>225</sup> It is generally agreed that the warranty arises only if the vessel is in port at the time the insurance attaches; however, the law is unclear in this respect. Also, it is discussed whether such a warranty exists at all. Staring Craydon concludes concerning this issue that:

“It is a fair conclusion that there is no American Rule at all and what has passed for one consists of two rules, one of which is not a warranty but a simple condition corresponding to the Marine Insurance Act and generally observed in the United States, and the other (a warranty still ill-defined) is little more than a Fifth Circuit rule effective in its own important region, without commercial foundation.”

#### 7.3.4. *Exceptions for losses caused by unseaworthiness*

The MIA based warranty for seaworthiness is as mentioned limited to voyage-policies. A time policy, which is the most common form, contains no implied warranty of seaworthiness. On the other hand, a time policy is subject to a special provision that if the ship, with the privity of the assured, is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.<sup>226</sup> The same solution is applied in the Institute Cargo Clauses.<sup>227</sup> The main difference from the warranty approach is that the insurer will only be free from liability if 1) the loss is caused by the unseaworthiness, and 2) the assured is in bad faith concerning the unseaworthiness.

This solution seems to be similar to the second part of the “American Rule”. This rule implies that once the initial warranty is satisfied, an additional condition which has been described as a “sort of negative modified warranty ... that the Owner, from bad faith or neglect, will not knowingly permit the vessel to break ground in an unseaworthy condition.” Unlike the first implied warranty, however, the consequence of a violation of this negative burden is “merely a denial of liability for loss or damage caused proximately by such unseaworthiness.”<sup>228</sup>

Also, this common law regulation corresponds to the civil law approach to the question of seaworthiness. The normal solution is that the exclusion for unseaworthiness only applies for losses caused by the unseaworthiness, and that

<sup>225</sup> *Saskatchewan Government Ins. Office v. Spot Pack, Inc.*, 242 F.2d 1422 (51hCir. 1992), cert. denied, 510 U. S. 813 (1993).

<sup>226</sup> UK MIA sec. 39 (5), Au MIA sec 45 (5), Ca MIA sec 37 (4), Hong Kong Ordinance sec. 39 (5), NZ MIA.

<sup>227</sup> ICC A, B and C Clauses 5.1.

<sup>228</sup> *The Spot Pack*, 242 F.2d at 388, Staring op. cit. p. 5.

there is a condition of fault on the part of the assured.<sup>229</sup> However, there are some differences concerning at which point in time the ship must be in a seaworthy condition and the assured must be in good faith. The Danish, German, Japanese and Chinese exceptions are connected to the ship's departure from the last harbor.<sup>230</sup> The solution in Norway, Sweden, Finland and Slovenia is to connect the question of seaworthiness to the point in time where the assured was in a position to intervene.<sup>231</sup> This will be similar to the departure from harbor approach if it is not possible for the assured to intervene at any later time. However, with the modern techniques of communication the situation may well be that intervention can be made also when the ship is at sea.

Portugal states that there is an exclusion for unseaworthiness, but gives no further details about the regulation. In the Netherlands and Venezuela, the question is solved in the policies, but no further details are given.

Apart from the Institute Cargo Clauses and the Danish Cargo Clauses, the question of seaworthiness is not expressly regulated in the cargo conditions. However, these conditions often exclude damage caused by unfitness of means of transport that may include the situation where the ship is unseaworthy.<sup>232</sup> The condition to invoke this clause is either that the assured became aware of the unfitness at a time it would have been possible for him to intervene,<sup>233</sup> or that the assured exercised due diligence in choosing the carrier.<sup>234</sup>

### *7.3.5. No special regulation*

Belgium, France, Italy, Croatia and Indonesia refer to no special exclusions for unseaworthiness. This means that the problem must be solved through more general rules concerning alteration of risk or misconduct by the insured. The Italian material implies that the provisions concerning exclusions for gross negligence<sup>235</sup> are interpreted in a way that makes an act or omission of the assured leading to unseaworthiness grossly negligent in itself, and loss caused by unseaworthiness is thus excluded through these provisions.<sup>236</sup> In practice this ruling is presumed to lead to the same result as UK MIA sec. 39(5) for time policies.

## *7.4. Safety regulation*

### *7.4.1. Introduction*

By safety regulation is here meant a regulation concerning measures for the prevention of loss. Special provisions for breach of safety regulation seems to be a Nordic invention, not much used in the other civil law countries. The Danish and Swedish ICA contain mandatory provisions concerning safety provisions, but as mentioned in chapter 2.1 these acts are under amendment.

<sup>229</sup> NP § 3-22, Danish HC 4.5, Danish CC 4.8, Swedish HC § 12, Finnish HC § 5, DTV Hull Clauses 23.1 and 23.2, Slovenian MA art. 733 first part, Chinese HC II, 1, Japanese CC art. 829.2.

<sup>230</sup> Danish HC 4.5, Danish CC 4.8, DTV Hull Clauses 23.1, Japanese CC art. 829.2, Chinese HC II, 1.

<sup>231</sup> NP § 3-22, Swedish HC § 12, Finnish HC § 5.2, Slovenian MA 733.

<sup>232</sup> Norwegian CC § 18, Swedish CC 2.4, DTV Cargo 7

<sup>233</sup> Norwegian CC § 18, Swedish CC 2.4.

<sup>234</sup> DTV Cargo 7.

<sup>235</sup> Italian C Nav section 524 ref. CC section 1900.

<sup>236</sup> See Tribunale Genoa, 31 December 1968, Court of Cassation, 2 March 1973.

The Nordic approach to this problem is to exclude losses caused by breach of safety regulations, see item 7.4.2.

In the common law countries a comparable result is provided for in the implied warranty of legality, see item 7.4.3. The connection between breach of safety regulation and other provisions in the policy is discussed under item 7.4.4. Also, some conditions contain special regulation concerning international safety conventions, see item 7.4.5.

#### *7.4.2. Exclusions for loss caused by breach of safety regulations*

A safety regulation may be issued by public authority, by the ship's classification society, or by the insurer. The widest concept of safety regulation is found in the Norwegian hull and cargo conditions, NP § 3-24, defining a safety regulation as any rule concerning measures for the prevention of loss issued by public authorities, prescribed by the insurer pursuant to the insurance contract, or issued by the classification society.<sup>237</sup> In the Danish conditions only regulation issued by public authorities has got the status of a safety regulation according to the contract.<sup>238</sup> According to the Swedish hull clauses, regulation issued by the classification society or the supervising authorities is given status as safety regulation, whereas in the cargo clauses the insurer shall issue the safety regulation.<sup>239</sup> The Finnish conditions contain only special safety provisions, resulting in no general inclusion of public or other regulation as a relevant safety regulation in the contract.<sup>240</sup>

In order for the insurer to be free from liability concerning breach of a safety provision two conditions must be fulfilled: Firstly, the assured must be responsible for the breach, and secondly, the loss must be caused by the breach.<sup>241</sup>

#### *7.4.3. Safety regulation as a warranty*

In MIA based systems, there is an implied warranty that the adventure is lawful, and that, so far as the insured can control the matter, the adventure shall be carried out in a lawful manner. This warranty probably encompasses breach of safety regulations issued by public authorities.<sup>242</sup> Recommendations etc.

<sup>237</sup> NP § 3-24, Norwegian CC § 20.

<sup>238</sup> Danish HC 4.7 ref. DC § 49, stating that a safety regulation must be expressly stated in the insurance contract.

<sup>239</sup> Swedish HC § 11 mom 1, Swedish CC 13. In addition, the SHC § 11 mom 2 onwards defines some specified safety provisions. The Danish and Swedish regulation is supposed to conform with the mandatory provision in the Nordic 1930 ICA § 51 that a safety regulation must be expressly stated in the contract.

<sup>240</sup> Finnish HC § 12. Strictly speaking, this is the correct approach according to the ICA 1930 § 51, which still is mandatory for Denmark and Sweden.

<sup>241</sup> NP § 3-25, Danish HC 4.7 ref. DC § 49, Swedish HC § 11 mom: 6 ref. SP § 52. This regulation corresponds to the 1930 ICA § 51.

<sup>242</sup> UK MIA sec. 41, Au MIA sec. 47 and *Mowie Fisheries v Switzerland Insurance* (1997) 144 ALR 234, NZ MIA sec. 42 and *Harbour Inn Seafoods v Switzerland General Insurance*, Australian Law Reform Commission DP 63 p. 127.

issued by the Classification society are as mentioned above under item 7.2 included in the Classification requirements in ITCH 4.1.

To the extent the warranty of legality includes breach of public safety regulations, the insurer will be discharged from liability from the date of the breach of such regulation regardless of the assured's knowledge of the breach and regardless of causation between the breach and the loss.

In Australia, it is also assumed that the warranty concerning seaworthiness probably encompasses breach of safety regulations.<sup>243</sup> The condition here must, however, be that the breach of the regulation results in the ship being unseaworthy, see further below under item 7.4.4.

#### *7.4.4. Breach of safety regulation included in other regulation*

There is a close connection between breach of safety regulations and the question of seaworthiness in that a breach of a safety regulation may lead to the ship not being seaworthy. In systems operating with both kinds of regulations, the result will therefore be that the insurer may invoke both provisions.

In systems that contain no specific provision for breach of a safety regulation, a breach of such regulation will not in itself invoke a sanction from the insurer. If however, there is an exclusion for unseaworthiness, this exclusion may be invoked if a breach of a public safety regulation (national or international) leads to the ship not being in a seaworthy condition. This is expressly stated in the German hull conditions, see above under item 7.3, and also follows from the Australian material, above item 7.4.4. On the other hand, if a breach of a safety regulation does not have this result, it must be dealt with by other provisions, i.e. alteration of risk or misconduct.

Belgium, France, Italy, Croatia and Indonesia seem to have no regulation for either seaworthiness or safety regulation. The only way to handle a breach of public safety regulation will then be through the general provisions.

Another general approach to solve this problem is through exclusions for lack of maintenance if that is the result of a breach of a safety regulation. This problem will not be discussed further here.

#### *7.4.5. Requirements connected to the ISM Code and the SOLAS Convention*

The ISM Code and the SOLAS Convention are two international safety regulations of particular interest and importance for marine insurance. Provisions concerning breach of safety regulations will include breach of these provisions to the extent that the concept includes international safety regulations. This is the case in Norway, Denmark and presumably in Sweden, but not in Finland.

A breach of the ISM Code, however, leads to special problems in this context. During the amendment of the Norwegian Plan it was discussed to what extent non-compliance with the ISM Code would discharge the insurer from liability. The Committee concluded that this rarely would be the case due to the

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<sup>243</sup> Mowie Fisheries v Switzerland Insurance (1997) 144 ALR 234.

causation requirement in the penalty system. The ISM Code provides a more general internal control arrangement and quality assurance system for ship owners, under which breach of the formal requirements for creation and maintenance of the system will less frequently be the cause of the casualty in question. Thus, a breach of the ISM Code must normally lead to some kind of defect that may be the direct cause of a casualty for the insurer to be able to invoke a breach of safety regulations against the assured. In such a case, the defect will often also result in the ship not being seaworthy.

In some cases, the other systems contain special regulation concerning these conventions even if they do not include the concept of safety regulations in their conditions. In Italy, sometimes the "classification clause" in the ITCH is extended to encompass the adoption of safety certificates. In that case the rules for warranties apply. The Japanese material states that non-compliance with the ISM code is normally provided for in the hull policy, but does not describe the method.

The ITCH on the other hand, contains as far as I can see no regulation concerning the ISM Code or the SOLAS Convention. However, as the ISM Code has been made mandatory by the SOLAS Convention, the UK MIA standard of seaworthiness with which the vessel must comply is now to be tested against the requirements of the Code. Thus, there is a strong possibility that a failure to comply with the requirements of the ISM Code will be evidence of unseaworthiness with potential consequences under Section 39 of the UK MIA. This connection between a breach of the ISM Code and the question of seaworthiness will probably be the same for all MIA based legislation.

In addition, this question is regulated in some of the cargo clauses. According to the new German Cargo Clauses, there is a requirement that the means of international transport shall be certified according to the ISM Code or as required by the SOLAS Convention. The condition to invoke breach of this requirement is that the assured has not acted as "prudent businessman in choosing the carrier or forwarding agent".<sup>244</sup> A similar solution is described for the French Cargo Clauses, stating that loading on a non ISM compliant vessel renders the policy not applicable. Nevertheless, the innocent holder of the policy remains covered.<sup>245</sup> The last reported example is a Cargo ISM Endorsement developed by the London market which places the onus on the cargo owner to ensure the cargo is carried with a vessel that is ISM certified or whose owners or operators hold an ISM Code Document of Compliance.<sup>246</sup>

If there is no safety regulation, warranty or condition concerning the ISM code or the SOLAS Convention, a breach of these rules will have to be dealt with by general provisions in the contract. The most practical approach seems to be to use the exclusions for gross negligence.

<sup>244</sup> DTV Cargo Conditions 7.1 and 7.2.

<sup>245</sup> Reference to art. 3-2 of the French CC which states that the insurance does not apply to the consequences of trade barriers or hindrance to the commercial transactions of the assured. Art 3-3 excluding the illegal trading of cargo seems better.

<sup>246</sup> Cargo ISM Endorsement (JC 98/019, 1 May 1998), described in Australian Law Reform Commission DP 63 p. 82.

### 7.5. *Summary*

The main impression from this discussion is that the insurer looks upon safety at sea as a very important issue. Also, there is a common approach to two main questions, namely certain classification issues and the question of seaworthiness. One disorder concerning these two issues is that the classification requirements in some systems include not only the class of the vessel, but also certain obligations given by the Classification society. Another item where there is a distinction in approach is the US implied warranty of seaworthiness at the inception of a time policy. As this is discussed and also criticized in the US market, it may not pose a serious problem for harmonization. Apart from that, the question of seaworthiness seems to follow the same pattern for all the systems. For safety regulation, on the other hand, the regulation is much less common.

A main provision in the material is a very absolute and strict exclusion for change of classification society and loss of class. Here the warranty approach is used both in the common law and the civil law countries, and there seems to be no example of held covered clauses. Only France and Germany depart from this. For France, the mandatory provisions concerning alteration of risk, which incidentally Denmark and Sweden ignore in their provisions, may explain this more protective approach. In Germany, the reason may be that hull insurance is of less importance in the German market.

The fact that so many countries have the same approach to the classification requirements implies that it will be difficult to get acceptance for a more lenient solution. On the other hand, the arguments against the general warranty approach may be applied similarly against this regulation. If it can be proven that the insurer would have accepted the change of classification society if he had been asked, it seems very unreasonable that such a change should result in termination of the policy. It may therefore be argued that at least a materiality condition should be included for this issue. For loss of class it is easier to defend the strict solution as one may presume that loss of class will normally be material for the insurer.

As for compliance with recommendations, requirements or restrictions from the Classification society, the warranty approach seems even more unreasonable. It may here be referred to the discussion in the Norwegian market, where compliance with periodic surveys was lifted from the Classification Clause to the Safety Regulation Clause, and where safety regulation issued by the classification society traditionally has been defined as a safety regulation according to this clause. This solution will include conditions of fault and causation for the insurer to be able to sanction against breach of the Class requirements, which seems to be a more fair approach. The Norwegian solution also implies that the stricter approach is not necessary to deal with this problem successfully.

It may also be pointed out that the regulation in ITCH 4.1 seems to overlap the UK MIA regulation of seaworthiness on this point, as only recommendations, requirements or restrictions which relate to the Vessel's seaworthiness or to her maintenance in a seaworthy condition are included in the provision. The main

focus of the regulation thus seems to be to secure the seaworthiness of the ship, and not the recommendations as such. The result of the combined regulation is that if the ship is unseaworthy for other reasons than non-compliance with the recommendations etc. from the classification society the insurer will only be able to react if this is due to the assured and the loss is caused by the unseaworthiness. If on the other hand the assured is guilty of non-compliance with these recommendations etc. and there is thus a risk for the ship being unseaworthy, the insurance will be terminated automatically. It is difficult to see why a mere risk for unseaworthiness should be treated much harsher than unseaworthiness itself.

In principle, this argument may also be used against the regulation for change of classification society and loss of class, as the main problem seems to be the risk for less strict classification control and reduced quality of the safety of the ship following the change. An exclusion for loss caused by unseaworthiness should therefore be sufficient to deal with these problems. Since the market has decided that this is not so, the reason may be that the concept of unseaworthiness is difficult to define and also that it may be difficult for the insurer to prove that the ship in fact was unseaworthy and that this defect caused the loss. An automatic termination approach obviously provides the insurer with a more efficient tool to control the risk for unseaworthiness. Whether this risk is so great as to justify the crude approach may be debated.

The concept of safety regulation is of less common usage. As a concept, this is mainly a Nordic approach. The equivalent solution in the common law systems is found in the implied warranty of legality. However, this will be limited to public regulation, and may also be criticized for the same weaknesses as the general warranty approach. The advantage of the safety regulation approach is that it gives a consistent tool to deal with all safety regulation, including the international conventions and the recommendations from the classification societies. Compared to the warranty approach for these recommendations the safety regulation will therefore give both a more systematic and a more reasonable regulation. Compared to the regulation of seaworthiness, the advantage of safety regulations is that it is much easier to document a breach of a safety regulation than to prove that the ship was unseaworthy. Safety regulations therefore encompass some of the advantages of the warranty approach without including the harshness of the sanction.

It may therefore be argued that the combination of exclusions for unseaworthiness as defined in all systems except the US and a concept of safety regulation will render the warranty approach for the classification issues unnecessary, at least as far as recommendations and periodic surveys are concerned. This solution will probably also be more acceptable in the French legislation, where the mandatory provisions for alteration of risk seem to be an obstacle for the warranty approach.

## 8. *Warranties continued - change of flag, owner, management etc.*

### 8.1. *The problem*

The last decades have experienced an increasing internationalization of the shipping industry, and also of marine insurance. This has resulted in ship owners



choosing to sail under a foreign flag and to use crew from other nations where wages are lower than in their own country. Also, there has been a trend towards internationalization of ship management, and a diversification of management functions. Among the problems in the marine insurance market following this evolution is the relationship between the insurer and the ship owner, and the risk concerning unknown and maybe foreign owners, less strict flag state requirements and less qualified crew and management. These problems are dealt with in provisions concerning change of flag, ownership, management etc..

The problems dealt with under this item can be compared to the problems dealt with under item 7 in that a main concern is the quality of the ship and the standard of maintenance procedures and procedures to secure the safety of the ship. However, rules concerning change of flag, owner and management are less direct tools to obtain this goal as they concern the legal framework for and organization of the management of the ship. This may explain the fact that questions concerning flag, ownership and management of the ship are not regulated in the cargo clauses, but are solely a hull problem.

A characteristic feature for the issues of change of flag, ownership and management is also that these problems are normally not dealt with by the legislation. The questions will therefore normally have to be solved in the policy. As a lot of countries are following the ITCH, the solution in these clauses will be dominant in the material.

## *8.2. The regulation*

For **change of flag**, the strictest solution, which is automatic termination of the policy, will be found in ITCH, American HC and in the Danish HC.<sup>247</sup> This solution is thus also adopted in systems using the ITCH as standard clauses, viz. Portugal, Slovenia, Croatia, Greece, Israel, Venezuela, Australia, Indonesia, South Africa and Hong Kong. Spain, which combines the ITCH with its own standard-clauses, and Canada, seem to follow the ITCH warranty approach on this point.

However, Italy seems to depart from the ITCH solution concerning this issue, and argues that change of flag may be considered an alteration of risk, despite the fact that they use the ITCH as standard conditions combined with their own clauses. Also New Zealand follows another solution, with no exclusion for change of flag.

Under the French system the assured has a duty to disclose the flag when the contract is entered into, and to disclose any change of the flag during the insurance period. If the latter duty is not complied with, the reaction is similar to the reaction for alteration or loss of class; viz. cancellation of the policy with three days notice or proportionate reduction of indemnity.<sup>248</sup>

<sup>247</sup> ITCH 5.2, American Institute HC 1977, Change of ownership Clause, Danish HC 2.3 no 2. The regulation in Danish HC is similar to the class requirement, ref. above under 7.2. It may be argued that this regulation is contrary to the mandatory provisions in the Danish ICA, but the clauses may be defended if they are defined as a relevant increase of risk.

<sup>248</sup> French HC art. 8.1 and 8.3 and art. 14.

The conditions in Norway, Sweden, Finland, Slovenia, New Zealand and Japan contain no regulation for change of flag. However, in Japan, change of flag will always result in change of ownership, and therefore be provided for under this regulation, see below. Similar provisions may be found in other countries, but these are not discussed in the material.

**Change of ownership** will in Denmark, Germany, Norway, Sweden, Finland, Italy, France and Japan, and according to ITCH and American HC lead to automatic termination of the insurance.<sup>249</sup> In ITCH, the American, Danish, French and Japanese Clauses the same rule is applied to bare-boat charter.<sup>250</sup> As mentioned above, this regulation will also apply to systems using the ITCH as standard conditions. On the other hand, The New Zealand conditions contain no similar regulation, but assignment of the policy is regulated in the law.<sup>251</sup> Slovenia reports that they do not operate with exclusions for change of ownership.

In UK and US based systems, and also according to the Danish conditions, the regulation applied to change of ownership normally is also applied to **change of management**.<sup>252</sup> Again, Italy seems to depart from the ITCH solution on this point, and argues that changes in management may be considered an alteration of risk. This corresponds to the normal civil law approach to this question. The German and Swedish system here is that transfer of management of the ship shall be disclosed to the insurer. The German solution is that the assured has a duty to notify the insurer if “the manning, fitting-out and inspection of the vessel is transferred to new management”. Underwriters will in this situation have a right to cancel the insurance with a 14 days notice. In the case of non-disclosure, the insurer is discharged from liability unless the non-disclosure was not intentional.<sup>253</sup> The Swedish conditions follow the ordinary duty of disclosure, with a diversified reaction according to the degree of fault on the part of the assured, and also a right to terminate the contract.<sup>254</sup>

According to the Norwegian Plan change of the manager of the ship or the company which is responsible for the technical/maritime operation of the ship is deemed to be an alteration of the risk as defined in the Plan.<sup>255</sup> The penalty system here is as described above under item 5.2.4.

The other systems contain no specific regulation concerning these issues, and must therefore fall back to the general provisions.

<sup>249</sup> Danish HC 2.3 no 4, DTV Hull Clauses 13, NP 3-21, Swedish HC § 4, Finnish HC § 38, Italian HC art. 12, French HC art. 17 eighth and ninth paragraph, Japanese HC art. 14-1-6, American Institute HC Change of Ownership Clause, and ITCH 5.2. It may be argued that the Danish regulation is contrary to the mandatory provisions in the Danish ICA, but the clauses may be defended if they are defined as a relevant increase of risk.

<sup>250</sup> ITCH 5.2, American Institute HC Change of Ownership Clause, Danish HC 2.3 no 3, French HC art. 17 eighth and ninth paragraph, Japanese HC art. 14-1-6.

<sup>251</sup> NZ MIA sec. 51 and 52.

<sup>252</sup> ITCH 5.2, American Institute HC, Change of Ownership Clause, Danish HC 2.3 no 3.

<sup>253</sup> DTV Hull Clauses 12.1, 12.2 and 12.5.

<sup>254</sup> Swedish HC § 10 second part.

<sup>255</sup> NP § 3-8 second part.

### 8.3. *Summary*

The insurer's attitude towards change of flag, ownership and management is less homogenous than the attitude towards the safety issues discussed above under item 7.

The most common attitude on these issues seems to be automatic termination when there is a change of ownership. On this issue, the civil law regulation follows the warranty principle in the common law approach, and there is no example of more flexible exclusions. As it will often be difficult to show that change of ownership is the cause of the loss, it may be necessary to operate with absolute exclusions on this point. Also, it may be argued that change of ownership is of such a great importance both for the contractual relationship between the insured and the assured and for the management of the ship that termination is a necessary approach to protect the insurer from having to deal with owners where they have had no prior contact.

On the other hand, not all countries are applying the same harsh regulation for charter on bare-boat basis. The attitude in the Norwegian market when the Plan was amended was that the main issue to be regulated was the ownership, and that bare-boat charter should only invoke a sanction if the conditions to apply alteration of risk was satisfied. A main point here is that the insurer may not react against such change unless the change was material for the insurer.

Change of flag leads to automatic termination in systems using the ITCH or American HC, but many civil law systems lack any kind of exclusion for this change. This may imply that automatic termination is too harsh for change of flag. The question to be discussed here is whether the main question is who owns the ship, and that the regulation of change of flag is unnecessary.

The last issue was transfer to new management. Again you have the same distinction between the common law approach of automatic termination and the civil law approach of alteration of risk or similar solutions. Reference may therefore be made to earlier comparisons of the two approaches.

## 9. *Summary and main conclusions*

The main impressions from the discussions in this paper are as follows:

The most common concept in this paper is duty of disclosure, which is applied in both common law and civil law systems. In addition, the common law system and some civil law systems operate with a concept of good faith, but this is a generally more accepted concept in the common law countries. Even so, conceptually, it may be stated that there is a fairly common approach in the civil law and the common law countries with regard to circumstances concerning the evaluation of the risk before the contract is entered into. The differences on this point thus concern the material solutions more than the conceptual approach.

However, when it comes to circumstances happening when the insurance is running, the common law and the civil law systems have chosen different starting points. The civil law countries as a main rule apply the concept of alteration of risk, corresponding closely to the regulation concerning duty of disclosure. On the other hand, the common law systems and some systems having adopted the English insurance conditions apply the concept of

warranties. The systems meet, however, in special regulation in the civil law systems concerning certain issues (seaworthiness, classification issues, and change of flag, nationality and management).

Also, the main issues in the different regulations seem to be fairly common. The main issues concerning the duty of disclosure are the scope of the duty, the time the duty is applied, the relevance of the knowledge of the person effecting the insurance, and a sanctioning system varied according to the degree of fault of the person effecting the insurance. There is however, less variation in the sanctioning system in the common law systems than in the civil law systems. Also, the detailed regulation of these issues varies a great deal, and the total picture of the regulation is fairly complicated.

The main issue concerning the principle of good faith is that it embraces the duty of disclosure, but reaches further both concerning the scope of the duty of disclosure and concerning the time. The extensions of the scope concern the question of materiality and the knowledge of the assured. The extension of the time aspect concerns the fact that duty of good faith in UK (but not in US) is also applied against the assured while the insurance is running. However, it seems also to be a common feature with the principle that there is a great uncertainty as to how far it reaches. Thus, contrary to the regulation concerning duty of disclosure, the complication is not to get an overall view of the regulation, but to grasp the real content of the provisions.

The main issues concerning alteration of risk are the concept of the alteration of risk, the duty to notify the insurer and a sanctioning system connected to a combination of breach of a duty not to alter the risk and a duty to notify about such alteration of risk. However, as with duty of disclosure, the detailed regulation of these issues varies a great deal, and the total picture of the regulation is fairly complicated.

As for warranties, the main issues are the concept of warranties, the condition of absolute compliance, and the sanction of no liability/voidability regardless of materiality, fault and causation. Also, a common feature here is legislation trying to soften the principle, and held covered clauses to protect the assured. Another common feature is the difficulty to grasp the real nature of the principle. Thus, even if the provision is fairly simple in its wording, and only one regulation is applied contrary to the masses of regulations concerning alteration of risk, the principle is not an easy one to understand.

The total impression thus is that the civil law regulations create a very confusing picture, but that the regulation in most systems can be explained by legal fairness and economic efficiency. The common law systems are on the other hand deceptively simple in its common regulation, but hard to understand and even harder to explain.

As already stated above, the civil law systems also illustrate that the market may function without the principles of good faith and warranties. As a starting point it is difficult to see that the insurer needs any further protection than that which follows from the duty of disclosure. The principle of good faith may create a safety net for the insurer, but at the same time introduces a great deal of uncertainty for the assured. This seems contrary to what insurance is all about, namely to acquire certainty and to do away with risk.

Much of the same may be said about the concept of warranties, which compared to alteration of risk seems unnecessary harsh. However, even if a system does not use the concept of warranties, many conditions contain provisions that are very similar to warranties. The fact that these provisions regulate different problems may however indicate that few problems are of such a character that there is total agreement of the necessity of the warranty approach.

As for the question of harmonization, the main obstacles will be the mandatory regulations. One main obstacle is that the legislation in Denmark, Sweden, Slovenia, France, Italy, Australia, South Africa and may be also UK and US contain mandatory provisions for some or all of the issues discussed in this paper. As the Swedish and Danish ICA are under amendment, the mandatory provisions in these countries may disappear. The mandatory provisions in France, Italy, Slovenia and the common law countries will on the other hand prevail. The Italian mandatory regulation, however, concerns only alteration of risk, and may be departed from in favor of the assured. Only stricter solutions concerning alteration of risk will thus cause a problem under this legislation. The French mandatory provisions include also duty of disclosure, and the Slovenian legislation concerns only duty of disclosure. It is not clear to what extent more favorable solutions for the person effecting the insurance or the assured may be accepted in these systems. Neither is it clear to what extent the mandatory common law rules or principles may be departed from in favor of the assured. As the common law regulations of good faith and warranties are much stricter than the mandatory regulation in any civil law system, this seems to be the most problematic regulation to be dealt with in an attempt of harmonization.

Harmonization will thus require either that stricter systems accept that the milder solutions in France and Italy will define the limit for how strict these provisions may be, or that this legislation is made directory for marine insurance. The fact that the French and Italian markets seem to function under the prevailing mandatory regulation implies that stricter rules are not necessary to protect the interests of the insurers and the community of persons effecting insurance.

The discussion further shows that even if the civil law share the same main concepts and a main attitude concerning which problems should be given special regulation in a marine insurance contract, the details of the regulation are very different. Also, there are as mentioned some basic differences between the civil law countries and the common law countries. Harmonization will thus require that the different markets are willing to give away national and maybe traditional solutions and adapt a broader, more systematic and international attitude to the different questions. This holds both for the selection of the main concepts and for the more detailed regulation. Inherent in this is a shift in the perspective that in marine insurance the conditions themselves are the commodity and thus a factor of competition.

On the other hand, within the civil law systems the differences seem to apply more to the detailed elements of the regulation than to the main principles and reasoning. If there is agreement about main principles and the aim of the

regulation, agreement of the details should not be an impossible task. It is more uncertain whether it is possible to unite the basic differences between the civil law systems and the common law system in one set of clauses.

Also, even if there are some principles that may be agreed upon, the underlying concepts may well vary in the different countries. Concepts like fraud, intent, negligence and good faith may have a common core, but the borderline between the concepts may be defined differently. Another common concept that seems to vary is the concept of material information used in the regulation of duty of disclosure and duty of good faith. One point to be made here is that international harmonization cannot solve national discussion of the content of such concepts. Pointing out main international solutions based on the same starting point will thus not solve the court case battles in UK on the definition of materiality.

## **UNESCO DRAFT CONVENTION ON UNDERWATER CULTURAL HERITAGE**

At the Executive Council meeting held in Toledo in September 2000 this UNESCO project was discussed. Patrick Griggs and Frank Wiswall reported on the background to this project and pointed out that many of the provisions in the draft convention were inconsistent with the rights of salvors under the 1989 Salvage Convention. Members of the Council were informed of the report which John Kimball of the US Maritime Law Association had prepared on this subject and Patrick Griggs drew attention to a Draft Protocol to the Salvage Convention 1989 which had been drafted by the late Geoffrey Brice Q.C. The purpose of this Protocol was to accord to items of cultural importance found beneath the sea a degree of protection but always respecting the well established law of salvage.

The Executive Council decided to invite the existing International Working Group, chaired by Professor Japikse (Netherlands) to consider the Brice Protocol and report to the Singapore Conference whether the Protocol was an appropriate way of dealing with the undoubted problem of protecting the cultural heritage without unreasonably restricting the rights of salvors. Assuming a positive report it was resolved that an International Sub-Committee would be set up to develop the Draft Protocol and explore ways of implementing it.

The text of the Draft Protocol is published below:

### **Draft Protocol to the Salvage Convention 1989**

(on the basis of a draft prepared by the late Geoffrey Brice, QC)

#### **THE PARTIES TO THE PRESENT PROTOCOL,**

CONSIDERING that it is desirable to amend the International Convention on Salvage done at London on 28 August 1989

HAVE AGREED as follows:

#### **Article 1**

For the purpose of this Protocol:

1. "Convention" means the International Convention on Salvage, 1989.
2. "Organization" means the International Maritime Organization.
3. "Secretary-General" means the Secretary-General of the Organization.

## Article 2

*Article 1, subparagraph (a) of the Convention is replaced by the following text:*

- (a) Salvage Operation means any act or activity to assist a vessel or any other property (including services to or involving historic wreck) in danger in navigable waters or in any other waters whatsoever.

## Article 3

*The following text is added as subparagraphs (c)-1 and (c)-2 in Article 1 of the Convention:*

- (c)-1 Historic wreck means a vessel or cargo or artefacts relating thereto including any remains of the same (whether submerged or embedded or not) of prehistoric, archaeological, historic or other significant cultural interest.
- (c)-2 Damage to the cultural heritage means damage to historic wreck including damage or destruction at the salvage site of any significant information relating to the wreck or in its historical and cultural context.

## Article 4

*The following text is added as subparagraph (k) in Article 13 paragraph 1 of the Convention:*

- (k) in the case of historic wreck, the extent to which the salvor has:
- i) protected the same and consulted with, co-operated with and complied with the reasonable requirements of the appropriate scientific, archaeological and historical bodies and organizations (including complying with any widely accepted code of practice notified to and generally available at the offices of the Organization);
  - ii) complied with the reasonable and lawful requirements of the governmental authorities having a clear and valid interest (for prehistoric, archaeological, historic or other significant cultural reasons) in the salvage operations and in the protection of the historic wreck or any part thereof and
  - iii) avoided damage to the cultural heritage.

## Article 5

*Article 18 of the Convention is replaced by the following text:*

### The effect of salvor's misconduct

A salvor may be deprived of the whole or part of the payment due under this Convention to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part or if the



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*Unesco: Draft convention on underwater cultural heritage*

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salvor has been guilty of fraud or other dishonest conduct. In the case of historic wreck, misconduct includes a failure to comply with the requirements set out in Article 13 paragraph (k) or causing damage to the cultural heritage.

### **Article 6**

*Article 30, paragraph 1(d) of the Convention is replaced by the following text:*

- (d) when the property involved is historic wreck and is wholly or in part in the territorial sea (including on or in the seabed or shoreline) or wholly or in part in inland waters (including the seabed and shoreline thereof).

# UNIFORMITY OF LAW CONCERNING PIRACY AND ACTS OF MARITIME VIOLENCE

## REPORT OF THE JOINT INTERNATIONAL WORKING GROUP

The Executive Council, at its November 1997 meeting, approved a proposal made by the Maritime Law Association of the United States to consider formation of a working group to be charged with drafting a Model National Law concerning piracy.<sup>1</sup> Though the subject clearly lies in the area of public international law, it was pointed out that the Constitution of the Comité contemplated work by the CMI in public law,<sup>2</sup> and that in any case the CMI had already produced the 1924 Convention on the Immunity of State-Owned Ships and the 1957 Convention on Stowaways, both of which lay in the area of public international law.

Piracy and maritime violence remain an extremely serious and growing problem, highlighted in the work of international organizations such as IMO, INTERPOL and ICC-IMB. There has however been no unified pressure from national governments for a new international convention on the subject, and the majority of such incidents take place within or just outside waters under coastal State jurisdiction. Studies which have been undertaken conclude that one basic difficulty in obtaining effective measures of suppression is a lack of uniformity in national laws concerning piracy and acts of maritime violence as well as the reporting and investigation of incidents.

The Executive Council appointed Dr Frank Wiswall, Vice-President of the CMI, to canvass other concerned international organizations in order to determine their willingness to participate in such an effort, conditioned upon the Comité providing a chairman, rapporteur and secretariat services as well as a meeting place for discussions. At its May 1998 meeting, the Executive Council approved the establishment of the Joint International Working Group, including representatives of the following participants in addition to the CMI:

- the Baltic and International Maritime Council (**BIMCO**);
- the International Chamber of Shipping (**ICS**);

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<sup>1</sup> The draft Model National Law is Annex A to this Report.

<sup>2</sup> The object of the CMI is to contribute to the uniformity of maritime law “in all its aspects.” (1992 Constitution, Article 2).

- the International Criminal Police Organization (**INTERPOL**);
- the International Group of P & I Clubs (**IGP & I**);
- the ICC International Maritime Bureau (**ICC-IMB**);
- the International Maritime Organization (**IMO**);
- the International Transport Workers' Federation (**ITF**);
- the International Union of Marine Insurance (**IUMI**); and
- the United Nations Office of Legal Affairs, Division of Oceans Affairs and Law of the Sea (**UNOLA/DOALOS**).

Contact was also made with the Director of the Legal Bureau of the International Civil Aviation Organization (**ICAO**), and the Director of the Legal Department of the International Air Transport Association (**IATA**). Both of these organizations have expressed interest in the work and have requested copies of the documentation produced by the Group, but have not participated in the work.

Dr Wiswall was appointed Chairman of the Group, with Dr Samuel Menefee as Rapporteur. As of this Report the Group has held four meetings in London, and the individual representatives participating in the work are identified in Annex B. In the course of its deliberations the Group posed a detailed questionnaire in 1999 and a brief supplementary questionnaire in 2000 to the Comité's Member National Associations of Maritime Law; an abbreviated tabular representation of the responses to the principal questions is presented in Annex C. The Group wishes to express its gratitude to those Associations which answered either or both of the questionnaires; the names of those Associations and of the persons (where known) who prepared responses are listed in Annex D to this Report.

At the outset of its work, the Group was made aware of the activities of IMO, centred in its Maritime Safety Committee. A conscious effort has been made throughout to ensure that there would be no conflict and a minimum of overlap between the work of the two bodies, and that the respective work products would be as harmonious and mutually supportive as possible. There was early agreement that, broadly speaking, the Group would concentrate upon issues of jurisdiction and prosecution of the crimes of piracy and maritime violence, while IMO would continue its work on operational measures to investigate and report concerning incidents of piracy and maritime violence. Such a dual approach, it is hoped, will result in greater suppression of these unlawful acts.

It is difficult to overestimate the seriousness of the threat posed by maritime criminal activity, particularly with the entry of organized crime into the "business" of piracy and armed maritime theft, and the known fact that many incidents are not officially reported, if reported at all. For this reason the Group will present a Seminar at the Singapore Conference prior to discussion of the Group's work. It may be noted, however, that legal inability to effectively prosecute the accused in several recent incidents, notably the case of the *ALONDRA RAINBOW* in 1999, illustrate the need for a Model National Law.

The principal objective of the draft Model National Law is to ensure that no act of piracy or maritime violence falls outside the jurisdiction of affected States to prosecute and punish these crimes or, alternatively, to extradite for

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*Report of the Joint International Working Group*

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prosecution in another State. A second objective in drafting the Model Law has been to ensure that it will assist in giving full effect (a) to the provisions relating to piracy contained in the 1982 United Nations Convention on the Law of the Sea, and (b) to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Navigation ("SUA" Convention) for those States which have ratified or acceded to the Convention (with or without the 1988 SUA Protocol). A third objective is that the provisions of the SUA Convention (and, where appropriate, the Protocol) will also be uniformly applied as national law in those States enacting the Model Law which are *not* Parties to either the Convention or Protocol. Finally, the draft Model Law seeks to ensure that all incidents falling under its definitions of the crimes of piracy and maritime violence are reported to the proper national authorities and that this information is, in turn, relayed onward to the competent international organizations.

It must be stressed that the task of the Singapore Conference is to review and comment upon the draft Model National Law. Because the draft is *not* the work product of the CMI, but of a Group of international organizations, the Conference may suggest minimal changes for future consideration by the Group but will not itself make changes to the document. At the conclusion of the Conference's deliberations, an indicative "up-or-down" vote will be taken whether to recommend to the CMI Assembly that it endorse the draft Model Law. If endorsed by the Assembly, the Model Law will be passed on to the other participating international organizations for their consideration, and at the conclusion of this process, including any necessary future meeting of the Group in order to make final changes in the text, the Model National Law will be sent to the Member National Associations of the CMI with the request that they lobby their respective governments for enactment of all or as much as possible of the text as national law.

The draft text of the Model Law is set forth as Annex A to this Report.

Respectfully submitted,

FRANK L. WISWALL, JR.  
Chairman of the Group

SAMUEL P. MENEFE  
Rapporteur

## ANNEX A

**MODEL NATIONAL LAW ON ACTS OF PIRACY AND  
MARITIME VIOLENCE***Preamble*

The following Model National Law on Acts of Piracy or Maritime Violence is the result of deliberation by the Joint International Working Group on Uniformity of Law Concerning Acts of Piracy and Maritime Violence.<sup>1</sup> It attempts to attack the problem of piracy and maritime violence by proposing a more systematic treatment of these serious problems through national law, under whose admiralty / maritime jurisdiction the great majority of relevant incidents fall. The intention of the Working Group is to present a series of proposals designed to achieve greater uniformity in the body of various national legal traditions rather than to produce a standard document. Similarly, penalties are not specified, but must be severe enough in the context of national criminal law to discourage illegal conduct. It is recognized that those governments undertaking a review of piracy and related laws possess particular expertise in their own national problems. By isolating several general trends, however, the Working Group hopes to bring the attention of national legislators to international considerations that have a direct impact on national jurisdiction and prosecution. The format in which these are presented in this model is not intended to shape the form of any national legislation; content rather than form is the Working Group's concern. While the Working Group feels that its suggestions represent a balanced and coherent whole, States are encouraged to consider adapting *any* of the ideas herein, as even incremental change is likely to benefit effective legal coverage of this important topic.<sup>2</sup>

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<sup>1</sup> The Working Group is composed of representatives of the following international organizations: the Comité Maritime International (CMI), the Baltic and International Maritime Council (BIMCO), the International Chamber of Shipping (ICS), the International Criminal Police Organization (INTERPOL), the International Group of P&I Clubs (IGP&I), the ICC International Maritime Bureau (ICC-IMB), the International Maritime Organization (IMO), the International Transport Workers Federation (ITF), the International Union of Marine Insurance (IUMI), and the United Nations (Office of Legal Affairs / Division for Ocean Affairs and the Law of the Sea) (UN OLA / DOALOS).

<sup>2</sup> The Working Group also specifically urges accession to and adoption into national law of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and (where applicable) the related 1988 Protocol on Fixed Platforms, and of the 1982 Convention on the Law of the

*Section I: Definitions*

1. **Piracy** is committed when any person or persons, for any unlawful purpose, intentionally or recklessly:
  - a) engages in piracy as the act is defined by article 15 of the 1958 Convention on the High Seas; or
  - b) engages in piracy as the act is defined by article 101 of the 1982 Convention on the Law of the Sea.<sup>3</sup>
2. **Piracy** is also committed when any person or persons, for any unlawful purpose, intentionally or recklessly:
  - a) engages in an act constituting piracy under the criminal code of [name of enacting State]; or
  - b) engages in an act previously held to constitute piracy by [name of the highest judicial court of the enacting State]; or
  - c) engages in an act deemed piratical under customary international law.
3. The crime of **maritime violence** is committed when any person or persons, for any unlawful purpose, intentionally or recklessly:
  - a) injures or kills any person or persons in connection with the commission or the attempted commission of any of the offenses set forth in sub-Sections I (3) (b)–(h); or
  - b) performs an act of violence against a person or persons on board a ship; or
  - c) seizes or exercises control over a ship or any person or persons on board by force or any other form of intimidation; or
  - d) destroys or causes damage to a ship or ship's cargo, an offshore installation, or an aid to navigation; or
  - e) employs any device or substance which is likely to destroy or cause damage to a ship, its equipment or cargo, or to an aid to navigation; or
  - f) destroys or causes damage to maritime navigational facilities, or interferes with their operation, if that act would be likely to endanger the safe navigation of a ship or ships; or
  - g) engages in an act involving interference with navigational, life support, emergency response or other safety equipment, if that act would be likely to endanger the safe operation or navigation of a ship or ships or a person or persons on board a ship; or
  - h) communicates false information, endangering or being likely to endanger the safe operation or navigation of a ship or ships; or
  - i) engages in an act constituting an offense under article 3 of the 1988

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Sea. The Group notes that care should be taken in the drafting of appropriate legislation, as many existing national laws *do not directly track* provisions of these international conventions. Attention is also drawn to the IMO Draft Regional Agreement on Co-operation in Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships (MSC/Circ.622/Rev.1, Annex, Appendix 5), and to the IMO Draft Code of Practice/Instruments/Guidance Note for the Investigation of the Crime of Piracy and Armed Robbery Against Ships, being developed by the Maritime Safety Committee..

<sup>3</sup> The act of piracy defined in sub-Section I (2) and the acts of maritime violence as defined in sub-Sections I (3) and (4) are separate offences; neither one includes piracy as defined in sub-Section I (1).

- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; or
- j) engages in an act constituting an offense under article 2 of the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; or
  - k) engages in any of the acts described in sub-Sections II (3) (a)–(i), to the extent applicable, where such acts involve an offshore installation or affect a person or persons on an offshore installation.
4. **Maritime violence** is also committed when any person or persons, for any unlawful purpose, intentionally or recklessly endangers or damages the marine environment, or the coastline, maritime facilities or related interests of a State or States.
  5. An attempt to commit any of the offenses listed in sub-Sections I (1), (2), (3) or (4), or any unlawful effort intended to aid, abet, counsel or procure the commission of any of these offenses, or threats to commit any of them, shall constitute **maritime violence**.
  6. Notwithstanding the definitions in sub-Sections I (1), (2), (3), (4), and (5), reasonable acts to rescue a person or to recover stolen property or to regain lawful control of a ship or offshore installation shall not constitute piracy or maritime violence.
  7. Notwithstanding the definitions in sub-Sections I (1), (2), (3), (4) and (5), reasonable or proportionate acts to protect a person, ship or offshore installation, or related property, against piracy or maritime violence shall not constitute piracy or maritime violence.
  8.
    - a) The term **ship** as used in this law includes any type of vessel or other water craft.
    - b) The term **person** as used in this law includes, where applicable, entities having juridical personality as well as individual natural persons.

#### *Section II: Jurisdiction and Extradition*

1. Jurisdiction to prosecute piracy as defined in sub-Sections I (1) (a) and (b) shall lie as set forth in the relevant Convention.
2. The offences defined in sub-Sections I (2), (3), (4) and (5) shall be prosecuted if committed within the territory, internal waters or territorial sea of [name of enacting State], and to the degree that the exercise of national jurisdiction is permitted by the 1958 Geneva Conventions on the High Seas and Contiguous Zone or the 1982 Convention on the Law of the Sea, within the exclusive economic zone, continental shelf, contiguous zone or archipelagic waters of [name of enacting State], and on the high seas or in any place outside the jurisdiction of any State.
3. The offences defined in Section I shall be prosecuted if committed:
  - a) on board a ship entitled to fly the flag of [name of enacting State], wherever located; or
  - b) on an offshore installation belonging to or licensed by [name of enacting State].

*Annex A - Model national law*

4. Jurisdiction to prosecute shall also lie when the person accused of committing an offence defined in Section I is a citizen or national of [name of enacting State], or is an alien resident in [name of enacting State], or is a stateless person.
5. Jurisdiction to prosecute shall also lie when an offence defined in Section I is committed against a seafarer, passenger or shipowner who is a citizen or national of, or is an alien resident in [name of enacting State].
6. Extradition to [name of enacting State] may take place when another State has jurisdiction over the offences defined in sub-Sections I (1), (2), (3), (4) or (5). The possession of jurisdiction by [name of enacting State] shall not preclude the extradition of an alleged offender to another State or States under appropriate circumstances.
7. Trial of an alleged offender *in absentia* shall be allowed as permitted under the law of [name of enacting State].

*Section III: Prosecution, Punishment, Forfeiture and Restitution*

1. An individual found guilty of the crime of piracy shall be subject to imprisonment for a term of not more than \_\_\_\_ years and/or a fine of not more than \_\_\_\_, in addition to any restitution or forfeiture which may be required, or any other penalties which might be imposed under [relevant national law(s) of enacting State].<sup>4</sup>
2. An individual found guilty of the crime of maritime violence shall be subject to imprisonment for a term of not more than \_\_\_\_ years and/or a fine of not more than \_\_\_\_, in addition to any restitution or forfeiture which may be required, or any other penalties which might be imposed under [relevant national law(s) of enacting State].<sup>4</sup>
3. An entity with juridical personality found guilty of the crime of piracy or the crime of maritime violence shall be subject to a fine of not more than \_\_\_\_, in addition to any restitution or forfeiture which may be required, or any other penalties which might be imposed under [relevant national law(s) of enacting State].<sup>4</sup>
4. In cases where any person is injured or killed in connection with an incident of piracy or maritime violence, the person found guilty of the crime shall *also* be liable to whatever penalties exist under [relevant national law(s) of enacting State] for the injury or death.
5. In cases of loss of or damage to property in connection with an incident of piracy or maritime violence, the person found guilty of the crime shall *also* be liable to any other applicable penalties.
6. If another State claims jurisdiction with regard to an incident of piracy or an act of maritime violence, and the alleged offender is not brought to trial in [name of enacting State], the alleged offender shall, subject to the provisions of [relevant national law(s) of enacting State], be extradited to

<sup>4</sup> Penalties should take into account the grave nature of these offences and be severe enough to deter such acts. States are encouraged to consider standardizing such punishments.



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*Piracy and maritime violence*

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the requesting State. If multiple States with reasonable jurisdictional claims make requests for extradition in the absence of a trial in [name of enacting State], the alleged offender shall, subject to the provisions of [relevant national law(s) of enacting State], be extradited to one of the requesting States.

7. Ships, cargo, goods, or equipment employed in or the subject of piracy or acts of maritime violence shall be liable to forfeiture to the State. In the case of stolen property, however, any person with title may assert a claim, and the court shall have discretion to return the property.
8. Ships, cargo, goods or equipment wrongfully taken by person(s) convicted of piracy or maritime violence which were *not* employed in such crime(s) shall be returned to the owners upon legal proof of ownership. Converted property shall be sold and the proceeds distributed to the lawful claimants according to admiralty/maritime law, with any balance remaining being forfeited to the State. Items not claimed within the period established by law may be subject to judicial sale, or transfer to a fund for financing State or regional action to fight piracy or maritime violence. Owners of ships or cargo shall not be charged for port expenses incurred during investigation or prosecution for piracy or acts of maritime violence.
9. Nothing in sub-Sections III (1), (2), (3), (4) or (5) shall compromise or affect any rights or remedies which a person injured by an act of piracy and/or maritime violence might otherwise assert against any perpetrator of the act or acts.

#### *Section IV: Reporting of Incidents*

1. Any incident which may constitute piracy or maritime violence shall be reported by the following, as applicable: (a) the Master,<sup>5</sup> (b) the shipowner or manager, (c) the crew representative, (d) the cargo representative, (e) the insurers, (f) the investigating authorities, or (g) other persons having knowledge of the incident. Reports shall be made without delay and as soon as possible following receipt of knowledge of the incident. Reports shall be sent to [name of central national authority] and shall be in the form provided for by that authority.<sup>6</sup>  
Each person or entity listed above has an obligation to report every known incident. This obligation may be met by filing a joint report, or by forwarding and commenting upon a report on the occurrence made by another listed person or entity.
2. The [name of central national authority] shall be under a continuing duty to make reports without delay and in the required formats to the

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<sup>5</sup> The Master is to report without delay to the police and/or maritime authorities of the State in which the incident occurred or which is the coastal State nearest to the position of the incident, and also to the Administration of the Flag State.

<sup>6</sup> See the forms in IMO MSC/Circ.622/Rev.1, Annex, Appendices 3 and 4, and MSC/Circ.623/Rev.1, Annex, Appendices 2 and 4.

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*Annex A - Model national law*

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International Maritime Organization (IMO)<sup>7</sup> and the International Criminal Police Organization (INTERPOL).<sup>8</sup>

3. All incident reports made under (1) shall be open to the public. However, addenda marked “CONFIDENTIAL” and containing sensitive operational information shall *not* be open to the public.<sup>9</sup>

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<sup>7</sup> Refer to IMO MSC/Circ.622/Rev.1, Annex, Appendix 4, and MSC 59/33, paragraph 19.22.

<sup>8</sup> The Working Group encourages inclusion of the obligation to report to appropriate non-governmental organizations such as the ICC International Maritime Bureau (ICC-IMB).

<sup>9</sup> In the absence of appropriate legal action, where available, to compel disclosure of such information.

**ANNEX B****JOINT INTERNATIONAL WORKING GROUP  
ON UNIFORMITY OF LAW CONCERNING  
PIRACY AND ACTS OF MARITIME VIOLENCE****LIST OF PARTICIPANTS**  
Sessions 1 – 4, 1998 – 2000**Comité Maritime International (CMI):**

- Dr. Frank L. Wiswall, Jr. (Chairman of the Group), Vice-President of the CMI  
(Professor *ad hon.*, IMO International Maritime Law Institute;  
Past Chairman of the IMO Legal Committee)
- Dr. Samuel Pyeatt Menefee (Rapporteur of the Group), Maritime Law  
Association of the United States  
(Maury Fellow, Center for Oceans Law & Policy, University of  
Virginia; Professor of Law, Regent University School of Law)
- Richard Shaw, Esq., Titulary Member of the CMI  
(Lecturer, Southampton Maritime Law Institute; Chairman, CMI  
Working Group on Mobile Units & Offshore Fixed Structures)

**Baltic and International Maritime Council (BIMCO):**

Grant Hunter, Esq., Piracy Project Consultant, Legal and Documentary  
Division

**International Chamber of Shipping (ICS):**

- Mrs. Linda Howlett, Legal Adviser
- Mr. Brian Parkinson, Trade & Operations Adviser

**International Criminal Police Organization (INTERPOL):**

- John Porter, Esq., Team Leader, International Division
- Derek Whiting, Esq., Head of Bureau
- Lance Jones, Esq., Marine Crime Liaison Officer  
National Criminal Intelligence Service, INTERPOL London
- Ch. Insp. Suzanne Williams, Operations  
Royalty Protection Unit, Metropolitan Police, London

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*Annex B - List of Participants*

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**International Group of P&I Clubs (IGP&I):**

D. J. Lloyd Watkins, Esq., Secretary and Executive Officer

Hugh Hurst, Esq., Legal Adviser

Nigel Carden, Esq., Legal Adviser

**International Maritime Bureau (ICC – IMB):**

Capt. Jayant Abhyankar, Deputy Director

Dr. Niranjan Abeyratne, Legal Adviser

**International Maritime Organization (IMO):**

LCDR Brice Martin-Castex, Technical Programme Officer  
Maritime Safety Division

Augustin Blanco-Bazan, Esq., Deputy Director

Gaetano Librando, Esq., Senior Legal Officer  
Legal Affairs and External Relations Division

**International Transport Workers Federation (ITF):**

Mr. Jean-Yves Legouas, Secretary, Seafarers' Section

Capt. Joseph Thuillier, Assistant Secretary, Legal Department

Abdullah Mutawi, Esq., Assistant Secretary, Legal Department

Mr. Tom Holmer, Researcher, Seafarers' Section

**International Union of Marine Insurance (IUMI):**

Dr. Gerfried E. Brunn, Chairman, Liability Committee

**United Nations Office of Legal Affairs / Division for  
Ocean Affairs and the Law of the Sea (UN OLA / DOALOS):**

Mrs. Gabriele Goettsche-Wanli, Law of the Sea / Ocean Affairs Officer

## ANNEX C

**ABBREVIATED RESPONSES OF THE CMI NATIONAL  
MEMBER ASSOCIATIONS TO THE QUESTIONNAIRES  
CONCERNING THE LAW OF PIRACY**

**QUESTIONNAIRE #1**

(\* = indicates certain qualifications)

1. Does your country's national law define the crime of piracy?

ARGENTINA	<b>YES *</b>	DPR KOREA	<b>No</b>
AUSTRALIA	<b>YES</b>	NEW ZEALAND	<b>YES</b>
BELGIUM	<b>YES *</b>	NORWAY	<b>No</b>
FRANCE	<b>YES</b>	PORTUGAL	<b>No</b>
GERMANY	<b>No</b>	SPAIN	<b>No</b>
HONG KONG	<b>YES</b>	UNITED KINGDOM	<b>YES</b>
JAPAN	<b>No</b>	UNITED STATES	<b>YES</b>

2. Does your country have a national law specifically punishing the crime of piracy (as distinct from crimes that form elements of the crime of piracy)?

ARGENTINA	<b>YES</b>	DPR KOREA	<b>N/A</b>
AUSTRALIA	<b>YES</b>	NEW ZEALAND	<b>YES</b>
BELGIUM	<b>YES</b>	NORWAY	<b>N/A</b>
FRANCE	<b>YES</b>	PORTUGAL	<b>N/A</b>
GERMANY	<b>N/A</b>	SPAIN	<b>N/A</b>
HONG KONG	<b>YES</b>	UNITED KINGDOM	<b>YES</b>
JAPAN	<b>N/A</b>	UNITED STATES	<b>YES *</b>

**N.B.:** The Questionnaires requested and resulted in far more detail in the responses than can be reflected in this Table. They also requested copies of the relevant portions of national law, and many responses were accompanied by annotated extracts from national law. Responses arriving too late for inclusion in this Table will be presented at the Singapore Conference.

*Annex C - Abbreviated responses to the Questionnaire*

3. If so, does your country's national law punish the crimes of *attempted* piracy and/or of *conspiracy* to commit piracy?

ARGENTINA	YES	DPR KOREA	N/A
AUSTRALIA	YES	NEW ZEALAND	YES
BELGIUM	YES *	NORWAY	N/A
FRANCE	YES	PORTUGAL	N/A
GERMANY	N/A	SPAIN	N/A
HONG KONG	YES	UNITED KINGDOM	YES
JAPAN	N/A	UNITED STATES	No

4. Does your national law provide for the trial of piracy committed within waters under your country's national jurisdiction?

ARGENTINA	YES	DPR KOREA	No
AUSTRALIA	YES	NEW ZEALAND	YES
BELGIUM	No	NORWAY	No
FRANCE	YES	PORTUGAL	No
GERMANY	No	SPAIN	No
HONG KONG	YES	UNITED KINGDOM	No
JAPAN	No	UNITED STATES	YES

5. Does your national law provide for the trial of piracy committed outside your country's jurisdiction, *i.e.*, on the high seas and/or in waters within the jurisdiction of another State, on the basis that piracy is a universal international crime?

ARGENTINA	YES	DPR KOREA	No
AUSTRALIA	YES	NEW ZEALAND	YES
BELGIUM	No	NORWAY	YES/No
FRANCE	No	PORTUGAL	YES
GERMANY	No	SPAIN	YES
HONG KONG	YES	UNITED KINGDOM	YES/No
JAPAN	No	UNITED STATES	YES

6. Does your national law provide for the extradition of a person accused of the crime of piracy in another country to that State for trial?

ARGENTINA	YES	DPR KOREA	No
AUSTRALIA	YES	NEW ZEALAND	YES
BELGIUM	YES *	NORWAY	No
FRANCE	YES *	PORTUGAL	No
GERMANY	No	SPAIN	No
HONG KONG	YES	UNITED KINGDOM	YES
JAPAN	No	UNITED STATES	YES

*Piracy and maritime violence*

7. Does your national law provide that a person accused of the crime of piracy must either be tried in your country, or else extradited to another country for trial?

ARGENTINA	YES *	DPR KOREA	No
AUSTRALIA	No	NEW ZEALAND	YES
BELGIUM	YES *	NORWAY	No
FRANCE	YES *	PORTUGAL	No
GERMANY	No	SPAIN	YES *
HONG KONG	No	UNITED KINGDOM	No
JAPAN	No	UNITED STATES	No

8. What is the range of punishment under your national law for a person convicted of the crime of piracy?

ARGENTINA	3 – 25 YRS.	DPR KOREA	?
AUSTRALIA	LIFE	NEW ZEALAND	LIFE
BELGIUM	?	NORWAY	21 YRS.
FRANCE	20 YRS.	PORTUGAL	25 YRS.
GERMANY	?	SPAIN	20 YRS.
HONG KONG	LIFE	UNITED KINGDOM	LIFE
JAPAN	?	UNITED STATES	LIFE

9. Specifically, does your national law provide for the capital punishment (death by execution) of a person convicted of the crime of piracy, where the pirate has not been convicted of the crime of capital murder (homicide in the first degree)?

ARGENTINA	No	DPR KOREA	No
AUSTRALIA	No	NEW ZEALAND	No
BELGIUM	No	NORWAY	No
FRANCE	No	PORTUGAL	No
GERMANY	No	SPAIN	No
HONG KONG	No	UNITED KINGDOM	No
JAPAN	No	UNITED STATES	No

10. Does your national law provide for the capital punishment (death by execution) of a person convicted of the crime of piracy, where the pirate *has also been convicted of capital murder* (homicide in the first degree) committed in connection with the event of piracy?

ARGENTINA	No	DPR KOREA	No
AUSTRALIA	No	NEW ZEALAND	No
BELGIUM	No	NORWAY	No
FRANCE	No	PORTUGAL	No
GERMANY	No	SPAIN	No
HONG KONG	YES	UNITED KINGDOM	No
JAPAN	No	UNITED STATES	YES

*Annex C - Abbreviated responses to the Questionnaire*

11. If a person has committed the act of armed theft of a vessel (or the taking of a vessel by threat of violent harm) *within waters under your country's national jurisdiction*, would that act constitute the crime of piracy under your national law?

ARGENTINA	<b>No</b>	DPR KOREA	<b>No</b>
AUSTRALIA	<b>YES</b>	NEW ZEALAND	<b>YES</b>
BELGIUM	<b>No</b>	NORWAY	<b>No</b>
FRANCE	<b>YES</b>	PORTUGAL	<b>No</b>
GERMANY	<b>No</b>	SPAIN	<b>N/A</b>
HONG KONG	<b>YES</b>	UNITED KINGDOM	<b>No</b>
JAPAN	<b>No</b>	UNITED STATES	<b>YES</b>

12. If a person has committed the act of armed robbery of persons on board a vessel (or the taking of property on board a vessel by threat of violent harm) *within waters under your country's national jurisdiction*, would that act constitute the crime of piracy under your national law?

ARGENTINA	<b>No</b>	DPR KOREA	<b>No</b>
AUSTRALIA	<b>YES</b>	NEW ZEALAND	<b>YES</b>
BELGIUM	<b>No</b>	NORWAY	<b>No</b>
FRANCE	<b>YES</b>	PORTUGAL	<b>No</b>
GERMANY	<b>No</b>	SPAIN	<b>No</b>
HONG KONG	<b>YES</b>	UNITED KINGDOM	<b>No</b>
JAPAN	<b>No</b>	UNITED STATES	<b>YES</b>

13. Would the answers to Questions 11 and 12 above be different depending upon whether the vessel was moored or at anchor or, alternatively, was underway?

ARGENTINA	<b>No</b>	DPR KOREA	<b>No</b>
AUSTRALIA	<b>No</b>	NEW ZEALAND	<b>No</b>
BELGIUM	<b>No</b>	NORWAY	<b>No</b>
FRANCE	<b>No</b>	PORTUGAL	<b>YES</b>
GERMANY	<b>No</b>	SPAIN	<b>No</b>
HONG KONG	<b>No</b>	UNITED KINGDOM	<b>No</b>
JAPAN	<b>No</b>	UNITED STATES	<b>No</b>

14. Would the answers to Questions 11 and 12 above be different depending upon whether the vessel was tied up alongside a wharf or quay or, alternatively, was not alongside but was moored or at anchor?

ARGENTINA	<b>No</b>	DPR KOREA	<b>No</b>
AUSTRALIA	<b>No</b>	NORWAY	<b>No</b>
BELGIUM	<b>No</b>	NEW ZEALAND	<b>No</b>
FRANCE	<b>No</b>	PORTUGAL	<b>No</b>
GERMANY	<b>No</b>	SPAIN	<b>No</b>
HONG KONG	<b>No</b>	UNITED KINGDOM	<b>No</b>
JAPAN	<b>No</b>	UNITED STATES	<b>No</b>



*Piracy and maritime violence*

15. If a person has committed the act of armed robbery of persons or other violent acts against persons on an offshore platform or other fixed offshore structure *within waters under your country's national jurisdiction*, would such acts constitute the crime of piracy under your national law?

ARGENTINA	<b>No</b>	DPR KOREA	<b>No</b>
AUSTRALIA	<b>?</b>	NEW ZEALAND	<b>No</b>
BELGIUM	<b>No</b>	NORWAY	<b>YES</b>
FRANCE	<b>YES</b>	PORTUGAL	<b>YES</b>
GERMANY	<b>No</b>	SPAIN	<b>No</b>
HONG KONG	<b>YES</b>	UNITED KINGDOM	<b>No</b>
JAPAN	<b>No</b>	UNITED STATES	<b>No</b>

16. If a person has committed the act of armed robbery of persons or other violent acts against persons on an offshore platform or other fixed offshore structure on the high seas, or within waters under the national jurisdiction of another State, would such acts constitute the crime of piracy under your national law?

ARGENTINA	<b>YES</b>	DPR KOREA	<b>No</b>
AUSTRALIA	<b>No</b>	NEW ZEALAND	<b>No</b>
BELGIUM	<b>No</b>	NORWAY	<b>No</b>
FRANCE	<b>YES</b>	PORTUGAL	<b>?</b>
GERMANY	<b>YES</b>	SPAIN	<b>No</b>
HONG KONG	<b>No</b>	UNITED KINGDOM	<b>No</b>
JAPAN	<b>YES</b>	UNITED STATES	<b>No</b>

17. If stolen goods or other property of victims of piracy is taken into custody by your country's authorities, what is your national law concerning its disposition when the victim makes a claim to the property?

ARGENTINA	<b>RETURN</b>	DPR KOREA	<b>?</b>
AUSTRALIA	<b>RETURN</b>	NEW ZEALAND	<b>RETURN</b>
BELGIUM	<b>RETURN</b>	NORWAY	<b>RETURN</b>
FRANCE	<b>?</b>	PORTUGAL	<b>RETURN</b>
GERMANY	<b>RETURN</b>	SPAIN	<b>RETURN</b>
HONG KONG	<b>?</b>	UNITED KINGDOM	<b>SALVOR'S FEE</b>
JAPAN	<b>RETURN</b>	UNITED STATES	<b>NONE</b>

18. If instrumentalities of piracy (e.g., weapons, fast boats, portable electronics, etc.) are taken into custody by your country's authorities, what is your national law concerning the disposition of such items?

ARGENTINA	<b>?</b>	DPR KOREA	<b>?</b>
AUSTRALIA	<b>FORFEIT</b>	NEW ZEALAND	<b>FORFEIT</b>
BELGIUM	<b>FORFEIT</b>	NORWAY	<b>FORFEIT</b>
FRANCE	<b>?</b>	PORTUGAL	<b>FORFEIT</b>
GERMANY	<b>FORFEIT</b>	SPAIN	<b>FORFEIT</b>
HONG KONG	<b>FORFEIT</b>	UNITED KINGDOM	<b>SALVOR'S FEE</b>
JAPAN	<b>FORFEIT</b>	UNITED STATES	<b>FORFEIT</b>

*Annex C - Abbreviated responses to the Questionnaire*

19. If the property referred to in Question 18 were stolen by the pirates, does your national law provide for the restoration of such property in due course to an innocent owner when the owner makes a claim to the property?

ARGENTINA	YES	DPR KOREA	?
AUSTRALIA	YES	NEW ZEALAND	YES
BELGIUM	?	NORWAY	YES
FRANCE	?	PORTUGAL	YES
GERMANY	YES	SPAIN	YES
HONG KONG	YES	UNITED KINGDOM	SALVOR'S FEE
JAPAN	YES	UNITED STATES	NO

20. If no claim is made to the property referred to in Questions 17 and 19, what is your national law concerning disposition of the property?

ARGENTINA	?	DPR KOREA	?
AUSTRALIA	FORFEIT	NEW ZEALAND	FORFEIT
BELGIUM	RETAIN	NORWAY	FORFEIT
FRANCE	?	PORTUGAL	FORFEIT
GERMANY	RETAIN	SPAIN	FORFEIT
HONG KONG	FORFEIT	UNITED KINGDOM	FORFEIT
JAPAN	FORFEIT	UNITED STATES	FORFEIT

21 Does your country's law require the reporting of all incidents of piracy to a central national authority? If so, please supply the name and address of this authority, the numbers for electronic contact (telephone, fax, E-Mail, telex, cable, etc.) and the name and title of an individual to contact for further details.

ARGENTINA	YES *	DPR KOREA	NO
AUSTRALIA	NO	NEW ZEALAND	NO
BELGIUM	NO	NORWAY	NO
FRANCE	?	PORTUGAL	NO
GERMANY	NO	SPAIN	NO
HONG KONG	NO	UNITED KINGDOM	NO
JAPAN	NO	UNITED STATES	NO

22. Does your country have any treaties or other standing agreements with (a) bordering States, (b) nearby States maintaining a naval establishment with high enforcement capability, or (c) other States in the region, concerning co-operation to suppress and/or punish piracy?

ARGENTINA	NO	DPR KOREA	NO
AUSTRALIA	NO	NEW ZEALAND	NO
BELGIUM	NO	NORWAY	NO
FRANCE	ROME '88	PORTUGAL	NO
GERMANY	NO	SPAIN	YES/NO
HONG KONG	NO	UNITED KINGDOM	NO
JAPAN	NO	UNITED STATES	NO

*Piracy and maritime violence*

23. If your country is party to any relevant treaties or standing international agreements other than those referred to in Question 22 above, please supply copies of such agreements if possible (otherwise citations to the agreements) and the names of the States parties.

ARGENTINA	No	DPR KOREA	No
AUSTRALIA	[LIST]	NEW ZEALAND	[LIST]
BELGIUM	?	NORWAY	No
FRANCE	No *	PORTUGAL	[LIST]
GERMANY	[LIST]	SPAIN	[LIST]
HONG KONG	No	UNITED KINGDOM	[LIST]
JAPAN	No	UNITED STATES	[LIST]

24. If your country has national laws specifically concerning *maritime* crimes of violence *other than piracy*, please supply those portions of your law and indicate the relevant sections within the documents.

ARGENTINA	No	DPR KOREA	?
AUSTRALIA	YES/[TEXT]	NEW ZEALAND	YES/[TEXT]
BELGIUM	YES [NO TEXT]	NORWAY	YES/[TEXT]
FRANCE	No	PORTUGAL	No
GERMANY	No	SPAIN	No
HONG KONG	YES [TEXT]	UNITED KINGDOM	YES/[TEXT]
JAPAN	YES/[TEXT]	UNITED STATES	YES/[TEXT]

25. Do you believe there would be general support in your country for broadening the scope of your national law (if necessary) so as to treat violent maritime crimes on the same basis as piracy is treated under international law?

ARGENTINA	YES *	DPR KOREA	?
AUSTRALIA	?	NEW ZEALAND	No
BELGIUM	?	NORWAY	?
FRANCE	?	PORTUGAL	YES
GERMANY	No	SPAIN	?
HONG KONG	?	UNITED KINGDOM	?
JAPAN	?	UNITED STATES	YES

*Annex C - Abbreviated responses to the Questionnaire***QUESTIONNAIRE #2**

26. Do international treaties ratified or acceded to by your country automatically become part of your country's national law (*i.e.*, are treaties to which your State becomes a party 'self-executing' under your constitutional system), or do they require enactment of enabling legislation in order to have effect?

ARGENTINA	?	DPR KOREA	N/A
AUSTRALIA	LEGISLATION	NEW ZEALAND	LEGISLATION
BELGIUM	?	NORWAY	LEGISLATION
FRANCE	LEGISLATION	PORTUGAL	NO/YES
GERMANY	?	SPAIN	?
HONG KONG	LEGISLATION	UNITED KINGDOM	?
JAPAN	LEGISLATION *	UNITED STATES	YES *

27. Do any government agencies of your country have regulations covering the subject of piracy or maritime violence? If so, please supply the relevant regulations or document.

ARGENTINA	?	DPR KOREA	N/A
AUSTRALIA	?	NEW ZEALAND	No
BELGIUM	?	NORWAY	No
FRANCE	No	PORTUGAL	No
GERMANY	?	SPAIN	?
HONG KONG	?	UNITED KINGDOM	?
JAPAN	YES *	UNITED STATES	?

28. What are the names and addresses of any of your country's government agencies, port authorities, police forces, etc., that would deal with acts of piracy or crimes of maritime violence? What is/are the name(s) and title(s) of appropriate contact person(s) in such organization(s)?

ARGENTINA	?	DPR KOREA	N/A
AUSTRALIA	[GIVEN]	NEW ZEALAND	[GIVEN]
BELGIUM	?	NORWAY	[GIVEN]
FRANCE	?	PORTUGAL	[GIVEN]
GERMANY	?	SPAIN	?
HONG KONG	[GIVEN]	UNITED KINGDOM	?
JAPAN	[GIVEN]	UNITED STATES	?

**ANNEX D****CMI NATIONAL MEMBER ASSOCIATIONS RESPONDING TO  
THE QUESTIONNAIRES CONCERNING THE LAW OF PIRACY**

(With names of individuals preparing the Responses, where known)

**ARGENTINA** – ASOCIACION ARGENTINA DE DERECHO MARITIMO,  
by Prof. José D. Ray, Buenos Aires

**AUSTRALIA** – MARITIME LAW ASSOCIATION OF AUSTRALIA AND NEW ZEALAND,  
by Dr Michael W. D. White, QC, Brisbane

**BELGIUM** – ASSOCIATION BELGE DE DROIT MARITIME,  
by M. Joseph, Esq., Brussels

**FRANCE** – ASSOCIATION FRANCAISE DU DROIT MARITIME,  
by Dr Philippe Boisson and Maître Jean-Serge Rohart, Paris

**GERMANY** – DEUTSCHER VEREIN FÜR INTERNATIONALES SEERECHT,  
by Dr. Hans-Heinrich Möll, Hamburg

**HONG KONG, CHINA** – THE MARITIME LAW ASSOCIATION OF HONG KONG,  
by S. K. Anand, Hong Kong

**JAPAN** – THE JAPANESE MARITIME LAW ASSOCIATION,  
by Prof. Kazuhiro Nakatani, Tokyo

**D.P.R. OF KOREA** – CHOSON MARITIME LAW ASSOCIATION  
by Mr. CHA Mun Bin

**NEW ZEALAND** – MARITIME LAW ASSOCIATION OF AUSTRALIA AND NEW  
ZEALAND,  
by Karl Stolberger, Esq., Auckland

**NORWAY** – DEN NORSKE SJORETTSFØRENING,  
by Kjetil Eivindstad, Arendal

**PORTUGAL** – COMISSÃO DE DIREITO MARITIMO INTERNACIONAL,  
by Dr Dias Bravo, Lisbon

**SPAIN** – ASOCIACION ESPANOLA DE DERECHO MARITIMO,  
by Fernando Ruiz-Galvez, Esq., Madrid

**UNITED KINGDOM** – BRITISH MARITIME LAW ASSOCIATION,  
by the BMLA Sub-Committee on the Law of Piracy

**UNITED STATES** – THE MARITIME LAW ASSOCIATION OF THE UNITED STATES,  
by Prof. Samuel Pyeatt Menefee, Charlottesville, Virginia

# **IMPLEMENTATION AND INTERPRETATION OF THE 1976 LLMC CONVENTION**

## **DRAFT REPORT**

### **1. Introduction**

The CMI has suggested to the Legal Committee of IMO to carry out an investigation into the manner in which the 1976 LLMC Convention has been implemented by States Parties<sup>1</sup> and into the manner in which its provisions have been interpreted and applied.

Uniformity is in fact not achieved by ratification, but through the action taken by States Parties in order to implement the Convention and through the subsequent interpretation of its provisions, and the knowledge of the manner in which its provisions have been interpreted by the Courts of the States Parties would increase the prospects of their uniform interpretation.

The proposal of the CMI has been endorsed by the Legal Committee of IMO at its 80th session<sup>2</sup> and by the Assembly at its 21st session.<sup>3</sup>

In order to collect the necessary information in respect of all States Parties a questionnaire has been prepared (Annex IV).

### **2. The purpose of the study**

On the basis of the responses to the questionnaire received as of 15 October 2000 (Annex V) and of the analysis of the manner in which the individual articles of the LLMC Convention have been implemented by the States Parties in respect of which such responses have been received (Annex VI) a tentative assessment can be made of the level of actual legislative uniformity and of the prospect of uniform interpretation of the provisions of the Convention. Such assessment can in turn enable some views to be expressed in respect of which methods of implementation are likely to ensure a higher degree of actual uniformity.

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<sup>1</sup> A list of the States who have ratified or acceded to the Convention is annexed hereto as Annex I.

<sup>2</sup> An extract from the report on the 80th session is annexed hereto as Annex II.

<sup>3</sup> An extract from the report of the Administrative, Financial and Legal Committee is annexed hereto as Annex III.

### **3. The purpose of conventions on uniform law**

Before making such assessments it is however deemed useful, by way of an introduction, to make some general remarks on the purpose of the conventions containing rules of substantive law.

It is thought that such purpose is not only that of ensuring actual uniformity of the laws on a given subject but, also, of enabling all interested parties to find out how the relevant convention has been implemented. This is an easy task if the convention has been given the force of law. It is less easy if instead its provisions have been enacted without adopting the language of the convention verbatim, or have been enacted only in part, for instance because some of its provisions conform with general rules of the national law and it is therefore considered unnecessary to reproduce them, or their provisions are scattered in different parts of a wider text.

The question, therefore, that ought to be considered is whether, in case a convention is implemented in such a manner, the obligation arising out of the ratification of such convention is actually fulfilled.

In this connection it is worth noting that some maritime conventions expressly allow Contracting States a certain flexibility in their implementation.

For example, the 1924 Brussels Bills of Lading Convention provides in its Protocol that the High Contracting Parties may give effect to the Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under the Convention.

Identical provisions may be found in the 1968 Visby Protocol to that Convention (Article 16) and in the 1967 Brussels Convention on Maritime Liens and Mortgages (Article 14(1)).

Whatever may be the answer to the question of validity of such method of implementation, the fact remains that the ratification entails an obligation to give effect to the convention by enacting its provisions into the domestic legal system. It must therefore be ascertained whether the method of implementation adopted in each particular case yields such result or not.

### **4. Implementation by ratification and publication and by giving the force of law to the provisions of the LLMC Convention**

Although there is, from a constitutional point of view, a difference between the States in which a convention becomes part of the national legal system following its ratification and publication and the States in which an ad hoc Act giving the force of law to a convention is required for that purpose, the result is the same.

The former technique, used in several countries of continental Europe, has for the LLMC Convention been adopted by Croatia, France, Greece, the Netherlands and Spain. The latter technique, used mainly in common law countries, has been adopted by Australia, Bahamas, Barbados, Canada, Germany, Hong Kong China, Ireland, Mexico and the United Kingdom.

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In all such countries, therefore, the Convention has been implemented word for word, save for the provisions in respect of which an option to regulate the subject matter differently is granted (Article 6(3), Article 10(1), Article 15(1), (2) and (3)) or a reservation is permitted (Article 2(1)(d) and (e)) and, in respect of Canada,<sup>4</sup> save for the limits of liability, which are those of the 1996 Protocol.

However, notwithstanding the implementation of Article 11(1) in its original text, in several countries there appear to be in force provisions in conflict with the rule whereby a fund may be constituted with the Court in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. This seems to be the case in Australia, Belgium, France, Greece, Hong Kong China, the Netherlands and the United Kingdom.

## **5. Implementation by means of the incorporation of all or part of the provisions of the Convention in a national law**

Some States (Japan) have enacted an ad hoc law which regulates the limitation of liability of shipowners for maritime claims based on the provisions of the Convention. Others (Denmark, Finland, Georgia, New Zealand, Norway and Sweden) have incorporated certain provisions of the Convention in a wider national act, such as a maritime code<sup>5</sup> or an act regulating generally the law of transport.<sup>6</sup> It is therefore necessary to establish whether and to which extent the national rules correspond to the provisions of the Convention.

As it appears from Annex VI the individual articles of the Convention have been implemented practically without any change by certain countries, while they have been implemented with more significant changes or their implementation has been omitted by other countries. The table which follows gives a general, albeit not precise, picture of the situation. The names of the countries of the first group are printed in bold type and the names of the countries of the second group have been printed in italics.

Article 1: **Denmark, Finland, Japan, Norway** - *Georgia, New Zealand, Sweden*

Article 2: **Japan, New Zealand** - *Denmark, Finland, Georgia, Norway, Sweden*

Article 3: **Georgia, Japan, New Zealand** - *Denmark, Finland, Norway, Sweden*

Article 4: **Georgia (probably), Japan, New Zealand** - *Denmark, Finland, Norway, Sweden*

Article 5: **Denmark, Finland, Georgia, Japan, Norway, Sweden** - *New Zealand*

<sup>4</sup> Canada, however has not yet ratified the LLMC Convention.

<sup>5</sup> This is the case for Denmark, Finland, Georgia, Norway and Sweden.

<sup>6</sup> This is the case for New Zealand.



*Implementation and interpretation of the 1976 LLMC Convention*

- Article 6: **Denmark, Finland, Japan, New Zealand, Norway, Sweden - Georgia**
- Article 7: **Japan, New Zealand - Denmark, Finland, Georgia, Norway, Sweden**
- Article 8: **Denmark, Finland, Japan, New Zealand, Norway, Sweden - Georgia**
- Article 9: **Japan, New Zealand - Denmark, Finland, Georgia, Norway, Sweden**
- Article 10: **Denmark, Finland, Norway, Sweden - Georgia, Japan, New Zealand**
- Article 11: **Japan - Denmark, Finland, Georgia, New Zealand, Norway, Sweden**
- Article 12: **Denmark, Finland, Japan - Georgia, New Zealand, Norway, Sweden**
- Article 13: **Denmark, Finland, Japan, Norway. Sweden - Georgia, New Zealand**

The table below shows the position country by country:

**Denmark** has implemented practically without changes Articles 1, 5, 6(1) except for the minimum limit for warships and ships employed on a non-commercial service, 6(2), (4) and (5), 7(1), 8, 9(1)(a) and (c), 10, 12 and 13; has implemented with some changes Articles 2, 3, 4 and 11; has not implemented Articles 7(2) and 9(1)(b) and (2).

**Finland** has implemented practically without changes Articles 1, 5, 6(1) except for the minimum limit applicable to warships and ships employed on a non-commercial service, 6(2), (4) and (5), 7(1), 8, 9(1)(a) and (c), 10, 12 and 13; has implemented with some changes Articles 2, 3, 4 and 11; has not implemented Articles 7(2) and 9(1)(b) and (2).

**Georgia** has implemented practically without changes Articles 3, 4 (probably), 5, 6(1) and (2), 9(1)(a), 11(2) and 12(1); has implemented with some changes Articles 1, 2, 8, 11(1); has not implemented Articles 6(4) and (5), 7, 9(1)(b) and (c) and 9(2), 10, 11(3), 12(2), (3) and (4) and 13.

**Japan** has implemented practically without changes Articles 1, 2(a), (b), (c) and (f), 3(a)-(d), 4, 5, 6(1), (2), (4) and (5), 7, 8(1), 9, 11, 12 and 13; has not implemented Article 2(d) and (e) and 3(e).

**New Zealand** has implemented practically without changes Articles 2, 3, 4, 7, 8(1), 9, 12(1); has implemented with some changes Articles 1, 6 (the option granted by Article 15(2)(b) having been exercised) and 13 and has not implemented Articles 5, 10, 11, 12(2)-(4).

**Norway** has implemented practically without changes Articles 1, 2(1)(b)-(f) and (3), 5, 6(1) except for the minimum limit applicable to warships and ships employed on a non-commercial service, 6(2), (4) and (5), 7(1), 8(1), 10, 12(1), (2) and (4) and 13; has implemented with some changes

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Articles 2(1)(a), 3, 4, 9(1)(a) and (c) and 11; has not implemented Articles 7(2), 9(1)(b), 9(2) and 12(3).

**Sweden** has implemented practically without changes Articles 2(1)(b)-(f) and (3), 5, 6(1) except for the minimum limit applicable to warships and ships employed on a non-commercial service, 6(2), (4) and (5), 7(1), 8, 9(1)(a) and (c), 10, 12 and 13; has implemented with some changes Articles 1, 2(1)(a), 3, 4, 11; has not implemented Articles 7(2), 9(1)(b) and (2).

The changes and omissions do not always entail an actual modification of the Convention regime, but certainly create difficulties and uncertainties as to the interpretation of the domestic provisions and may adversely affect the uniform interpretation of the Convention. However from the responses to the Questionnaire it appears that in Denmark, Finland, Japan, Norway and Sweden the international origin of the provisions with which a convention is implemented and the travaux préparatoires of such convention are taken into consideration.

In the above summary reference has not been made to Article 14 of the Convention since this is merely a private international law rule. Provisions on the limitation procedure exist in the great majority of the States parties and those which have been made available may be found in Annex VII.

## 6. Permissible variations

The Convention allows a limited flexibility to States Parties in the implementation of the Convention. This is done in various manners.

- (a) The operation of certain provisions is made conditional to the rules of the applicable national law.
  - (i) Article 3(2) provides that claims by servants of the shipowner or salvor are excluded from limitation if under the law governing the contract of service the shipowner is not entitled to limit his liability in respect of such claims or if under such law he is permitted to limit his liability to an amount greater than that provided under Article 6. Since, however, no provision to such effect exists, it follows that Article 3(e) does not apply and the claims in question are subject to limitation under Article 2(a).
  - (ii) Pursuant to Article 10(1) States Parties may provide that a person liable may only invoke the right to limit liability if a limitation fund has been constituted. This option has been exercised by Japan and the Netherlands.
- (b) The rule set out in Article 12(1), whereby the fund is distributed in proportion to the established claims, may be departed from, as respects claims other than those for loss of life and personal injury, for claims in respect of damage to harbour works, basins and waterways and aids to navigation (Article 6(3)). Such option has been exercised by Australia and Poland.

- (c) The scope of application of the Convention may be restricted by States Parties in the cases specified by paragraphs 1, 2, 3 and 4 of Article 15.
- (i) In accordance with Article 15(1) the Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before a court of a State Party. Nevertheless each State Party may exclude from the application of the Convention any person who has not his habitual residence or his principal place of business in a State Party or any ship which does not fly the flag of a State Party. A State Party wishing to avail itself of this possibility should enact a provision to that effect. It seems that of the States Parties for which replies to the questionnaire have been received only Poland has exercised this option.
- (ii) Although Article 1(2) provides that the Convention shall apply to seagoing ships and this provision seems to exclude ships intended for navigation on inland waterways from the scope of application of the Convention, in accordance with Article 15(2)(a) such ships seem to be governed by the Convention, unless a national system of limitation is applicable. Article 15(2)(a) in fact provides that a State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are according to the law of that State ships intended for navigation on inland waterways. This option has been exercised by Germany, the Netherlands, Poland and Switzerland, whilst Belgium and the U.K. apply the provisions of the Convention to ships employed in inland navigation and in France there is no limitation of liability for ships intended for navigation on inland waterways.
- (iii) In accordance with Article 15(2)(b) a State Party may enact limits of liability other than those of the Convention for ships of less than 300 tons. Several states have availed themselves of this possibility (France, Germany, Japan, the Netherlands, Poland and United Kingdom).
- (iv) Article 15(3) provides that a State Party may enact a special system of limitation to be applied to cases in which nationals of other States Parties are not involved. No one of the States Parties for which replies to the questionnaire have been received has taken such a step. However, in Spain it is not settled whether the Convention would apply in such a case.
- (v) In accordance with Article 15(4) of the Convention Denmark, Finland, Norway and Sweden have established higher limits of liability for ships constructed for or adapted to and engaged in drilling.
- (d) A reservation to exclude the application of Article 1(2)(d) and (e) is permitted by Article 18. The following States have made a reservation to exclude the application of Article 1(2)(d) and (e): Belgium, France, Germany, Japan, the Netherlands. The United Kingdom has made a reservation to exclude the application of Article 1(2)(d) and to exclude the application of Article 1(2)(e) with regard to Gibraltar only and Hong Kong China has made a reservation to exclude the application of Article 1(2)(d).

## 7. Constitution and Distribution of the Limitation Fund

This is dealt with in Articles 10 to 14 of the 1976 Limitation Convention. These articles provide a framework of universal principles but also allow to States Parties a number of specific permitted variations. Article 14 then records that subject to these principles the Rules for constitution and distribution of a limitation fund and the appropriate rules of procedure shall be governed by the *lex fori*. It is noteworthy that the predecessor of the 1976 LLMC, the 1957 Convention on Limitation of the Liability of the Owners of Sea Going Ships, contained very few provisions dealing with the constitution and distribution of a limitation fund. The implementation by the States Parties to the 1976 Convention therefore required new thinking in the legislatures concerned, and it cannot be surprising that there are differences.

### a. *Article 10 - Limitation without constitution of a Limitation Fund*

It has long been possible in many states to plead limitation of liability as a defence without the need to deposit the funds to constitute a fund. The logic of such a practice is evident. In the majority of cases involving limitation of liability there is only one claimant – usually a cargo damage claimant – who may well have demanded and received security for its claim in the form of a P and I Club or other letter of guarantee. No useful purpose is served in such cases in requiring the limiting shipowner or other person liable to deposit the money with the court.

This practice is not referred to in the 1924 and 1957 convention, although it has applied in the common law countries for many years. However the draftsmen of the 1976 Convention allowed States Parties to provide in their national law that a person liable may only invoke the right to limit liability if a limitation fund has been constituted. This derogation from the general principle was not in the nature of a reservation and did not require notification to the Secretary General as was required by reservations exercised in accordance with article 18.

Of the respondents to the CMI questionnaire, only Japan and the Netherlands require the constitution of a limitation fund as a prerequisite to limitation of liability. Croatia has indicated that amendments to the existing law to make this a requirement are in the legislative pipeline. Georgia has advised that article 10 has not been enacted, but that the relevant article of the Maritime Code makes the constitution of a limitation fund optional.

### b. *Article 11 - Constitution of the Fund*

The term “constitute” in the context of a limitation fund appeared for the first time in Article 2 (2) of the 1957 Convention. Previous English statutes had referred to a fund being “set up” (Merchant Shipping Act 1894 s.503) or “established” (Merchant Shipping (Oil Pollution) Act 1971 and Merchant Shipping Act 1995 s.159). The difference is, however, semantic, and the 1999 Admiralty Practice Direction uses in para 9.6(1) the word “constitute”.

The 1976 Convention addressed for the first time the form in which the fund should be constituted. The essence of the 1957 Convention was that “bail or other security” should be provided to avoid the arrest of the ship in question

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*Implementation and interpretation of the 1976 LLMC Convention*

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or procure its release from arrest, and that such bail or other security should be available to meet all the potential claimants against the limitation fund (art. 5). Article 4 left all questions as to the constitution and distribution of the limitation fund to national law. Article 11(2) of the 1976 Convention expressly provides that the fund may be constituted either by depositing the sum in question with the court or by producing a guarantee acceptable under the legislation of the state party where the fund is constituted and considered adequate by the court or other competent authority.

It appears therefore that three possible variations are permitted by this article:

- i. The use of the word “*may*” in the first lines of paragraphs 1 and 2 indicates that the constitution of a limitation fund is not a mandatory requirement for limited liability. This is of course consistent with article 10. It appears however that only Spain and Georgia have construed this wording in this particular manner.
- ii. Paragraph 2 allows the State Party to legislate that a guarantee is acceptable in lieu of cash. Of the respondents to the CMI questionnaire, only Belgium, Georgia, Netherlands and Norway have indicated that their legislation gives such flexibility to the court administering the limitation proceedings.
- iii. The words “*in which legal proceedings are instituted*” in the first sentence of Paragraph 1 appears to indicate that legal proceedings against the defendant **must** be commenced before that defendant can constitute a limitation fund. Such an interpretation would prevent a pre-emptive constitution of a limitation fund by the defendant following a casualty which produces many claims. Such an action would have the benefit to bringing all the claimants to the same forum and should expedite payment to the victims. The Australian legislation, almost uniquely among the CMI respondents, expressly provides that a limitation action may be commenced “where a claim is made, *or expected to be made...*” in respect of any liability which may be limited.” The Canada Shipping Act also refers to a “claim made or apprehended.” The response from Greece indicates that the position there is similar.

c. *Article 12 - Distribution of the Fund*

This article substantially reproduces paragraphs 2, 3, and 4 of article 3 of the 1957 Convention, although paragraph 3 is new. A noteworthy absentee from this article is any reference to the establishment, to the satisfaction of the parties, or, failing agreement between them, to that of the court, that the party seeking limitation of liability is entitled to it. Under the legislation giving effect to the 1957 Convention and its predecessors, the English law courts required the person liable to discharge the burden of proving the **absence** of fault or privity (“*faute personnelle*”), a burden which proved very difficult to discharge in cases such as the “*Lady Gwendolen*” and the “*Marion*”. By contrast, the courts in the civil law jurisdictions on the continent of Europe retained the general principle that the burden of proof lay with the claimant to

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demonstrate the existence of fault or privity if they sought to deprive the owner or other person liable of the right to limited liability.

The 1976 Convention sought to correct this difference of approach, and the wording of article 4 of the 1976 Convention places the burden of proof on the claimant with the words "if it is proved that the loss resulted from his personal act or omission...". That interpretation has been confirmed in England by the Admiralty Judge in the case of the "*Capetan San Luiz*". The Admiralty Practice Direction contains express provision in para 9.1(7) requiring the claimant on whom a limitation claim form has been served to serve a defence to the limitation claim within 28 days of service upon them of the limitation claim form, or to file a notice that they admit the right of the owner or other relevant party to limit liability. The time scale is certainly short, and is unlikely to be sufficient to obtain sufficient evidence of intentional personal acts or recklessness on the part of the limiting party.

Apart from those of the Netherlands, and a brief mention in the Norwegian Maritime Code, the procedural rules submitted by CMI member associations do not contain express provisions dealing with the exercise of a challenge to the entitlement of the party liable to limitation of liability. It seems that this right, which is enshrined in article 4 of the 1976 Convention, is simply left to the discretion of the court administering the limitation proceedings.

d. *Article 13 - Bar to other Actions*

This article reproduces the substance of paragraphs 1,2,3 and 4 of the 1957 Convention. The drafting of those paragraphs, and more particularly of the English statute which gave them the force of law in England, was severely criticised by Lord Denning in the case of the "*Putbus*" in 1969. That was a good example of the dangers of "translating" an international convention into English statutory language, rather than simply annexing the entire convention as a schedule to the enabling statute; the practice adopted with the 1976 Convention.

The wording of this article has already given rise to some difficulty. When a ship is arrested and a limitation fund has been deposited (to use a neutral word) in a contracting state, but in circumstances where the arresting party is mounting a serious challenge to the right of the owner to limitation of liability, is the fund "constituted" such that the arresting court is obliged to release the ship from arrest in accordance with article 13(2)? The words "release shall always be ordered" in the second part of that paragraph are strong indeed, and do not appear to allow much discretion to the arresting judge. Yet it seems difficult to believe that the draftsmen of this paragraph intended such a result where the arrestor can at the time of the arrest show at least a prima facie case of wilful wrongdoing or recklessness on the part of the owner or person liable. This issue was raised in France in the case of the "*Heidelberg*" and the application for the release of the vessel from arrest after the constitution of the limitation fund was rejected on the ground that the right to limitation had already been denied by a judgment, albeit not final (for a summary of the case see Bonassies, *Le droit positif français en 1996*, 1997 DMF, Hors série n. 1, paragraph 25).

*The Administrator of the Proceedings*

The 1976 Convention does not contain any provision dealing with who shall administer the Limitation Fund, but expressly leaves all such matters to the law of the State Party where the fund is constituted (article 14). In many countries the relevant procedural rules leave this in the hands of the maritime court in question, but there are express provisions for the appointment of an appropriately experienced and qualified person in Denmark ("Director of the Fund"), Finland ("Administrator of the Fund"), France ("un juge-commissaire et un liquidateur"), Greece ("junior judge and liquidator"), Netherlands ("supervisory judge and a liquidator"), Norway ("Fund Administrator"), and United Kingdom ("Admiralty Registrar").

*e. Article 14 - Governing Law*

This article has already been referred to above. It reproduces the substance of articles 1(6), 4, and 5(5) of the 1957 Convention, and demonstrates the extent to which this convention has left matters on the hands of the national laws and procedures of the States Parties. This convention is therefore a fertile ground for divergent application and interpretation. The opportunity for sharing experiences and problems which is provided by this CMI study will, it is hoped, provide a chance to minimise those divergences.

**8. A comparison between the various methods of implementation**

The unification of law is best served if the text of a Convention is enacted by the State Parties without any change in its wording. It will then be easier to ensure a uniform interpretation and application of the provisions of the Conventions in the States Parties.

If other methods are chosen, such as that of adaptation of the text of the Convention to the structure of the national maritime or commercial code, there will always be a risk of discrepancies between the Convention and the text adapted to the national codes of the States Parties as well as the risk that the international origin of the domestic provisions be ignored and that the domestic provisions be interpreted under the background of the general national law rather than of the travaux préparatoires of the Convention.

However, it appears that, as far as the States Parties for which replies to the questionnaire have been received are concerned, the discrepancies do not relate to the most important provisions of the Convention.

What counts more in fact is the unification of the main limitation of liability issues: amounts of limitation, safeguards for avoiding a duplication of funds, constitution of fund, conduct barring limitation etc. On these main issues a satisfactory degree of unification has been reached.

It may, however, be pointed out that, although Article 11(1) provides that the fund may be constituted in any State Party in which legal proceedings are instituted in respect of claims subject to limitation, several States Parties have enacted provisions prescribing an exclusive jurisdiction of their courts.

It is encouraging to note that from the replies to the questionnaire it

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results that in the States Parties the interpretation of the international conventions in general (and consequently also the interpretation of the LLMC 1976 Convention) shall take into account the international origin of the rules and the need for a uniform interpretation as well as the “travaux préparatoires” and to some extent also interpretations by courts of other States Parties.

*Respectfully submitted as a draft*  
30 October 2000

FRANCESCO BERLINGIERI  
RICHARD SHAW  
PANAYIOTIS SOTIROPOULOS



**ANNEX I****STATES PARTIES TO THE LLMC CONVENTION**

Australia	Japan
Bahamas	Ireland
Barbados	Liberia
Belgium	Marshall Islands
Benin	Mexico
China-Hong Kong Special Administrative Region	Netherlands
Croatia	New Zealand
Denmark	Norway
Egypt	Poland
Equatorial Guinea	Spain
Finland	Sweden
France	Switzerland
Georgia	Turkey
Germany	United Arab Emirates
Greece	United Kingdom
Guyana	Vanuatu
	Yemen

## ANNEX II

**LEGAL COMMITTEE, 80TH. SESSION,  
AGENDA ITEM 10 (ANY OTHER BUSINESS)***(e) Implementation of international conventions*

141. The observer delegation of the CMI introduced document LEG 80/10/5 identifying problems which arise where, following ratification, States Parties adopt different methods of implementation and where the courts of States Parties fail to give consistent interpretation to Convention provisions. The delegation stated the will of the CMI to carry forward research on the basis of questionnaires such as the one annexed by way of example in connection with the LLMC Convention. The CMI expressed readiness to undertake this research at its own cost, not only in connection with this treaty but also other treaties adopted as a consequence of the work of the Legal Committee. It would then report its findings to the Committee.

142. The initiative of the CMI was welcomed by many delegations. Some delegations emphasized the importance of obtaining information as to how the courts interpret IMO treaties. Some delegations questioned some aspects of the questionnaire. Other delegations had reservations.. it was noted that the CMI would modify the questionnaire in the light of comments made by the Committee.

143. Some delegations noted the need to avoid a situation in which the work undertaken by the CMI overlaps with other analogous exercises already in progress at IMO.

144. The Committee expressed its gratitude for the initiative of the CMI and endorsed the project, noting that the CMI would take account of the comments made in the Committee in finalizing its questionnaire. The Committee instructed the Secretariat to work with the CMI to ensure that this project does not duplicate other work in IMO. The Committee further requested the CMI to report back to the Committee on the progress of its research.

**ANNEX III****21ST IMO ASSEMBLY - ADMINISTRATIVE, FINANCIAL AND  
LEGAL COMMITTEE**

In considering the subject of the implementation of international conventions through a research project to be pursued by the Comité Maritime International (CMI), it was agreed that the Legal Committee's decision to endorse this work should be construed as meaning that the Legal Committee recognises the outcome of such works as worthwhile given the relevance of the project for the Committee's own work. In this way the CMI project would not overlap with similar work to be carried out by IMO itself.

Several delegations noted with appreciation the contributions of the CMI in the preparation of draft treaties adopted by the Legal Committee since the inception of the Committee's activities. In particular, mention was made of the draft convention on wreck removal at present under consideration by the Committee. A proposal to note with appreciation the continued support of the CMI for the work of the Organization received unanimous support.

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*Annex IV - Questionnaire*

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**ANNEX IV****QUESTIONNAIRE**

1. How has the Convention been implemented?
  - 1.1. Has it been given the force of law?
  - 1.2. Has it been given effect to by the enactment of national rules?
  - 1.3. Which other method has been adopted?
2. Which changes or additions, if any, have been made to the text of the Convention?
  - 2.1. Has priority been granted to claims in respect of damage to harbour works, basins and waterways and aids to navigation pursuant to Article 6(3)?
  - 2.2. Is the constitution of a fund required in order to invoke the right to limit liability as permitted by Article 10(1)?
  - 2.3. If so, how has Article 11(1) been given effect to? Is it necessary that proceedings are commenced in respect of claims subject to limitation before a fund may be constituted?
  - 2.4. If proceedings are instituted in different courts, is the person invoking limitation entitled to constitute the fund with one of such courts at his choice?
  - 2.5. Has Article 13(2) been given effect to without any change? If not, what changes have been made?
3. What rules relating to the constitution and distribution of the limitation fund and what other rules of procedure have been enacted?
4. Does the Convention apply to vessels intended for navigation on inland waterways or is a different system of limitation of liability applicable to such vessels?
5. Does the Convention apply to vessels of less than 300 tons or is a different system of liability applicable to such vessels?

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*Implementation and interpretation of the 1976 LLMC Convention*

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6. Does the Convention apply to claims arising in cases in which interests of persons who are nationals of other States parties are in no way involved?
7. Does the Convention apply to ships constructed for, or adapted to, and engaged in, drilling?
8. Has the application of Article 2 paragraphs 1(d) and (e) been excluded?
9. When replying to questions 3-8 please provide an English translation of the relevant statutory provisions or, if this is more convenient, a summary of such provisions.
- 10.1. Does the interpretation of international conventions, if given the force of law, or of the national enactment take into account the international origin of the rules and the need for a uniform interpretation?
- 10.2. Are the travaux préparatoires, when the conditions set in article 32 of the Vienna Convention apply, taken into consideration?
- 10.3. Is the interpretation given to the provisions of a Convention by the Courts of other Contracting States taken into consideration?
- 11.1. Has the interpretation and application of the Convention or of the national implementing legislation been the subject of any decision by your Courts?
- 11.2. If so, please provide a summary of such decisions and state if the need for a uniform interpretation of such provisions has been taken into account.

## ANNEX V

**RESPONSES TO THE QUESTIONNAIRE**

*from the Maritime Law Associations of  
Australia, Belgium, Croatia, Denmark, Finland, France, Germany, Greece,  
Hong Kong China, Japan, Ireland, Netherlands, New Zealand, Norway,  
Poland, Spain, Sweden, United Kingdom and from the Maritime Authority  
of Bahamas and the Government of Barbados  
arranged under each question*

**General remarks****GREECE***Comments regarding the application of the Convention in time*

The forthcoming implementation of the 1996 Protocol in the various jurisdictions will again bring to the surface the problem that the Convention does not contain a rule determining the scope of the new law time-wise, i.e. whether the Convention or the subsequent protocols -as the case may be- apply to incidents occurring after their entry into force or to those occurring prior to such date, too. It could be argued that in Greece the issue would be resolved in favour of the application of the law in force at the time when the incident took place, which would also be sensible for the purposes of liability insurance cover; but Court precedents available have only dealt with pre-Convention law, and the possible impact of Article 15(1) has not been examined. On the international level, conflicting solutions have been adopted; see e.g. French Cour de Cassation judgment of 28.5.1991 *Cie d'assurances l'Europe c. Mme Gazier* applying the law in force on the date when the order opening the procedure for the constitution of the fund was made, and the High Court of Australia judgment in the "Sanko Harvest" case, opting for the law in force at the time of the incident. In the UK the issue has been catered for by way of a specific provision included in the national statute. Such inconsistency is bound to jeopardize the concept of mutual recognition of limitation proceedings between LLMC contracting States and the ensuing obligation to release a ship or other property under Article 13(2) because, even where two countries will both have implemented e.g. the 1996 Protocol, the constitution of a fund in country A on 1976 figures in respect of an incident occurring prior to the entry into force of the 1996 Protocol in both States, would not result into a compulsory release from arrest in country B if the latter extends the

application of the Protocol to all incidents, irrespective of whether they have taken place before or after its entry into force.

## **NETHERLANDS**

Some of the questions put forward in the questionnaire may be answered by reference to a national Summary on the Dutch position in respect of limitation of liability. This Summary (hereinafter 'Summary') was written by the former President of this Association (Mr Eric Japikse) for inclusion in the textbook 'Limitation of Liability for Maritime Claims', LLP, London, 1998, by CMI President Mr Patrick Griggs and Richard Williams. Copies of the title page of that book and the Summary are attached (Annexe 1).\*

The Summary describes the Dutch position in December 1996. Since then, the expected changes of the Dutch law of limitation of liability indicated in the Summary under '14. General' have entered into force on 1 January 1997. See also the Note at the end of the Summary.

As indicated in the Summary, the changes are, however, not material and I therefore take the liberty of referring to the text of the Summary where possible and useful.

Furthermore, I wish to draw attention to the CMI Questionnaire on the same subject, distributed by letter of 8 July 1998, and the reply of this Association to that questionnaire dated 25 August 1998. Some of the questions contained in the 1998 Questionnaire overlap with the questions of the 2000 Questionnaire. This reply therefore also draws on the reply to the earlier questionnaire.

## **NEW ZEALAND**

We have been asked to report on the Implementation of the International Convention on the Limitation of Liability for Maritime Claims ("1976 Convention") in New Zealand and to respond to a questionnaire. In giving effect to the 1976 Convention, the New Zealand Parliament summarised parts only of the 1976 Convention into statute rather than annexing the 1976 Convention in its entirety. This form of enactment has resulted in inconsistencies between the 1976 Convention text and the legislation. In answering the questionnaire we have outlined some of these inconsistencies but it is important to bear in mind that the manner of New Zealand's enactment of the 1976 Convention makes it at times difficult to draw meaningful comparison with the 1976 Convention in its original form.

Before addressing the questionnaire, we set out in outline New Zealand's legislative history in this area.

In the 1970s New Zealand considered acceding to the Convention relating to the Limitation of Liability of Owners of Seagoing Vessels 1957, signed at Brussels ("1957 Convention"). Before that, the New Zealand regime was based on 19<sup>th</sup> century English legislation and was contained in the Shipping

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\* This document is not enclosed, but can be made available on request.

*Annex V - Responses to the Questionnaire*

and Seamen Act 1952. Although a number of Bills were proposed, New Zealand never acceded to the 1957 Convention.

In 1987, a Bill was brought before Parliament to amend the Shipping and Seamen Act 1952. It was proposed again that the 1957 Convention should be enacted and suggested that it be included in the Bill. However, the existence of the 1976 Convention was noted. It was accepted that the 1976 Convention should form the basis of the amendments on shipowner's liability. The result was the Shipping and Seamen Amendment Act 1987 which amended the relevant sections of the Shipping and Seamen Act 1952.

It is to be noted that New Zealand in passing the Shipping and Seamen Amendment Act 1987 did not accede to the 1976 Convention. The 1976 Convention was not adopted "wholesale" by the Shipping and Seamen Amendment Act 1987, but rather specific provisions were taken from it and inserted into the Shipping and Seamen Act 1952. The language of the 1976 Convention was not adopted verbatim. The basic approach was to enact the limitation provisions (which was a much more realistic amount than that contained in the old 19<sup>th</sup> century legislation which previously had applied) and certain other provisions in revised form.

The Shipping and Seamen Act 1952 was reviewed in 1992. The result was the passing of the Maritime Transport Act 1994 ("MTA") which repealed the Shipping and Seamen Act 1952. New Zealand acceded to the 1976 Convention on 14 February 1994. However, unlike the Merchant Shipping Act 1979 in the United Kingdom, which simply annexed the 1976 Convention and gave it force of law, New Zealand acceded to the 1976 Convention in 1994, having already "enacted" it in summary form in 1987.

Under the MTA the provisions on limitation of shipowner's liability are left largely unchanged. The bulk of the MTA came into effect on 1 February 1995. The relevant sections on limitation and liability which are currently in force are attached to this report. These sections would be the primary reference for a New Zealand Court on any limitation issue.

## **POLAND**

The 1976 LLMC Convention was ratified by Poland in 1986 (Journal of Laws of 1986, No. 35, item 176). The Convention obtained the force of law on January 1st, 1986. The 1996 Protocol is not ratified up to the present time.

In the system of Polish maritime law provisions of international conventions present the most important source of law. In accordance with art. 91.1 of the 1997 Constitution international conventions ratified and promulgated in Journal of Laws become a part of domestic legal order and are applied by courts and administrative authorities. Under art. 91.2 of the Constitution and according to art. 1 § 1a of the Polish Maritime Code (PMC) rules of international conventions take priority over rules of the national law.



**1. How has the Convention been implemented?****1.1. Has it been given the force of law?****1.2. Has it been given effect to by the enactment of national rules?****1.3. Which other method has been adopted?****AUSTRALIA**

**1/1.1.** Yes.

**1.2.** No.

**1.3.** The English text of the convention constitutes a Schedule to the Limitation of Liability for Maritime Claims Act 1989 (Cth) (the "Limitation Act"). Pursuant to section 6 of the Limitation Act, the Convention has the force of law in Australia.

In addition, s59B of the Navigation Act 1913 (Cth) provides:

(1) In this section:

"Convention" means the Convention on Limitation of Liability for Maritime Claims, 1976, being the Convention a copy of whose English text is set out in Schedule 1 to the Limitation of Liability for Maritime Claims Act 1989.

(2) The owner of a ship is not entitled to limit his, her or its liability in respect of any claim of a kind specified in paragraph (1) (a) of Article 2 of the Convention made by:

- (a) a servant of the owner whose duties are connected with the ship; or
- (b) any heir or dependant of the servant or any other person who is, within the meaning of paragraph (e) of Article 3 of the Convention, a person entitled to make such a claim.

**BAHAMAS**

**1.** LLMC 1976 was implemented by giving direct effect to the text of the convention.

**1.1.** Yes.

**BARBADOS**

**1/1.1.** Yes.

**1.2.** Yes. It has been incorporated in the Barbados Shipping Act, 1994-15 and is attached as the Second Schedule. Sections 302 to 311 make reference to the Convention. The relevant extract from the Act is attached. The Convention itself is also contained in the Second Schedule to the Act, this text is also provided.\*

**1.3.** None.

**BELGIUM**

The LLMC Convention (which came into force in Belgium on 1st October 1989) has been implemented in Belgium by law of 11th April 1989 (published on 6th October 1989 which came into force on 1st December 1989).

The 'Royal Decree' of 24th November 1989 contains different provisions in respect of the execution and the operation of the law of 11th April 1989.

Pursuant to the abovementioned law of 11th April 1989 several provisions in respect of the limitation of liability have been implemented in our Maritime Code (articles 46 until 57).

*Annex V - Responses to the Questionnaire*

A copy of the French version of these articles is attached.\* You will see that they relate to the applicability of the LLMC Convention (with the remark that the application of art. 2§1, d. and e. of said Convention is excluded), the constitution of the limitation fund in Belgium and the procedure of distribution of the fund.

According to Art 10 of law of 11th April 1989 the provisions of the LLMC Convention also apply to:

- seagoing vessels operated by the Government or a public service whoever is the Owner of said vessels;
- seagoing vessels used for pleasure trips or scientific research.

Furthermore Art. 11 of law of 11th April 1989 states that in respect of seagoing vessels with a tonnage of less than 300 tons the King - by Royal Decree - enacts the categories of these vessels and the amount of the limitation of liability.

## **CROATIA**

**1.** It has been both ratified and implemented into the national Maritime Code.

**1.1.** The Convention has been ratified by the Parliament of the Republic of Croatia on November 27, 1992 and published in the Official Gazette of the Republic of Croatia-International Treaties 2/92. International Agreements concluded and ratified in accordance with the Constitution and made public are part of the internal legal order of the Republic of Croatia and therefore prevail over domestic laws, as regulated by Art. 134 of the Constitution of the Republic of Croatia. Their provisions may be changed or repealed only under conditions and in the way specified in them or in accordance with the general rules of international law.

**1.2.** Yes, it has been implemented into the Croatian Maritime Code, enacted in 1994. The provisions of the Convention are adopted in Part seven of the Code, under the title "Liability of the Ship Operator", Art. 405-420, and "Proceedings for the Limitation of Ship Operators Liability", Art. 421-447.

**1.3.** None.

## **DENMARK**

**1/1.1.** The Convention has been given the force of law in Denmark.

**1.2.** This has been achieved by implementing the Convention into the Danish Merchant Shipping Act.

The implementation came into force on 1 April 1982 as part of the then in force Chapter 10 (Liability and Limitation of Liability) and Chapter 15 (Limitation Funds) of the Danish Merchant Act.

In 1994 Chapters 10 and 15 were divided into Chapter 7 (General Rules on the owner's vicarious liability), Chapter 9 (Limitation of Liability) and Chapter 12 (Limitation Funds). These changes, however, did not result in any substantial changes to the rules of limitation of liability or of the limitation funds as these had been implemented in 1982.

**1.3.** No other methods of implementation have been adopted.

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\* These documents are not enclosed, but can be made available on request.

**FINLAND**

1. The 1976 LLMC Convention was ratified by Finland on 8 May 1984. The earlier Limitation Convention of 1957 was denounced on 30 March 1984. The present rules on limitation of liability for maritime claims entered into force on 1 April 1985 and they have been incorporated into the Finnish Maritime Code (FMC) of 1994 Chap. 9. Finland is going to ratify the 1996 Protocol to the LLMC 1976 and has planned to incorporate its provisions into the FMC by the end of 2000.

1.1. The Convention as such has not been given the force of law. See *supra* under 1.

1.2. See *supra* under 1.

1.3. No other method.

**FRANCE**

C'est la réponse n° 3 qui est la plus adaptée ("other method"). Comme pour toutes les Conventions internationales qu'elle introduit dans son ordonnancement juridique après ratification, la France a conservé à celle de Londres du 19 novembre 1976 sur la limitation de la responsabilité en matière de créances maritimes (ci-après la Convention LLMC 1976) son origine internationale. La Convention n'a donc pas été reproduite par un texte interne de nature législative à qui elle emprunterait sa force. Elle reste un Traité international, ce qui lui confère une force supra-législative.

On peut donc dire, très exactement, que la France a donné à la Convention LLMC 1976 une force supérieure à celle d'une loi, par application de ses règles constitutionnelles.

Aux termes de l'article 55 de la constitution française de 1958, en effet, "les traités...régulièrement ratifiés...ont, dès leur publication, une autorité supérieure à celle des lois". Or la France a ratifié la Convention LLMC 1976 par un décret n° 86-1371 du 23 décembre 1986 et cette convention a été publiée au *Journal officiel de la République française* le 12 janvier 1987.

On observera en outre que, suivant la méthode moderne désormais adoptée par le législateur maritime français pour éviter une distorsion fâcheuse entre le droit maritime interne et le droit maritime international, les dispositions de la Convention LLMC 1976 sont aussi applicables, à quelques nuances près, dans les situations purement internes à la France. C'est ce que prévoit l'article 61, alinéa 1er, de la loi du 3 janvier 1967 sur le statut des navires en ces termes:

"Les limites de responsabilité du propriétaire de navire...sont celles établies par la convention sur la limitation de la responsabilité en matière de créances maritimes faite à Londres le 19 novembre 1976".

Il faut bien comprendre qu'en procédant ainsi, le législateur français n'adopte absolument pas la méthode, évoquée dans le questionnaire, qui aurait consisté à introduire la Convention en l'incluant dans une loi nationale en reproduisant les dispositions. La Convention LLMC 1976 s'applique bien en France en tant que traité international, par sa propre force. Mais elle a aussi servi de modèle pour régler les situations purement internes que la Convention n'a pas pour vocation de régler. Il s'agit d'un procédé de réglementation par analogie, dont on trouve d'autres exemples en droit des transports intérieurs.

*Annex V - Responses to the Questionnaire*

C'est ainsi que l'article L.321-3 du Code de l'aviation civile, énonce que "la responsabilité du transporteur de marchandises ou de bagages est régie, au cas de transport par air, par les seules dispositions de la Convention de Varsovie du 12 octobre 1929 ou de toute convention la modifiant et applicable en France, même si le transport n'est pas international au sens de cette convention".

**GERMANY**

1.1. Yes.

1.2. No. It has been implemented tel quel by § 486 (1) HGB (Commercial Code) which makes the Convention directly applicable.

1.3. No answer.

**GREECE**

Under article 28 of the Constitution of Greece, international conventions become part of Greek national law through their ratification by an Act of Parliament. Accordingly, LLMC 1976 has become part of Greek law at the time of its ratification by Act 1923/1991, published in fascicle A 13 of the Government Gazette of the Hellenic Republic on 14 February 1991. Article 1 of the Act provides for the ratification of the Convention in accordance with the Constitution and then follows the full text of the Convention in the English original and in Greek translation. Article 2 deals with the entry into force of the Act. Separate national rules have not been enacted.

**HONG KONG CHINA**

1. The Convention has been implemented in Hong Kong.

1.1/1.2. The Convention is given force of law by the Merchant Shipping (Limitation of Shipowners Liability) Ordinance (Cap. 434-copy attached).\*

1.3. The Convention is set out in full in Schedule 2 of the Ordinance.

**IRELAND**

1. Yes. Merchant Shipping (Liability of Shipowner and Others) Act 1996. Date of commencement of Act 6th February 1997.

1.1. Yes, by Section 7 of the 1996 Act.

1.2. No.

1.3. The text of the Convention is set out in the First Schedule to the 1996 Act. Part II of the Act (Sections 6-17) deals with matters such as interpretation and construction and the method of implementation of the Convention. Section 7(1) provides:

"Subject to the provisions of this Part, the 1976 Convention shall have the force of law in the State and judicial notice shall be taken thereof."

**JAPAN**

1/1.1. No.

1.2. Yes, The Shipowners Limitation of Liability Act, 1975 which has introduced 1976 LLMC by the revision of 1982.

1.3. No.

\* This document is not enclosed, but can be made available on request.

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*Implementation and interpretation of the 1976 LLMC Convention*

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**NETHERLANDS**

1. The 1976 Convention was ratified by the Kingdom of the Netherlands on 15 May 1990 with entry into force on 1 September 1990, on the basis of Article 17(3) of the Convention ('first day of the month following the expiration of ninety days after the date when such State deposited its instrument'). The 1976 Convention has replaced the 1957 Convention to which the Netherlands was a party from 31 May 1968 until 1 September 1990, while the provisions of the 1957 Convention had been made part of Dutch statutory law as early as 1 April 1966.

With respect to the instrument used to make the 1976 Convention part of Dutch national law I enclose a copy of the Dutch treaty series (Tractatenblad) 1990, 111 of 31 July 1990 (Annexe 2);\* it records the Act approving the Convention and the reservations to be made upon accession, with a final provision as to the date of its entry into force. A translation into English of those (relevant) parts of the document that are written in Dutch, is attached as well (Annexe 3).\*

The ratification of the 1976 Convention only extends to the Kingdom in Europe, thereby excluding the Dutch dependencies, i.e. the Netherlands Antilles and Aruba.

The Netherlands Antilles is not a party to any of the three conventions (1924, 1957, and 1976) on this subject. However, a decree relating to the limitation of liability of shipowners is in force in The Netherlands Antilles, the provisions of which are based on the principles of the 1976 Convention (Decree Limitation Shipowners' Liability of 29 November 1985, P.B. 1985, 161; in force on 1 January 1986). The decree gives special rules for pleasure craft and for wreck removal (compare Article 15(2)(b) and Article 18(1) j° Article 2(1)(d) and (e) of the 1976 Convention), but also for damage to harbour works, docks, and waterways (unlimited liability; compare Article 6(3) of the 1976 Convention).

On 16 December 1986 the territorial application of the 1957 Brussels Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships (in force in the Kingdom in Europe at that time) was extended to Aruba, which obtained a status independent of the Netherlands Antilles on 1 January of that same year. Aruba has remained a party to the 1957 Convention to this day.

Please note that the remainder of this reply to the Questionnaire will only deal with the Kingdom in Europe and not with the Netherlands Antilles or Aruba.

Article 93 of the Dutch constitution provides that provisions of international conventions of a 'self-executing' nature shall have the force of law after they have been promulgated (in the official treaty series 'Tractatenblad'). Article 94 of the Constitution further states that statute law which is not in conformity with such provisions shall not be applied. It is commonly held that, unlike the 1957 Convention, substantive provisions of the

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\* These documents are not enclosed, but can be made available on request.

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*Annex V - Responses to the Questionnaire*

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1976 Convention are of a 'self-executing' nature. These provisions themselves have therefore obtained the force of law in the Netherlands on 1 September 1990. See also the Summary under '12. Applicable law'.

The substantive provisions of the 1976 Convention were, however, also enacted in the Dutch Commercial Code (Articles 740a-740j), which enactment also entered into force on 1 September 1990. As for the procedural provisions I refer to the Introduction and Sections 12 to 14 of the Summary.

In view of the continuing legislative operation aiming at the transfer of transport related provisions from the Dutch Commercial Code to Book 8 of the revised Civil Code, the Articles 740a-740j of the Commercial Code have been re-enacted as Articles 8:750-8:759 (the '8:' refers to Book 8) of the Dutch Civil Code (hereinafter: 'DCC').

The procedural provisions, which served and still serve as the procedural rules for limitation of liability for sea-going ships as well as inland waterway ships, have also been amended. The amendments were needed in view of the pending ratification by the Netherlands of the *Convention de Strasbourg sur la limitation de la responsabilité en navigation intérieure (CLNI)*, Strasbourg, 4 November 1988. The provisions were re-enacted as Articles 642a-642z of the Dutch Code of Civil Procedure (hereinafter: 'DCCP').

As indicated above, both re-enactments entered into force on 1 January 1997. Copies of translations into English of both sets of provisions currently in force are attached (Annexes 4 and 5).\*

It remains noteworthy, however, that in cases where the conditions for application of the 1976 Convention laid down in Article 15(1) are met, the substantive provisions of the Convention of a 'self-executing' nature apply in the Netherlands in their own right. The national enactment of the substantive rules on limitation of liability (or, for that matter, other general Dutch statutes) could then only apply in cases where the Convention remains silent in respect of certain issues or permits additions or departures which were adopted by the Netherlands (the Netherlands i.a. adopted departures permitted under Articles 15(2) and 18(1) of the Convention). Furthermore, the domestic Dutch limitation rules could find application (instead of those of the Convention) where a court of a non-Contracting State does not have to apply the Convention (Article 15) and, applying its own choice of law rules on the facts of the case, holds that Dutch law should be applicable and, on the interpretation of that court's conflict of law rules, 'Dutch law' is judged to refer to Dutch domestic law only, thereby excluding the Convention from the notion of 'Dutch law'. See also the Summary under '12. Applicable law'.

For a detailed description of the Dutch statutory provisions on limitation of liability I refer to Mr Japikse's Summary. As the Summary refers to the former Articles 740a-740j of the Commercial Code and 320a-320z DCCP, the earlier mentioned translations of the provisions currently in force (Annexes 4 and 5) contain references to the former Articles for reasons of convenience. See also the Summary under '14. General'.

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\* These documents are not enclosed, but can be made available on request.

*Implementation and interpretation of the 1976 LLMC Convention*

**1.1.** Yes, in view of Articles 93 and 94 of the Dutch constitution, and in view of their commonly believed 'self-executing' nature, the substantive provisions of the 1976 Convention have the force of law, subject to the permitted departures (i.a. specific provisions and reservations under Articles 15(2) and 18(1) of the 1976 Convention) which were adopted by the Netherlands.

**1.2.** Yes. The 1976 Convention has also been given effect by the enactment of national rules, but these statutory provisions are only relevant in cases where:

- the 1976 Convention remains silent in respect of certain issues or permits additions or departures which were adopted by the Netherlands (the Netherlands i.a. adopted departures permitted under Articles 15(2) and 18(1) of the 1976 Convention);
- the domestic Dutch limitation rules would find application (instead of those of the Convention) where a court of a non-Contracting State does not have to apply the 1976 Convention (Article 15) and, applying its own choice of law rules on the facts of the case, holds that Dutch law should be applicable and, on the interpretation of that court's conflict of law rules, 'Dutch law' is judged to refer to Dutch domestic law only, thereby excluding the 1976 Convention from the notion of 'Dutch law'.

**1.3.** Not applicable.

**NEW ZEALAND**

**1/1.1.** No.

**1.2.** Yes. Refer earlier explanation of the enactment of the 1976 Convention.

**1.3.** No answer.

**NORWAY**

It has been given effect by the enactment of national rules.

**POLAND**

The 1976 LLMC has been implemented by art. 308 § 1 of the PMC which makes the Convention directly applicable. Art. 308 § 1 of the PMC provides:

The liability of a debtor for maritime claims may be limited in accordance with provisions of the Convention on Limitation of Liability for Maritime Claims done at London on 19 November 1976 (Journal of Laws of 1986, No. 35, item 175), hereinafter called "Convention on Limitation of Liability".

It should be pointed out that the PMC provides for the application of provisions concerning the limit of liability on the principle of reciprocity. This has been expressed by art. 308 § 2 of the PMC which reads as follows:

To a foreign creditor having, at the time when the claim is brought, his permanent place of domicile or principal place of business in a State which established a lower limit of liability than that determined according to Convention on Limitation of Liability, the debtor is liable to that lower limit of liability.

(See also point 6).

*Annex V - Responses to the Questionnaire***SPAIN**

The 1976 Convention was given the force of law by means of publication in the B.O.E. (Official Bulletin of the State) of the instrument of the Spanish ratification, dated 22<sup>nd</sup> October 1981, of the Convention. The publication in the B.O.E. was effected on the 27<sup>th</sup> December 1986 (B.O.E. number 310, at pages 3857 and 3858). This method of implementation is established by Art. 96.1 of the Spanish Constitution of 1978 for international treaties. The original Spanish text was published.

**SWEDEN**

*1/1.2.* The Convention has been implemented by the enactment of national rules. The provisions of the Convention have been implemented in Chapter 9 in the Swedish Maritime Code on Limitation of Liability and in Chapter 12 on Limitation Funds and Limitation Proceedings.

*1.3.* Further provisions of limitation are included in Chapter 13 on Carriage of General Cargo (sections 30-33), in Chapter 14 on Chartering of Vessels (sections 27 and 63) and in Chapter 15 on Carriage of Passengers and Luggage (sections 21-26). Extracts of the Swedish Maritime Code translated into English are enclosed (from an edition by the Axel Ax:son Johnson Institute for Maritime and Transport Law 1995).

The Swedish Maritime Code has been made in close co-operation with the other Nordic countries and, consequently, the Nordic Maritime Codes are virtually identical.

**UNITED KINGDOM**

The 1976 Limitation Convention was adopted into UK law originally by Section 17 of the Merchant Shipping Act 1979 and now by Section 185 of the Merchant Shipping Act 1995. The text of Section 185 of the 1995 Act is as follows:

“185-(1) The provisions of the Convention on Limitation of Liability for Maritime Claims 1976 as set out in Part I of Schedule 7 (in this section and Part II of that Schedule referred to as “the Convention”) shall have the force of law in the United Kingdom.

(2) The provisions of Part II of that Schedule shall have effect in connection with the Convention, and sub-section (1) above shall have effect subject to the provisions of that Part.

(3) The provisions having the force of law under this section shall apply in relation to Her Majesty's ships as they apply in relation to other ships.

(4) The provisions having the force of law under this section shall not apply to any liability in respect of loss of life or personal injury caused to, or loss of or damage to any property of, a person who is on board the ship in question were employed in connection with that ship with the salvage operations in question if:

- (a) he is so on board or employed under a contract of service governed by the law of any part of the United Kingdom; and
- (b) the liability arises from an occurrence which took place after the commencement of this Act.



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*Implementation and interpretation of the 1976 LLMC Convention*

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In this sub-section “ship” and “salvage operations” have the same meaning as in the Convention.”

**2. *Which changes or additions, if any, have been made to the text of the Convention?***

**BARBADOS**

None.

**CROATIA**

None, the integral text of the Convention has been adopted in the Maritime Code, articles 405-447. Even the Special Drawing Right has been adopted as the unit of account, and not the national currency.

**GREECE**

No changes or additions were made to the text of the Convention.

**HONG KONG CHINA**

No changes or additions have been made to the text of the Convention as it appears in Schedule 2 of the Ordinance.

**NETHERLANDS**

Before continuing with the reply to the specific questions 2.1-2.5 it is perhaps best to again stress the contents of the reply under 1.1 and 1.2 above. Any changes or additions to or departures from the text of the 1976 contained in the Dutch statutory provisions which are not permitted under the (substantive and self-executing) provisions of the 1976 Convention will not apply in those cases where the (substantive and self-executing) provisions of the 1976 Convention have the force of law.

For an example of such a departure: see the Summary under ‘2. Ship’. The final paragraph of that section records a discrepancy between the text of the 1976 Convention and the Dutch statutory provisions with regard to floating platforms.

**NORWAY**

The convention has been enacted in Chapter 9 in the Norwegian Maritime Code of 1994. When conventions are enacted in Norwegian law, the text is not directly implemented. An enactment law is written according to Norwegian tradition regarding legal texts. Please see the attached copy of an English translation of Chapter 9 of the Maritime Code. The rules on limitation funds and limitation proceedings are found in chapter 12 of the Maritime Code, of which we also enclose a copy.\*

**SPAIN**

No changes or additions have been made to the text of the Convention.

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\* These documents are not enclosed, but can be made available on request.

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*Annex V - Responses to the Questionnaire*

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**2.1. *Has priority been granted to claims in respect of damage to harbour works, basins and waterways and aids to navigation pursuant to Article 6(3)?*****AUSTRALIA**

Yes: s8 of the Limitation Act.

**BELGIUM**

Neither the law of 11th April 1989 nor the Royal Decree of 24th November 1989 contains a provision giving priority to claims in respect of damage to harbour works, basins and waterways and aids to navigation pursuant to Article 6(3) of the LLMC Convention. On the contrary, Art. 51§1 of the Belgian Maritime Code (implemented in the Belgian Maritime Code by Art. 2 of the law of 11th April 1989) states that no right of priority can be exercised on the part of the limitation fund that is destined to settle damage to goods/property.

The answer to the question therefore must be negative.

**BAHAMAS**

No.

**BARBADOS**

No.

**CROATIA**

No.

**DENMARK**

Articles 6 and 7 of the Convention are implemented into section 175 (previously section 239) of the Danish Merchant Shipping Act.

The possibility of granting priority to certain claims of damage pursuant to Article 6(3), however, has not been utilised.

**FINLAND**

No.

**FRANCE**

Aucune disposition de la législation nationale française ne donne priorité aux créances pour dommages causés aux ouvrages d'art des ports, bassins, voies navigables et aides à la navigation sur les autres créances de l'alinéa b) du § 1er de la Convention LLMC 1976.

**GERMANY**

Yes. § 487 b HGB has granted priority to claims pursuant to Article 6 (3) LLMCC.

**GREECE**

No priority has been granted to claims envisaged in Article 6(3).

**HONG KONG CHINA**

No, but there is provision in the Ordinance for the government of the HKSAR to give priority to such claims: see section 15 of the Ordinance.

**IRELAND**

No.

**JAPAN**

No.

**NETHERLANDS**

No. The Dutch legislative history of the Act by means of which the 1976 Convention was ratified (Explanatory Note, 19769, Nr. 3, p. 11), states that the Netherlands shall not exercise its right to provide in its national law that claims in respect of harbour works, basins and waterways and aids to navigation shall have priority over other claims under paragraph 1(b) (without prejudice of the right of claims for loss of life or personal injury).

The Explanatory Note states further that a departure from the principle of *paritas creditorum* is not justified by the fact that in many cases the infrastructure in question will be under the management or control of the government.

A question regarding the choice of law may arise in case of e.g. limitation proceedings in the Netherlands regarding a claim in respect of damage to harbour works in a country the national law of which does provide for such priority.

**NEW ZEALAND**

No.

**NORWAY**

No.

**POLAND**

According to art. 311 of PMC claims in respect of damage to harbour works, basins, waterways and aids to navigation have the priority over other claims with the exception of claims for loss of life, bodily injury and disturbance of health.

**SPAIN**

The priority option under Art. 6(3) has not been exercised.

**SWEDEN**

No priority has been granted to claims in respect of damage to harbour works, basins and waterways and aids to navigation pursuant to Article 6 (3). The reason is that an investigation made in connection with the procedure leading up to the implementation, showed that the frequency of claims where limitation was at all involved were very few and the Nordic countries decided not to use the possibility granted in Article 6 (3).

**UNITED KINGDOM**

Article 6(3) has not been incorporated into the law of the United Kingdom by the 1995 MSA (see Schedule 7, Part I). The assumption must be that the United Kingdom legislature has no intention of taking advantage of this provision. But see also the answer to (8) below – the United Kingdom has

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a policy of unlimited liability for wreck removal expenses and has therefore (by paragraph 3 of Schedule 7, Part II, and Section 185 of the 1995 MSA) made a reservation in respect of Article 2(1)(d) making liability claims for the cost of wreck removal unlimited.

**2.2. *Is the constitution of a fund required in order to invoke the right to limit liability as permitted by Article 10(1)?***

**AUSTRALIA**

No: s9 of the Limitation Act.

**BAHAMAS**

No.

**BARBADOS**

No.

**BELGIUM**

According to some old decisions a shipowner can limit his liability even if no limitation fund has been constituted (cfr. Ghent, 9th December 1980, J.P.A., 1981-82, 178). Although this decision dates from before the implementation of the LLMC Convention the jurisprudence is of the opinion that - given the contents of art. 47§1 Belgian Maritime Code ("The Owner of a vessel can - with reservation of the provisions of §2 and 3 of this Article - limit his liability in accordance with the provisions of the ... LLMC Convention. The applicability of Article 2, §1, d and e of said Convention is excluded.") - this solution remains valid under the 'new' law.

Anyhow, neither the law of 11th April 1989 nor the Royal Decree of 24th November 1989 contains a specific provision in which is provided that a person liable may only invoke the right to limit liability if a limitation fund has been constituted. Therefore it can only be concluded that limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 of the LLMC Convention has not been constituted.

**CROATIA**

According to the existing provisions of the Maritime Code, the constitution of the limitation fund is not required to invoke the right to limit liability as permitted by Article 10(1). However, there have been some efforts to amend the existing Maritime Code by inserting a provision to the effect that the constitution of a fund is a requirement for the limitation of liability. Such amendment to the existing Maritime Code has been introduced in the legislative procedure, and the amendments can be expected in due time.

**DENMARK**

Under the Danish Merchant Shipping Act the constitution of a fund is optional and is therefore not required in order to invoke the right to limit liability, c.f. sections 177 and 180 (previously sections 240 and 242).

**FINLAND**

According to the FMC Chap. 9, § 9, limitation of liability may be invoked notwithstanding that a limitation fund has not been constituted. If suit has been brought concerning a claim subject to limitation of liability and if a limitation fund has not been constituted, the court in applying the provisions of Chap. 9 shall take account only of the claim concerned in the lawsuit. If the defendant wants any other claim subject to the same liability amount to be considered with regard to limitation of liability, a reservation to that effect shall be made in the judgment. Furthermore, if a limitation fund has not been constituted, the parties may submit the question of the amount of the limitation of liability and the distribution to decision by an average adjuster.

**FRANCE**

Les seuls textes qu'on peut citer sont les articles 59 et suivants du décret du 27 octobre 1967 sur le statut des navires, pris pour l'application de la loi du 3 janvier 1967 citée au 1 ci-dessus. Et ces textes ne disent pas clairement que le propriétaire d'un navire doit constituer le fonds de limitation avant de pouvoir *invoquer* la limitation de responsabilité. Ces textes n'organisent, en effet, que la procédure de constitution du fonds, sans faire clairement de l'existence de cette procédure le préalable à la possibilité pour le responsable d'invoquer la limitation.

**GERMANY**

In Germany the debtor may choose between the constitution of a limitation fund and the declaration of a defence during the court proceedings. The constitution of a limitation fund leads to an *in rem* limitation having effect on any claim directed against the debtor even if it is not pending before the court. In case of the declaration of a defence the debtor bears the risk that other claimants who are not bound to the first court decision might raise further claims resulting in an additional (limited) payment irrespective of the first payment. Therefore, the debtor should prefer to constitute a fund if there is more than one claimant.

**GREECE**

The constitution of a fund is not required in order to invoke limitation of liability, as permitted by Article 10(1). This provision has recently been applied by the Piraeus Multimember Court of First Instance in a case where the right to limit was invoked as a defence to an action for collision damages (Judgment 3248/1999).

**HONG KONG CHINA**

No. Article 10(1) applies.

**IRELAND**

No.

**JAPAN**

Yes (Art. 25(3)).

*Annex V - Responses to the Questionnaire***NETHERLANDS**

Yes. See Article 8: 750(1) DCC (Annexe 4) and Article 642a et seq. DCCP (Annexe 5). See also the Summary under '8. Constitution of the fund'.

The Dutch legislative history of the Act by means of which the 1976 Convention was ratified (Explanatory Note, 19769, Nr. 3, p. 13), mentions that Dutch law (Article 320a DCCP)(now Article 642a DCCP; TvdV) contains a condition to constitute a fund, as a result of which the claimant who's claim is limited, has security that the (limited) claim shall be satisfied.

The Dutch legislative history of the Act by means of which the 1976 Convention was implemented in Dutch statutory law (Explanatory Note, 19768, Nr. 3, p. 2), mentions that the text of the proposed Act maintains the previous system (i.e. to require the constitution of a fund; TvdV) as this system leads to a more convenient procedure, while the fact that the fund may be constituted by means of posting security (see Article 642c(2)(b) DCCP; TvdV) may prevent cash flow being affected.

**NEW ZEALAND**

No. See further explanation under paragraph 10.

**NORWAY**

No (section 180 first paragraph).

**POLAND**

According to art. 309 of the PMC the constitution of the limitation fund is not required to invoke the right to limit liability. However, if the probability is that more creditors would appear, the Court may make limitation of liability conditional upon the establishment of the limitation fund.

**SPAIN**

The constitution of a fund is not required (Art. 10.1).

**SWEDEN**

No. The constitution of a fund is not required.

**UNITED KINGDOM**

The second sentence of Article 10(1) does not appear in Schedule 7, Part 1, to the 1995 MSA and does not therefore have the force of law in the United Kingdom by virtue of Section 185(1) of the Act. The implication is, therefore, that the United Kingdom Government does not intend to place restrictions on a person's rights to invoke limitation of liability without constitution of a fund. This is further suggested by paragraph 9.5(1) of the Admiralty Practice Direction to Part 49 of the Civil Procedure Rules which states:

"A limitation fund may be established before or after a limitation claim has been commenced."

**2.3. *If so, how has Article 11(1) been given effect to? Is it necessary that proceedings are commenced in respect of claims subject to limitation before a fund may be constituted?***

**AUSTRALIA**

Under s9 of the Limitation Act, if a claim is made or expected, the shipowner may apply to the court for determination of the limit of the liability. The court, in determining liability, may make orders as to the constitution and administration of a fund.

**BAHAMAS**

First question: Direct effect was given to the text of Article 11(1). Second question: No.

**BARBADOS**

Not relevant. See 2.2.

**BELGIUM**

The Belgian law of 11th April 1989 does not contain an amendment to Art. 11(1) of the LLMC Convention. Therefore it can only be concluded that proceedings should be commenced in respect of claims subject to limitation of liability before a fund may be constituted.

In all likelihood the Belgian courts will consider that the notion "proceedings" includes not only substantive proceedings but also provisional measures, such as an arrest of a vessel or summary proceedings, for instance in respect of the appointment of a court surveyor.

**CROATIA**

No answer.

**DENMARK**

Article 11 (1) of the Convention has been given full effect under section 232 (previously section 351) regarding the size of the sum constituted in the fund and in section 177, sub-section 2 (previously section 240, subsection 2) regarding availability for payment of claims. However, the Danish Merchant Shipping Act does not specify that the limitation fund can be constituted by any person alleged to be liable under Chapter 9 (previously Chapter 10).

It follows from section 177, sub-section 1 (previously section 240, sub-section 1) that legal proceedings must have been instituted in respect of claims subject to limitation before a limitation fund can be constituted.

**FINLAND**

No answer.

**FRANCE**

Réponse non nécessaire, voir 2.2 ci dessous.

**GERMANY**

The procedure how to establish a limitation fund is laid down in the Schiffahrtsrechtliche Verteilungsordnung (Regulation on the Distribution of

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Claims in Shipping Matters - SVertO). In general, claims subject to limitation of liability can be pursued only in accordance with the SVertO [§ 8 (2)]. Legal proceedings which have already been commenced before a limitation fund has been constituted are to be interrupted until the claims are accepted or the distribution procedure is revoked or suspended [§ 8 (3)]. Execution proceedings are inadmissible [§8 (4)].

**GREECE**

Limitation can be sought pre-emptively; it is not necessary that proceedings are commenced in respect of claims subject to limitation before a fund is constituted (Piraeus Single-member Court of First Instance judgment 5848/1999). An issue which has arisen in relation to Art. 11(1), but has not been resolved thus far, is the rate at which interest should be calculated on the amount of limitation between the time of the incident and the time when the fund is constituted: during that time, said amount is still a quantity of SDRs and, therefore, a rate of interest relevant to the SDR should be applied, as opposed to the domestic rate of interest applicable to the national currency into which the SDR figure would thereafter be converted. The problem is that apparently neither the IMF makes available an official interest rate for the SDR (as central banks do for the currencies they are issuing) nor is a market rate for SDR deposits easily available (there appears to be no LIBOR for SDRs, for instance).

**HONG KONG CHINA**

Effect is given to Article 11(1) by the Rules of the High Court Order 75 Rule 37 (copy attached).<sup>\*</sup> Limitation proceedings can be commenced before the fund is constituted but it is only after the fund has been constituted that the court may stay other proceedings relating to claims which are the subject of the limitation action: see section 19(2) of the Ordinance.

**IRELAND**

Not applicable.

**JAPAN**

The court must order the person who wishes to allege limitation of liability to deposit as a fund the sum which the court decides as limited amount, together with 6% interest thereon from the date of the occurrence until the date of the deposit.

No, it is not necessary to commence judicial proceedings before a fund may be constituted.

**NETHERLANDS**

See Article 8:750(1) DCC (Annexe 4).

The Dutch statutory provisions do not seem to give particular effect to Article 11(1) of the 1976 Convention and the phrase 'in which legal proceedings are instituted in respect of claims subject to limitation'. However,

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<sup>\*</sup> This document is not enclosed, but can be made available on request.



it is indeed necessary that legal proceedings are commenced in respect of claims subject to limitation before a fund may be constituted. See the Summary under '11. Jurisdiction'.

**NEW ZEALAND**

No. See further explanation under paragraph 10.

**SPAIN**

With regard to Art. 11(1), in Spain there will be no need to constitute a fund. The limitation rights may be invoked before the Spanish Courts in respect of claims subject to limitation prior to or without constituting a fund (Supreme Court Judgement of 24.10.95).

**SWEDEN**

No answer.

**UNITED KINGDOM**

No answer.

**2.4. *If proceedings are instituted in different courts, is the person invoking limitation entitled to constitute the fund with one of such courts at his choice?***

**AUSTRALIA**

Yes: Article 11(1).

**BAHAMAS**

Yes.

**BARBADOS**

Not relevant. See 2.2.

**BELGIUM**

As neither the law of 11th April 1989 nor the Royal Decree of 24th November 1989 contains an amendment/exception in this respect it should be concluded that the person invoking limitation is - if proceedings are instituted in different courts - entitled to constitute the fund with the courts at his choice.

**CROATIA**

According to the existing provisions of the Maritime Code, the constitution of a fund is not required to invoke the right to limit liability as permitted by Article 10(1). However, there have been some efforts to amend the existing Maritime Code. See reply to Question 2.2 above.

**DENMARK**

It follows from section 231, sub-section 2 (previously section 350, sub-section 2) that a limitation fund can be constituted at the Maritime and Commercial Court of Copenhagen exclusively.

**FINLAND**

Yes, the fund may be constituted in any contracting State, but after a

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limitation fund has been constituted in Finland, suit regarding a claim of a kind that is subject to limitation may be brought only in a limitation action (FMC Chap. 9, § 7).

**FRANCE**

La réponse est donnée par l'article 59 du décret du 27 octobre 1967 sur le statut du navire. La requête en vue de constituer le fonds de limitation ne peut être présentée qu'au président du tribunal de commerce du port d'attache du navire, si celui-ci est français.

Si le navire est étranger, la requête doit être adressée au président du tribunal de commerce du port français où l'accident s'est produit, ou du premier port français atteint après l'accident ou, en l'absence de l'un de ces ports, du lieu de la première saisie, ou du lieu où la première sûreté a été fournie.

**GERMANY**

No. In Germany there is an exclusive jurisdiction of the Amtsgericht (Local Court):

- where the ship is registered (if registered in Germany) or,
- in case of salvors or pilots being applicants, where these person have their settlement or ordinary residence or,
- in case of applicants not having a settlement or ordinary residence in Germany, where the competent court for the material claim has its seat.

Thus, the applicant has no choice [§ 2 (1) and (2) SVertO].

**GREECE**

The answer to this is probably yes, as regards multiplicity of proceedings in different States. If multiple proceedings are pending within Greece, jurisdiction for the constitution of a limitation fund lies with the Court of the vessel's port of registration or with the Court of Piraeus; the latter would, therefore, assume jurisdiction regarding all non-Greek flag vessels.

**HONG KONG CHINA**

Limitation proceedings in Hong Kong fall under the admiralty jurisdiction of the High Court; it is not possible to commence limitation proceedings in any other court in Hong Kong other than High Court. But a Hong Kong based defendant who wishes to limit liability elsewhere in a jurisdiction other than Hong Kong is not precluded from doing so, and there is no requirement that he set up the fund here and the provisions of Articles 11 to 13 of the Convention apply.

**IRELAND**

Yes. The text of the Act does not say otherwise.

**JAPAN**

No. The court jurisdiction of limitation procedure is prescribed as exclusive one (Art. 9).

**NETHERLANDS**

No, the person invoking limitation has no choice regarding the court with which he may constitute a fund. See Article 642a(1) DCCP (Annexe 5). See also Mr Japikse's Summary under '11. Jurisdiction'.

If the ship is registered in the Netherlands the District Court of the place where the ship is registered has jurisdiction. Ships can only be registered in the Netherlands in one of the following places: Amsterdam, Arnhem, Breda, Groningen, Roermond, Rotterdam and Zwolle (Organisation of Public Registry Regulation 1994, Stcrt. 1994, 81).

If the ship is not registered in the Netherlands the District Court of Rotterdam has jurisdiction.

The fact that legal proceedings may be instituted in different courts therefore has no effect when determining with which court the fund can be constituted. Whatever the circumstances, the fund can only be constituted within the Netherlands with one particular District Court. This court may be a different court than the Dutch court where the legal proceedings are instituted.

**NEW ZEALAND**

Yes. See further explanation under paragraph 10.

**NORWAY**

This question is not dealt with directly by the Maritime Code. The reply is probably yes, however.

**POLAND**

According to art. 314 § 2 of the PMC only the District Court in Gdansk is exclusively competent to the constitution of the fund.

**SPAIN**

Affirmative, provided that such person stands to be a Defendant in the proceedings brought into the chosen Court.

**SWEDEN**

Yes. In respect of Swedish courts (normally the Maritime courts).

If a legal action has any other form than that of an ordinary law suit, a request for an arrest, the Maritime court for the district where the request for an arrest is filed is competent.

Special problems could arise in respect of ad hoc-arbitrations, but normally either the domicile of the respondent or the place of the arbitration would then decide which national court is competent.

**UNITED KINGDOM**

The limitation fund can be constituted with any Court "in which legal proceedings are instituted". The party seeking to limit may thus choose (from amongst those State Party Courts in which proceedings have been commenced) where to constitute the limitation fund.

**2.5. *Has Article 13(2) been given effect to without any change? If not, what changes have been made?***

**AUSTRALIA**

Yes. Not applicable.

**BAHAMAS**

Yes. No change has been made to the text of Article 13(2), however, a provision was made having effect in connection with the paragraph. As a result of the provision, where an arrested or attached ship is released on application under Article 13(2), the applicant is deemed to have submitted to the jurisdiction of the court to adjudicate on the claim for which the ship was arrested or attached.

**BARBADOS**

Yes.

**BELGIUM**

Yes. None. According to Art. 48§5 Belgian Maritime Code the President of the Commercial Court rules - on basis of the report of the liquidator in which is mentioned that the cash deposit has taken place or the guarantee has been issued - that the limitation fund has been constituted. As from the date of this decision Art. 13 of the LLMC Convention and the Arts. 496-500, 502-504 and 508 of Book III of the Code of Commerce (procedure in respect of the declaration and verification of claims) apply.

**CROATIA**

It has been adopted without any change. Art. 418. par. 1. reads:

“If the limitation fund has been constituted according to Article 416 of this Law, no person having set out a claim relative to the fund may have the right for such a claim in respect of other property of the person entitled to the constituted fund”.

**DENMARK**

Article 13 (2) of the Convention has been given effect to under the Danish Merchant Shipping Act section 178 (previously section 241) with some changes.

When a limitation fund is constituted in either Denmark, Norway, Sweden or Finland, ships or other property belonging to a person as mentioned in Article 13 (2) cannot be arrested or attached and no other rights be exercised over such ships or other property. Already arrested ships or property (or a security) must be released if the limitation fund is constituted in the above mentioned countries.

If the limitation fund is not constituted in Denmark, Norway, Sweden or Finland, but in another state that is a party to the Convention or in a state that is not a party to the Convention, but were the limitation fund nevertheless resembles the limitation fund mentioned in section 177 (previously section 240), the competent court must deny a request to arrest or attach a ship or other property belonging to a person as mentioned in Article 13 (2). In these cases already arrested ships or other property (or a security) may be released. Only

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in the circumstances mentioned in Article 12 (2) a-c must the arrest or the security be released.

**FINLAND**

The FMC Chap. 9, § 8 contains the addendum (in relation to the text of the Convention) that after a limitation fund has been constituted in Finland, Denmark, Norway or Sweden, no security measure or distraint against a vessel or other property belonging to any person for whom the fund has been constituted and who is entitled to limitation of liability can be maintained in respect of a claim capable of being brought against the fund. If the security measure or distraint has already been effected, the procedure shall be annulled. Security lodged for the avoidance of a security measure or distraint or for obtaining the interruption of such proceedings shall be released (Subpara. 2).

**FRANCE**

L'article 13(2) n'a subi aucune modification.

**GERMANY**

Article 13 (2) LLMCC has been implemented with alterations which do not infringe the Convention: The constitution of a fund in Germany has the effect that securities expire and enforcement procedures are terminated irrespective of whether the conditions of Article 13 (2) LLMCC are met [§§ 20 and 21 SVertO]. The disadvantageous effect for the claimant is covered by Article 13 (2) sentence 1. If the fund has been constituted in another State Party the law is not quite clear whether the above applies. § 50 SVertO which regulates the legal consequences of the constitution of a fund in another State Party only refers to § 8 SVertO. Particular rules as to §§ 20 and 21 SVertO are missing. There the view that Article 13 (2) LLMCC is to be applied directly.

**GREECE**

There have been no changes regarding the effect of Article 13(2).

**HONG KONG CHINA**

Article 13(2) applies without change.

**IRELAND**

Yes. But Section 17 of the Act states that:

"Where the release of the ship or other property is ordered under paragraph 2 of Article 13 of the 1976 Convention the person on whose application it is ordered to be released shall be deemed to have submitted to the jurisdiction of the court to adjudicate on the claim for which the ship or property was arrested or attached."

**JAPAN**

No. The order for the release is always issued voluntarily by the court (Art. 23 para. 1).

**NETHERLANDS**

Yes. See Article 642e DCCP. Except for wording which deals with the limitation proceedings (compare Article 14 of the 1976 Convention) Article

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642e DCCP seems to be a copy of Article 13 of the 1976 Convention. See also the Summary under '9. Bar to other actions'.

**NEW ZEALAND**

Not directly given effect to but see further explanation under paragraph 10 on section 89 MTA which provides the Court with ability to stay proceedings.

**NORWAY**

Article 13(2) has been implemented in section 178 of the Maritime Code.

Section 178 contains the same rules as Article 13(2), but there are some small changes in the drafting. Section 178 also have specific rules regarding limitation funds constituted in the Nordic countries, and regarding limitation funds constituted in non-Contracting States:

Paragraph 2 in section 178 deals with limitation funds constituted in Norway and the other Nordic countries, stating in the second sentence that after a limitation fund has been constituted (first sentence) "Security given to avoid or dismiss enforcement proceedings shall be released".

Section 3 deals with limitation funds constituted in other Convention States. It follows by this provision that when a fund has been constituted in a Convention State, the court may release security and annul enforcement measures, and that the court shall do so in circumstances a) b) and c) which are the same as a) b) and c) in article 13(2). Letter (d) of article 13(2), concerning the State where the arrest is made, is covered by section 178 paragraph 2 dealing with limitation funds constituted in Norway, see above.

Under paragraph (4) of section 178, the provisions of paragraph (3) may also be given application in other States (non-party States), provided the limitation fund constituted there can be considered an equivalent of a fund constituted according to the Convention.

**POLAND**

Article 13(2) has been given effect without any change.

**SPAIN**

Art. 13(2) has been given effect without any change.

**SWEDEN**

Article 13(2) has effect to its entirety. The first part of this Article, which is facultative, has been made compulsory in respect of funds constituted in Denmark, Finland, Norway and Sweden.

**UNITED KINGDOM**

Article 13(2) has been implemented in the United Kingdom without any changes. However, the legislature has decreed (para 10 of Schedule 7, Part II and Section 185 of the 1995 MSA) that when an order is made by any Court of the United Kingdom under Article 13(2) releasing a vessel or property from arrest, the person applying for such relief is deemed to have submitted to the jurisdiction of that Court to adjudicate on the claim for which the ship or property was arrested or attached.

There is some doubt, however, over the application of articles 13.1 and 13.2. This follows from the decision of the Court of Appeal in *Bouygues Offshore SA v. Caspian Shipping* [1998] 2 LLR 461. In this case the Court of Appeal held that the Court had jurisdiction to grant a limitation decree where liability for the incident giving rise to the limitation action had not been established or admitted<sup>1</sup>. Tucked away in the Judgment of Evans LJ, however, appear the following words:

“No-one suggests that a shipowner gets the benefit of the bar on other actions and the release of arrested ships provided for by Article 13.1 and 13.2 until a limitation decree has been granted but it is common practice to constitute the limitation fund well before that decree.”

These comments do not form an operative part of the Court of Appeal's Judgment, and are therefore not binding on the Courts below. But they might be persuasive. If they are correct, however, it means that, even after a cash limitation fund had been constituted, the Owner of a vessel might still face the risk of multiple arrests until he had also obtained a decree of limitation. Such a result would appear not only to be contrary to established practice but also to be inconsistent with Article 11 which requires a fund to be “constituted” but does not seem to require the constitution of the fund to be accompanied by a decree. Evans LJ's comments can perhaps be explained by the fact that, on the facts of the case, there was only one claimant and thus multiple arrests were not contemplated.

### **3. *What rules relating to the constitution and distribution of the limitation fund and what other rules of procedure have been enacted?***

#### **AUSTRALIA**

Section 25 of the Admiralty Act 1988 (Cth) is in the following terms:

25. Limitation of liability under Liability Conventions

(1) A person who apprehends that a claim for compensation under a law (including a law of a State or a Territory) that gives effect to provisions of a Liability Convention may be made against the person by some other person may apply to the Federal Court to determine the question whether the liability of the first-mentioned person in respect of the claim may be limited under that law.

(2) Subsection (1) does not affect the jurisdiction of any other court.

(3) On an application under subsection (1), the Federal Court may, in accordance with the law referred to in that subsection:

(a) determine whether the applicant's liability may be so limited and, if it may be so limited, determine the limit of that liability;

<sup>1</sup> There had previously been apparently conflicting views expressed on this issue by Rix J, who, in *Caspian v. Bouygues (No. 4)* [1997] 2 LLR 507, said that there was no requirement for: “an admission or determination of liability as a condition precedent to the commencement of a limitation action or the granting of a decree in that action.”; and Clarke J who, in *Caltex v. BP* [1996] 1 LLR 286, doubted whether a shipowner could in practice obtain a decree of liability without admitting liability in an amount greater than the limit.

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(b) order the constitution of a limitation fund for the payment of claims in respect of which the applicant is entitled to limit his or her liability; and

(c) make such orders as are just with respect to the administration and distribution of that fund.

(4) Where a court has jurisdiction under this Act in respect of a proceeding, that jurisdiction extends to entertaining a defence in the proceeding by way of limitation of liability under a law that gives effect to provisions of a Liability Convention.

Further, Rules 61 to 64 of the Admiralty Rules make provision for such procedural matters as service of initiating process, advertising and the setting aside of limitation determinations.

Beyond these provisions, the constitution and distribution of the fund, to the extent not regulated by the Convention, are matters for the court.

**BAHAMAS**

The applicable rules are contained in Order 22 of the Rules of the Supreme Court.

**BARBADOS**

Inasmuch as the constitution of a fund is not required, this is not relevant.

**BELGIUM**

See Arts. 48-53 Belgian Maritime Code and Arts. 496-500, 502-504 and 508 of Book III of the Code of Commerce (French text enclosed herewith)\*.

*Constitution of the limitation fund.**Art. 48 § 1*

According to Article 48 Belgian Maritime Code the “Shipowner” or “Salvor” should file a request before the President of the Commercial Court (of Luik, Brussels or Antwerp - depending on the place where the damage occurred - cfr. Article 627, 10 of the Belgian Judicial Code).

The request should comply with the provisions of Art. 1026 Belgian Judicial Code (mention of the day, month and year, mention of the name, christian name, the profession and the address of the claimant and/or his legal representative(s), mention of the subject and the nature of the claim, mention of the Court and claimants’ lawyers’ signature) and should contain:

- the nationality and name of the vessel;
- the incident during which the damage occurred with mention of date and place;
- the legal amount of the limitation of liability as calculated by claimant;
- information as to how the limitation fund will be constituted : a cash deposit or a guarantee

The request should be substantiated with a list of all known creditors against whom the limitation of liability may be invoked (also mentioning the

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\* This document is not enclosed, but can be made available on request.



address, the (provisional) amount of the claim and the nature of the claim) and with documentation supporting the calculation of the legal amount of the limitation.

§ 2

The filing of the request cannot be considered to be an acknowledgement of liability.

§ 3

The President of the Commercial Court examines whether the amount mentioned by claimant corresponds with the amount for which claimant can actually limit his liability. As soon as the President has ascertained that these amounts correspond, he gives the order to commence the procedure for the constitution of the limitation fund.

In case the claimant has not offered to deposit the amount (increased by the statutory interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the limitation fund) in cash the President will order the institution of the procedure only in case claimant offers to issue an acceptable and adequate guarantee.

The guarantee is acceptable in case the President is of the opinion that the fund will be really available and freely transferable as soon as the guarantee has been issued.

The guarantee is adequate in case its amount corresponds with the amount for which the liability can be limited, increased with a provision to cover the legal interests for a period indicated by the President of the Commercial Court.

The President's decision mentions the term in which the cash deposit should be done or the guarantee should be issued. This term may not exceed one month as from the date of the decision. Latter decision furthermore determines the provision due to cover the costs of the procedure of constitution and distribution of the limitation fund. Said provision should be deposited within the same term as the cash deposit should be done or the guarantee should be issued.

The President also appoints an official receiver and a liquidator.

The salary of the liquidator is determined by the President in accordance with the nature and the importance of the procedure of constitution and distribution of the limitation fund.

Arts. 460, 462 and 463 of Book III of the Code of Commerce apply to the proceedings/activities of the official receiver and the liquidator.

§ 4

In case of a cash deposit the liquidator will appoint the institution where the money should be deposited. This deposit is effected in name of the liquidator *qualitate qua*. No withdrawal is allowed without the consent of the official receiver.

The interests of the amounts deposited are accrued.

In case a guarantee is issued same is in favour of the liquidator *qualitate qua*.

No changes to the guarantee are allowed without authorization of the official receiver.

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The provision to cover the costs of the procedure is put at the disposal of the liquidator. The latter disposes over this amount under supervision of the official receiver.

## § 5

The President of the Commercial Court rules - on basis of the report of the liquidator in which is mentioned that the cash deposit has taken place or the guarantee has been issued - that the limitation fund has been constituted. As from the date of this decision Art. 13 of the LLMC Convention and Arts. 496-500, 502-504 and 508 of Book III of the Code of Commerce (procedure in respect of the declaration and verification of claims) apply.

For the purpose of the first part of paragraph 5 the decision of the President is put on the same footing as the adjudication order mentioned in the Arts. 496, 504 and 508.

The notifications mentioned in Art. 496 should - in such cases - be done in one or more foreign maritime papers.

The opposition against the decision mentioned in the first part of paragraph 5 should be done within three months as from the publication mentioned in Art. 496. Said opposition should be introduced before the Commercial Court. The delays mentioned in Art. 55 Belgian Judicial Code (in case parties are not living/established in Belgium) are added to the delay of three months.

## § 6

At the time of the verification mentioned in paragraph 3 of the Article the amounts of the limitation are converted to the national currency.

## § 7

Art. 1039 Belgian Judicial Code applies to all decisions of the President of the Commercial Court in respect of the administration of justice mentioned in this chapter.

*Art. 49 § 1*

The judgment (of the Commercial Court or the Appeal Court) that - after the constitution of the limitation fund - declares the bankruptcy of claimant and grants postponement of payment or ratifies the judicial agreement, has no consequences for the limitation fund.

## § 2

Claimant and (if appointed) the trustee in bankruptcy should be summoned to all proceedings in respect of the procedure of the distribution of the fund.

*Procedure of liquidation and distribution of the fund.**Art. 50 § 1*

As soon as the liability of the shipowner or salvor is ascertained and they are entitled to limit their liability, the procedure of liquidation and distribution of the fund is pursued.

## § 2

Arts. 496-500, 502-504 and 508 of Book III of the Code of Commerce apply to the declaration, verification and dispute of the claims against the fund.

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*§ 3*

The notifications mentioned in Art. 496 should - as the occasion arise - be done in one or more foreign maritime papers.

*Art. 51 § 1*

No right of priority can be exercised on the part of the limitation fund that is destined to settle damage to goods/property.

*§ 2*

The liquidator makes a draft of distribution and discloses same to the creditors.

In case of dispute in respect of the draft of distribution the President of the Commercial Court will decide pursuant to the report of the liquidator.

*Art. 52 § 1*

The fund shall be distributed among the creditors in proportion to their established claims against the fund.

*§ 2*

Payment to a creditor of the part of the limitation fund due to him, puts an end to this claim against claimant.

*§ 3*

In case every claim has been settled the party that has constituted the fund or in case of his bankruptcy the bankrupts appropriable property is entitled to the balance - if any - of the limitation fund.

Pursuant to the report of the liquidator - co-signed by the official receiver - the President of the Commercial Court declares the procedure 'closed'/terminated.

**CROATIA**

Rules relating to the constitution and distribution of the limitation fund are non litigious and are conducted by sole judge of the court having territorial jurisdiction. See copy of the Part Seven, Art. 421-447 of the Maritime Code, hereto attached.\*

**DENMARK**

Regarding the constitution of the limitation fund it follows from sections 233 and 234 (previously sections 352 and 353) that the person who has requested that the limitation fund is constituted must either deposit the sum of the fund in cash or provide sufficient security for an amount equal hereto. The Maritime and Commercial Court of Copenhagen decides the size of the sum.

Distribution from the limitation fund takes place in accordance with sections 235-246 (previously sections 354-265).

The Maritime and Commercial Court of Copenhagen initially publishes an announcement in the Danish Official Gazette ("Statstidende") whereby creditors are requested to notify the Court of their claims within a time limit of not less than two months.

When the time limit set forth in the announcement has expired the Court

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\* This document is not enclosed, but can be made available on request.

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may decide to release the fund if the person who had it constituted and all the creditors who have notified the Court in time agree hereto. If the fund is not released and the person who had the fund constituted so desires, the Court proceeds to call for a preliminary hearing regarding questions that may be relevant to settle before the distribution of the fund.

When all relevant disputes have been settled the Court distributes the fund. This distribution is binding upon everyone who may raise a claim against the fund, whether or not they have done so within the time limit set forth in the announcement. The decision regarding the distribution of the Maritime and Commercial Court of Copenhagen may be appealed to the Danish Supreme Court.

**FINLAND**

The rules relating to the constitution and distribution of the limitation fund have been included into the FMC Chap. 9, §§ 6-8. In the main, they follow the text of the Convention (notice, however, 2.5 *supra*). Furthermore, Chap. 12 contains provisions on limitation funds and limitation proceedings. These provisions apply to both LLMC claims and claims in respect of oil pollution damage.

**FRANCE**

Les règles de procédure prévues pour la constitution et la distribution du fonds de limitation sont énoncées aux articles 59 et suivants du décret du 27 octobre 1967 sur le statut des navires, dont copie jointe.\* V. aussi réponse à la question 9 ci-après.

**GERMANY**

The question is not clear. Anything regarding the constitution and the distribution of a limitation fund is laid down in the SVertO. Further rules deal with the publication of decisions, remedies, the ranking of claims, the examination of claims, and the trustee. On request we can make the SVertO available (in German only).

**GREECE**

No special rules were enacted to enable the conduct of limitation proceedings. The existing provisions dealing with the procedure for limiting liability under the previous regime set out in the Fifth Title of the Greek Code of Private Maritime Law (Act 3816/1958) are applied, with some adjustments, by the Greek Courts in the conduct of limitation proceedings under the Convention. It is argued, however, that the procedure enacted for the purposes of limitation in CLC cases (Presidential Decree 666/1982) would have been more appropriate for LLMC cases than the system provided in the Code.

By way of comment on the manner in which limitation is conducted, one could perhaps raise the issue of possible delay in obtaining the judgment permitting the constitution of a limitation fund through production of a guarantee: the combined effect of the requirement, placed by Article 11 § 2 of the Convention, for Court intervention in confirming the adequacy of the security and of the submission of the proceedings for the constitution of the

fund to the procedure for security measures in Article 91 CPML may result in the release of the vessel delaying by some weeks in case the application is put on the ordinary Court list.

The issue of whether claims subject to limitation continue to bear interest after the constitution of the fund is currently disputed in the Piraeus Courts.

### **HONG KONG CHINA**

The Rules of the High Court, Order 75 Rules 37-40 (copy attached)\* cover the constitution and distribution of limitation funds in Hong Kong.

### **IRELAND**

Section 8 of the Act provides that the Minister may, by Order, declare that any State specified in the Order is a Contracting State and the Order shall be evidence that that State is a Contracting State.

Section 9 provides that references in the Convention to a ship shall be construed as including references to any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or a part of a ship.

Section 10 provides that the right to limit liability extends to non-seagoing ships.

Section 11 provides a restriction on the right to limit liability. It shall not apply to claims in respect of the raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such a ship and Article 3 shall be construed accordingly.

Section 12 provides that the reference in Article 3 of the Convention to a nuclear ship includes a reference to a ship carrying nuclear material (whether or not the ship is powered by such material).

Section 13 provides for conversion of the amounts in units of account into currency of the State for the purpose of the Convention.

Section 14 states the rate of interest to be applied for the purposes of Article 11 of the Convention. The Section permits the Minister for the Marine, with the consent of the Minister for Finance, to prescribe by Order the rate of interest to be applied under the terms of the Convention.

Section 15 gives the Court power to stay proceedings where a fund is constituted.

Section 16 provides that no lien or other right in respect of any ship or property shall affect the proportions in which under Article 12 of the Convention the fund is distributed among the several claimants concerned.

Section 17 provides that where the release of a ship or property is ordered under paragraph 2 of Article 13 of the Convention the person on whose application it is ordered to be released shall be deemed to have submitted to the jurisdiction of the court to adjudicate on the claim for which the ship or property was arrested or attached.

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Section 38 provides for exclusion of liability in certain cases. A copy of Section 28 is appended hereto.

**JAPAN**

The Supreme Court Rule, 1976 concerning the Procedure for the Shipowners Limitation of Liability is also applicable in addition to the provisions of the Act.

**NETHERLANDS**

See the Articles 8:750-8:759 DCC and Articles 642a-642z DCCP (Annexes 4 and 5). See also Mr Japikse's Summary.

**NEW ZEALAND**

There is no specific provision in the MTA, nor in New Zealand's High Court Rules of procedure, for the constitution of a limitation fund. Articles 11-13 of the 1976 Convention have no directly comparable counterpart in the MTA.

Section 91 MTA provides for the release of arrested vessels where limitation of liability would appear to be available.

Section 89 MTA provides for the consolidation, on application of a party seeking to limit its liability, of two or more claims where the limitation provisions may apply. Under the section, the Court can determine the amount of a party's liability and distribute the amount rateably among the claimants. There is also provision for staying other proceedings and giving directions as to security.

The combination of sections 86, 89 and 91 MTA are probably sufficient to achieve the results sought to be achieved in articles 11-13 of the 1976 Convention. However, there is considerably less guidance and considerably more discretion left to the Court under the New Zealand legislation compared to the 1976 Convention.

High Court Rule 792 provides for limitation actions to be commenced as an admiralty action *in personam*. The Rule sets out certain associated procedural requirements which the party applying must observe in order to obtain an effective limitation order. In fixing limitation, the Court may make any associated orders as to security or otherwise as provided for in section 89 MTA.

**NORWAY**

Chapter 12 in the Maritime Code, as well as article 177 in chapter 10, deals with Limitation Funds and Limitation Proceedings. Here, we will only briefly mention the provisions which has been enacted in addition to the rules of the Convention on this point. Please see the enclosed copy of chapter 12 for further details.\*

Section 233 second paragraph requires certain information to be included in the application to constitute a fund.

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\* This document is not enclosed, but can be made available on request.

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Section 234 states that the fund shall be constituted by a ruling of the court, and that such ruling may be appealed. Section 234 also sets down requirements regarding the contents of the ruling which establishes the fund.

Section 235 requires public announcement of the constitution of the limitation fund, and notification by registered mail to all known creditors.

Section 236 states that the court may appoint a fund administrator.

Section 237 requires certain information regarding the claim to be given to the court by any person submitting a claim.

Section 238 deals with the situation for claims which is not notified to the court before the distribution of the fund. These can only be covered to the extent that the court has retained an amount to cover such claims, in accordance with the provisions of section 244 second paragraph.

Section 239 establishes the requirements for the payment and release of the fund.

Section 240 deals with the procedural rules regarding the writ of summons in limitation proceedings, and states that all persons on whose behalf the fund was constituted can be made parties to the procedure.

Section 241 states that the court shall summon to a fund-meeting, and regulates the procedures with regard to this.

Sections 242 and 243 concerns settlement of disputes and provisional payments.

Section 244 concerning the distribution of the fund, establishes a procedure for retaining an amount to cover claims that have not been submitted before the distribution of the fund.

Section 245 describes the effect of final judgements.

#### **POLAND**

The applicable rules are contained in: Book VII, Chapter II of the PMC; Code of Civil Procedure (provisions of non-litigious proceedings).

#### **SPAIN**

Apart from the rules contained in the Convention itself, the general Rules of Procedure provided by the Spanish Civil Procedure Act 1984 shall apply. No special domestic rules of procedure have been enacted.

#### **SWEDEN**

See the enclosed extracts from the Swedish Maritime Code.\*

#### **UNITED KINGDOM**

These rules are contained in the Admiralty Practice Direction to Part 49 of the Civil Procedure Rules.

The rules governing the constitution of the fund are contained in paragraph 9.6(1) which provides:

“The Claimant may constitute a limitation fund by paying into Court the sterling equivalent of the number of special drawing rights to which he

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\* This document is not enclosed, but can be made available on request.

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claims to be entitled to limit his liability under the Merchant Shipping Act 1995 together with interest thereon from the date of the occurrence giving rise to his liability to the date of payment into Court.”

The assessment of claims and distribution of the fund in England and Wales is performed by the Admiralty Registrar under paragraph 10 of the Admiralty Practice Direction.

**4. *Does the Convention apply to vessels intended for navigation on inland waterways or is a different system of limitation of liability applicable to such vessels?***

**AUSTRALIA**

Article 1.2 of the 1976 Convention provides that a shipowner may only limit its liability in respect of “seagoing ships”.

In *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351 at 369, it was found that a reference to “seagoing ships” means those ships that actually go to sea, rather than ships that are merely capable of going to sea. While *Kirmani* concerned the 1957 Limitation Convention, it is likely that Australian courts would hold that inland waterways vessels are not subject to limitation of liability under the 1976 Convention.

Article 15.2 of the 1976 Convention provides that national laws may regulate the system of limitation of liability to be applied to vessels that are intended for navigation in inland waterways. The Limitation Act contains no such provision but allows the States to legislate with respect to this matter. In this respect, sections 84 and 85 of the Western Australian Marine Act 1982 provide that the Convention relating to Limitation of Liability of Owners of Sea-going Ships 1957 applies, with some modifications, to inland waterways vessels and ferries.

**BAHAMAS**

Yes.

**BARBADOS**

Barbados is an island nation and has no inland waters.

**BELGIUM**

According to Art. 273 Belgian Maritime Code (see copy of the French text enclosed herewith\*):

- Articles 1-15 - with the exclusion of Art. 6§5 - of the LLMC Convention apply to vessels intended for navigation on inland waterways;
- Arts. 2§1 d. and e. of the LLMC Convention apply to vessels intended for navigation on inland waterways;
- Arts. 48-58 Belgian Maritime Code apply to vessels intended for navigation on inland waterways;
- the limits of liability mentioned in Arts. 6§1, 6§4 and 7 of the LLMC

\* This document is not enclosed, but can be made available on request.



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*Implementation and interpretation of the 1976 LLMC Convention*

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Convention and the foundation for the calculation of the limitation of liability are provided for by the King (Royal Decree of 24th November 1989 - see copy enclosed herewith\*) and differ from the limitation of liability provided for seagoing vessels in the LLMC Convention.

**CROATIA**

The Inland Navigation Act enacted in 1998 in its Article 1 par. 2 states that all the issues not covered by that Act, one of which is the limitation of liability for claims shall be governed by the corresponding provisions of the Maritime Code. Therefore, the inland water vessels are subject to the same regime as regards the limitation of liability as the maritime ones.

**DENMARK**

The committee that prepared the implementation of the Convention into the Danish Merchant Shipping Act was of the opinion that a different system of limitation of liability for vessels intended for navigation on inland waterways was unnecessary given the fact that navigation on inland waterways only occurs to a limited extent in Denmark. Consequently, Chapters 7, 9 and 12 (previously Chapters 10 and 15) of the Danish Merchant Shipping Act also apply to such vessels.

**FINLAND**

The Convention applies also to vessels intended for navigation on inland waterways.

**FRANCE**

La France a notifié qu'aucune limite n'était prévue pour les navires naviguant sur les voies d'eau intérieures ("no limit of liability is provided for vessels navigating on French internal waterways).

**GERMANY**

Yes. From 1<sup>st</sup> September 1998 the SVertO (which then changed its name from Seerechtliche Verteilungsordnung to Schiffsverkehrsrechtliche Verteilungsordnung) has been extended to the limitation of liability for claims originating from the use of inland waterway ships. This was due to the ratification of the Strasbourg Convention on the Limitation of Liability in Inland Waterway Shipping (CLNI) which entered into force on 1<sup>st</sup> July 1999. Thus, the same system with some particularities applies to inland waterway ships too.

**GREECE**

Greece made no reservations and the Convention is, thus, applicable to all cases falling within its scope. However, vessels intended for navigation on inland waterways do not qualify as "ships" in Greek private maritime law and, therefore, limitation of liability would not be available to their owners either under the Convention or under the Code of Private Maritime Law; this assumes that the definition of "ship" is left by the Convention to national laws.

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\* This document is not enclosed, but can be made available on request.

*Annex V - Responses to the Questionnaire***HONG KONG CHINA**

The Convention applies in Hong Kong to all vessels whether "sea-going or not": see section 14 of the Ordinance.

**IRELAND**

Yes. Section 10 of the Act.

**JAPAN**

No. There is no specific provisions which are to be applied to the vessels intended for navigation on inland waterways.

**NETHERLANDS**

At the risk of engaging in hairsplitting: Yes, the 1976 Convention does apply to vessels intended for navigation on inland waterways but Article 15(2)(b) allows a State Party to regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are, according to the law of that State, ships intended for navigation on inland waterways.

The Netherlands has indeed adopted a different system of limitation of liability applicable to such vessels. See Mr Japikse's Summary under '2. Ship'.

Mr Japikse comments that, in the absence of a definition in the 1976 Convention with regard to the meaning of 'seagoing ship', one may have to resort to apply the definition contained in (Dutch) national law. In respect of (the meaning of) 'ships intended for navigation on inland waterways' the 1976 Convention, however, expressly refers to national law: '(...)according to the law of that State (...)' (Article 15(2)(a) of the 1976 Convention). In that respect it may be relevant to point out that Article 8:3 DCC defines inland waterway ships as:

(...) ships which are entered in the register referred to in article 783 (i.e. the register for inland waterway ships; Tv dV), as well as ships which are registered neither in this register nor in the register referred to in article 193 (i.e. the register for seagoing ships; Tv dV), and which, according to their construction, are neither exclusively nor principally destined to float at sea.

The substantive rules of the limitation of liability in the Netherlands with regard to inland waterway ships are laid down in the *Convention de Strasbourg sur la limitation de la responsabilité en navigation intérieure (CLNI)*, Strasbourg, 4 November 1988, to which the Netherlands is a party (entry into force on 1 September 1997). The provisions of the CLNI are also implemented in Dutch statutory law by means of Articles 8:1060-8:1066 DCC.

At the time of ratification of the 1976 Convention the limits of liability with regard to inland waterway ships were laid down in the Royal Decree (Order in Council) of 19 February 1990, Stb. 1990, 96. Pursuant to Article 15(2), final paragraph, of the 1976 Convention the Netherlands has informed the depositary of these limits of liability. I refer to the 'Communication in accordance with Article 15, paragraph 2(a) and (b) of the Convention' contained in the earliermentioned and attached copy of the Dutch treaty series (Tractatenblad) 1990, 111 of 31 July 1990 (Annexe 2).

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*Implementation and interpretation of the 1976 LLMC Convention*

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The Royal Decree of 19 February 1990 has, however, been replaced by a more recent Royal Decree of 29 November 1996, Stb. 1996, 587. Although Article 15(2), final paragraph, of the 1976 Convention is not very clear on this point, the text may imply that the depositary should also be kept informed of changes in the limits of liability adopted in the national legislation pursuant to Article 15(2) of the 1976 Convention. Current information suggests that the depositary has not been informed of the latest Royal Decree, although it contains limits of liability which differ from those contained in the previous Royal Decree.

As mentioned before, the procedural provisions of Articles 642a-642z DCCP (Annexe 5) apply to the limitation of liability regarding both sea-going ships and inland waterway ships.

**NEW ZEALAND**

Yes.

**NORWAY**

The Convention apply to all vessels, with no exception for inland waterways. (The issue of inland waterways is not so relevant in Norway).

**POLAND**

The Convention is applicable to sea-going vessels only.

**SPAIN**

Affirmative. The Spanish State has not made use of the exclusion provided by Art. 15.2.a), so the Convention rules apply to them.

**SWEDEN**

Yes. The Convention applies to vessels of this kind.

**UNITED KINGDOM**

The Convention applies to "sea-going ships" only. However, section 503 of the MSA 1894 granted the rights to limit in the United Kingdom to ships whether sea-going or not. Paragraphs 2 and 12 of Part II to Schedule 7 and Section 185(1) of the 1995 MSA make it clear that in the United Kingdom the limitation provisions of the 1976 Convention are to continue to be applied in relation to any ship whether sea-going or not and that the word "ship" shall include "any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship".

**5. *Does the Convention apply to vessels of less than 300 tons or is a different system of liability applicable to such vessels?***

**AUSTRALIA**

There is no specific exclusion.

**BAHAMAS**

The Convention applies to such vessels but with lower specific limits of liability.

*Annex V - Responses to the Questionnaire***BARBADOS**

No separate system has been established.

**BELGIUM**

The Convention applies to vessels of less than 300 tons (cfr. Art. 4§1 of the Royal Decree of 24th November 1989 : “As far as seagoing vessels of less than 300 tons are concerned, the limits of liability are those mentioned in Art. 6, 1, a (i) and b (i) of the LLMC Convention.”

**CROATIA**

The same system applies to boats and vessels, subject only to their respective tonnage. (Art. 419. par. 1: “The provisions of Art. 406-476 of this Law shall also apply to boats, provided that for their application a boat is considered a ship of 500 gross tons”).

**DENMARK**

Chapters 7, 9 and 12 (previously Chapters 10 and 15) apply to vessels of less than 300 tons.

**FINLAND**

There is no different system of liability applicable to vessels of less than 300 tons.

**FRANCE**

Pour les navires de moins de 300 tonneaux, les limites générales de responsabilité sont égales à la *moitié* de celles fixées à l'article 6 de la Convention LLMC 1976 pour les navires de moins de 500 tonneaux. La France a fait une notification en ce sens au gouvernement belge, dépositaire de la Convention LLMC 1976:

“...as far as ships with a tonnage of less than 300 tons are concerned, the general limits of liability are equal to half those established in article 6 of the Convention...for ships with a tonnage not exceeding 500 tons”.

**GERMANY**

Germany has made use of Article 15 (2) LLMCC by implementing § 487 b HGB. According to this provision the liability is limited in case of ships up to 250 tons to 50% of the amount for ships of 500 tons.

**GREECE**

The Convention applies to vessels under 300 tons (but not less than 10 n.r.t., as these would not qualify as “ships” under Greek law; again this assumes that the definition of “ship” is left by the Convention to national laws).

**HONG KONG CHINA**

There are reduced limits of liability for ships of less than 3,000 tonnes: see section 17 of the Ordinance.

**IRELAND**

Yes. The Act has not made separate provision for ships of less than 300 tons although under the terms of the Convention it is open to the State to make regulations in respect of such vessels.

**JAPAN**

Yes. There is a special limitation amount of 56,000 SDR for the wooden ships of less than 100 tons.

**NETHERLANDS**

Again at the risk of engaging in hairsplitting: Yes, the 1976 Convention does apply to ships of less than 300 tons but Article 15(2)(b) allows a State Party to regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are ships of less than 300 tons.

The Netherlands has indeed adopted a different system of limitation of liability applicable to such vessels, but only with regard to ships (of less than 300 tons) which, according to their construction, are exclusively or principally destined to carry persons and only with regard to liability for the claims set out in Article 8:755(1)(b) DCC (the 'any other claims' of Article 6(1)(b) of the 1976 Convention). I refer to Article 8:755(2) DCC (Annexe 4). See also Mr Japikse's Summary under '2. Ship'.

The limitation of liability with regard to other types of ships of less than 300 tons or with regard to other types of claims than the 'any other claims' is subject to the 'regular' system of limitation of liability to be applied in the Netherlands.

At the time of ratification of the 1976 Convention the specific limits of liability with regard to these ships of less than 300 tons were laid down in the Royal Decree (Order in Council) of 19 February 1990, Stb. 1990, 97. Pursuant to Article 15(2), final paragraph, of the 1976 Convention the Netherlands has informed the depositary of these limits of liability. I refer to the 'Communication in accordance with Article 15, paragraph 2(a) and (b) of the Convention' contained in the earliermentioned and attached copy of the Dutch treaty series (Tractatenblad) 1990, 111 of 31 July 1990.

The Royal Decree of 19 February 1990 has, however, been replaced by a more recent Royal Decree of 29 November 1996, Stb. 1996, 586. Although Article 15(2), final paragraph, of the 1976 Convention is not very clear on this point, the text may imply that the depositary should also be kept informed of changes in the limits of liability adopted in the national legislation pursuant to Article 15(2) of the 1976 Convention. Current information suggests that the depositary has not been informed of the latest Royal Decree, but this is less relevant compared to the situation regarding inland waterway ships (see above under 4.), as the limit of liability contained in the latest Royal Decree (100.000 SDR) is the same as contained in the previous Royal Decree. The only reason for the new Royal Decree is the fact that the provisions of the Commercial Code, on which the former Royal Decree was based, were superseded by the current provisions in the Civil Code.

**NEW ZEALAND**

Yes. The limits of liability for vessels of less than 300 tons are stipulated in the same section as all other limits - section 87 MTA.

**NORWAY**

The Convention applies to all vessels, also those under 300 tons.

*Annex V - Responses to the Questionnaire***POLAND**

Poland has adopted specific provisions concerning limitation of liability to be applied to ships of less than 300 tons. According to art. 312 § 1 of the PMC the limits of liability shall be calculated as follows:

- 100.000 units of account in respect of claims for loss of life, bodily injury and disturbance of health;
- 50.000 units of account in respect of any other claims.

**SPAIN**

Likewise, the Spanish State has not enacted special rules for these vessels (Art. 15.2.b), so the LLMC 76 shall apply to vessels of less than 300 tons, though provided that such vessel be “seagoing ships” (according to Article 1.2). It should be therefore excluded from the application those crafts having no navigable structure to carry persons or goods and those crafts not being capable of perform sea-going navigation (i.e. harbour tugs will be included).

**SWEDEN**

Yes. Sweden has not adopted any special provisions to be applied to ships less than 300 tons.

**UNITED KINGDOM**

Under the Convention the deemed minimum tonnage for limitation purposes is 500 tons both in relation to claims for loss of life or personal injury and property damage. Section 1(1) of the 1958 Act provided that a deemed minimum tonnage of 300 tons would apply to loss of life or personal injury claims only and did not apply to property claims. However, by virtue of paragraph 5 of Schedule 7, Part II, and Section 185 of the 1995 MSA, there is a new minimum level of limitation for ships of less than 300 tons in respect of all claims falling within Article 6. These provisions do not apply to claims made by passengers. Article 7 of the 1976 Convention provides that limitation in respect of this type of claim to be based on a global fund calculated not by reference to the tonnage of the ship but by reference to the number of passengers which the ship is certificated to carry.

Currently passenger claims in the UK are more likely to be covered by the Athens Convention except where the vessel involved is non sea-going.<sup>2</sup>

**6. *Does the Convention apply to claims arising in cases in which interests of persons who are nationals of other States parties are in no way involved?***

**AUSTRALIA**

There is no specific exclusion.

<sup>2</sup> The UK Government has placed on the Statute Book (SI 98/1258) a draft Order which will eliminate the conflict between the passenger limitation provisions of the Athens Convention and those found in Article 7 of the 1976 Convention. The Athens Convention would apply to passengers on sea-going ships and Article 7 of the 1976 Convention would apply to passengers on non-sea-going ships.

This Order will become operative “on the date... on which the Protocol of 1996... enters into force in respect of the United Kingdom”.

**BAHAMAS**

Yes.

**BARBADOS**

No limitations have been specified in relation to cases involving interests of non-Party nationals.

**BELGIUM**

We assume that with this question you want to know whether the limitation of liability - as set forth in the LLMC Convention - also applies in case only interests of Belgian residents/companies or in case only interests of residents/companies of non-contracting States are concerned. No specific provision in this respect has been inserted in the Belgian Maritime Code so that it must be concluded that the LLMC Convention does not apply to claims arising in cases in which interests of persons who are nationals of other State parties are in no way involved.

**CROATIA**

The Convention (as incorporated in the Maritime Code) applies without restrictions *rationae personae* if Croatian law is the substantive law applicable.

**DENMARK**

Chapters 7, 9 and 12 (previously Chapters 10 and 15) applies to claims arising in cases in which interests of persons who are nationals of other States parties are in no way involved. This follows from section 182, sub-section 1, c.f. section 177, sub-section 4 (previously section 243a, sub-section 1, c.f. section 240, sub-section 4) which provide that the rules in Chapters 7, 9 and 12 (previously Chapters 10 and 15) must always be applied when claims of limitations on liability are enforced before the Danish courts.

**FINLAND**

Yes.

**FRANCE**

Les limites de responsabilité prévues par la Convention LLMC 1976 étant également applicables aux situations purement internes (v. l ci-dessus), la question se résout d'elle même.

**GERMANY**

The LLMCC applies to any claim in respect of which a limitation of liability has been asserted irrespective of whether the debtor is domiciled or resident in Germany. The LLMCC would even apply in pure national cases.

**GREECE**

The Convention does apply to claims arising in cases in which interests of persons who are nationals of other States parties are in no way involved.

**HONG KONG CHINA**

Yes, the Convention does apply to claims arising in cases where persons or nationals of other States Parties are in no way involved.

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**IRELAND**

Article 15.3 provides that a State party may regulate by specific provisions of national law the system of limitation of liability to be applied to claims arising in cases in which interests of persons who are nationals of other State parties are in no way involved. I am not aware of any regulations which have been brought in that regard.

**JAPAN**

Yes.

**NETHERLANDS**

Yes, the 1976 Convention does apply to claims arising in cases in which interests of persons who are nationals of other States Parties are in no way involved. The Netherlands has not adopted specific provisions of national law by which the system of limitation of liability to be applied to these claims is regulated.

The Dutch legislative history of the Act by means of which the 1976 Convention was ratified (Explanatory Note, 19769, Nr. 3, p. 16), mentions that there are no grounds for an exception on the basis of Article 15(3) of the 1976 Convention, as the situation described in that Article would rarely occur in the Netherlands.

**NEW ZEALAND**

Yes. Section 83 MTA states that the limitation provisions apply to “every ship (whether registered or not and whether a New Zealand ship or not)”.

**NORWAY**

Yes, there are no exceptions made to the rules in that respect.

**POLAND**

The text of art. 308 § 3 of the PMC is as follows:

The right of limitation is not vested in the foreign debtor who, at the time when he invokes the right of limitation, has his permanent place of domicile or principal place of business in a State, the law of which does not provide the limitation of liability for claims of this type; where this law provides higher limit than that determined in the Convention on Limitation of Liability, this higher limit is applicable.

**SPAIN**

This issue is arguable in Spain. Some authority stands for the application of the Convention rules whenever the limitation action is brought before the Courts of a contracting State, such as Spain, and regardless of the nationality of the parties involved and of the vessel's flag. Also, the Supreme Court Judgement of 24.10.95, in which the Convention was applied in respect of a Panama ship). Other scholars differ from such a view and reject the application of the Convention whenever no foreign element is present. Spain would however apply Article 15.1 strictly, it being a contracting State which did not make use of the excluding options provided thereunder.



**SWEDEN**

Yes.

**UNITED KINGDOM**

It would appear that the UK Government has decided not to take advantage of the right of exclusion of the right to limitation to persons not habitually resident in a State Party given by Article 15(1) as the material parts of that paragraph do not appear in Schedule 7, Part I, to the 1995 MSA and do not therefore have the force of law in the United Kingdom.

**7. *Does the Convention apply to ships constructed for, or adapted to, and engaged in, drilling?***

**AUSTRALIA**

There is no specific exclusion.

**BAHAMAS**

No.

**BARBADOS**

The Convention is applicable to owner, charters, managers or operators of "seagoing" ship - no distinction is made in relation to trading area of ship.

**BELGIUM**

According to Art. 1 Belgian Maritime Code vessels of at least 25 tons or more - normally used for the carriage of goods or persons, for fishing, for tugging or for any other profitable activity of shipping at sea - are considered to be 'seavessels' in view of the application of the law. As far as 'drilling' is considered to be 'a profitable activity of shipping at sea' the LLMC Convention and Arts. 47-58 Belgian Maritime Code apply. In case it concerns a vessel of less than 25 tons concerned Art. 273 Belgian Maritime Code will apply.

As mentioned before Art. 10 of the law of 11th April 1989 states that the provisions of the LLMC Convention also apply to seagoing vessels operated by the Government or a public service whomever is the Owner of said vessels and to seagoing vessels used for pleasure trips or scientific research. As no particular reference is made to ships constructed for, or adapted to, and engaged in 'drilling' it should be concluded that the Convention does not apply to such vessels.

**CROATIA**

No. Art. 419 par. 2 states that: "This part of the Law shall not apply to a) hydrofoils and b) rigs/platforms employed for researches and the exploitation of natural resources of the sea bed and its subsoil".

**DENMARK**

As a main rule Chapters 7, 9 and 12 (previously Chapters 10 and 15) apply to drilling ships.

However, according to section 181, sub-section 2 (previously section 243, sub-section 2) special liability limits apply to such ships (and to movable sea

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plants) while the drilling ships are used for exploration and recovery of raw materials from the subsoil or seabed in Danish territorial waters or the Danish continental shelf area. According to the Act on Certain Sea Plants, the shipowner may limit his liability under the same conditions as provided for in Chapters 7 and 9 (previously Chapter 10). However, the amounts of limitation are considerably higher according to the Act on Certain Sea Plants: The shipowner may limit his liability to 20 million SDR to which amount another 12 million SDR will be added in case of personal injury.

**FINLAND**

There are special limits of liability for a vessel built and adapted to drilling for natural resources of the sea-bed if the claims concern damage caused while the vessel is used in drilling activities. Equal amounts apply to mobile platforms intended for exploration or exploitation of the natural resources of the sea-bed (Chap. 9, § 10).

**FRANCE**

A notre connaissance, la Convention s'applique, sans particularité, aux navires construits ou adaptés aux opérations de forage.

**GERMANY**

The answer depends solely on the interpretation of the legal term „sea-going ship“ in Article 1 (2) LLMCC. Taking into account Article 15 (2) lit. a) LLMCC we understand that „sea-going ship“ is any ship intended for regular navigation on maritime waters whether registered as sea-going ship or not. Consequently, drilling units like other mobile craft would be treated as sea-going ships during their voyage.

**GREECE**

Floating rigs of more than 5,000 tons' displacement, as well as floating refineries and oil storage tanks of more than 15,000 g.r.t. used in exploration, drilling of the sea-bed, pumping, refining and storage of oil or natural gas from the sea are considered as “ships” under Greek law and limitation of liability is available to their owners. The Convention would apply to all such constructions, save for those excluded from its scope in Article 15(5)(b). But limitation would be available for the latter under the old regime contained in the Code of Private Maritime Law; indeed, this is one of the extremely few instances where the domestic rules would still remain applicable following the ratification of LLMC by Greece.

**HONG KONG CHINA**

The Convention applies to all ships whatever their purposes: see section 13 of the Ordinance. If the “thing” is a ship then its owner can limit his liability pursuant to Ordinance.

**IRELAND**

Section 9 of the 1996 Act states:

“References in the 1976 Convention to a ship shall be construed as including references to any structure (whether completed or in the course

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of completion) launched and intended for use in navigation as a ship or part of a ship.”

It would appear, therefore, that if a ship is constructed for or adapted to and engaged in drilling it would come within the ambit of the Act so long as it is a ship. If it was simply a drilling rig, the Convention would not appear to apply because of the provisions of Article 15.5 of the Convention.

**JAPAN**

Yes. But, due to the definition of “ships” under Commercial Law Art. 684 which requires navigability, the Convention does not apply to those drilling rigs which are not able to navigate.

**NETHERLANDS**

Yes, the 1976 Convention does apply to ships constructed for, or adapted to, and engaged in, drilling. Current information suggests that the conditions mentioned in Article 15(4)(a) and (b) have (still) not been met.

**NEW ZEALAND**

Section 84 MTA defines “ship” as:

“...every description of vessel (including barges, lighters, and like vessels) used or intended to be used in navigation, however propelled; and includes any structure (whether completed or not) launched and intended for use as a ship or part of a ship; and also includes any ship used by or set aside for the New Zealand Defence Force.”

There is no authoritative consideration of this definition. If the adapted ship is intended for drilling as a stationary platform rather than navigation, the better view is probably that the limitation provisions would not apply. The precise answer is likely to depend upon the extent to which the adapted ship could be used in navigation, if at all.

**NORWAY**

Yes, see section 4 of the Maritime Code.

**POLAND**

Yes. In Poland the 1976 Convention does apply to all sea-going vessels (merchant sea-going vessels, vessels employed exclusively for scientific research or for sports). According to art. 3 § 3 of the PMC merchant sea-going vessels are sea-going vessels appropriated to or employed in the carriage of cargo or of passengers, for sea fisheries or for the exploitation of other wealth of the sea, for towage or salvage of sea-going vessels and of other floating structures, for recovering property sunk in the sea or for other activity of an economic nature.

**SPAIN**

Affirmative. None of the circumstances set out by Art., 15.4 are found in the Spanish Law.

**SWEDEN**

Yes. There are special limits of liability in respect of vessels built and

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adapted for drilling for national resources of the seabed and mobile platforms intended for the exploration of the national resources of the seabed. The limitation is 12 million SDR for personal injuries and 20 million SDR for other types of damage, except damage suffered by passengers, if the claim concerns damage caused while the vessel has been used in drilling or exploration activities.

**UNITED KINGDOM**

Article 15(4) does not appear in Schedule 7, Part 1, of the 1995 MSA and therefore does not have the force of law in the United Kingdom by virtue of Section 185 of this Act. The implication is that such vessels are subject in the United Kingdom to the limitation provisions of the 1976 Convention provided that they satisfy the definitions of "ship" contained in paragraph 12 of Schedule 7, Part II, to the MSA 1995 (see response to Question 4, above) and in s.313(2) of the MSA 1995.

**8. *Has the application of Article 2 paragraphs 1(d) and (e) been excluded?*****AUSTRALIA**

Yes: s6 of the Limitation Act.

**BAHAMAS**

The application only of Article 2 paragraph 1(d) has been excluded.

**BARBADOS**

No.

**BELGIUM**

Yes (see Art. 47 Belgian Maritime Code).

Nevertheless the Belgian legislator has - in Arts. 12-18 of the law of 11th April 1989 - provided in a system of limitation of liability in case of 'shipping accidents (accidents de navigation)'.<sup>1</sup>

According to said law - and in particular Art. 13, 1 - the owner, the master or shipper of a vessel that stranded or sank should raise and remove the vessel including anything that is or has been on board of such vessel to a place appointed by the Government.

In urgent matters or in case the owner, master or shipper do not comply with the provisions of Art. 13, 1 of law of 11th April 1989 or in case the identity of the owner, master or shipper is not known the Government can - officially and at the risk of the owner and the party that is liable - take all necessary measures (specified in Art. 14 of law of 11th April 1989).

According to Art. 16 of law of 11th April 1989 the liable party or - in the absence of such a liable party - the owner should refund to the Government the costs incurred by the latter.

According to Art. 18 of law of 11th April 1989 the owner of a vessel can limit his liability in respect of the amounts/costs due to the Government as a result of shipping accidents. The limitation of liability - mentioned in Art. 18 - for a vessel of maximum 500 tons is BEF 15.000.000,-. For vessels of a higher tonnage the amount of BEF 15.000.000,- is raised with:

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- BEF 18.000,- per ton for every increase of the tonnage with one ton from 501 until 6000 tons;
- BEF 7.000,- per ton for every increase of the tonnage with one ton from 6001 until 70.000 tons;
- BEF 5.000,- per ton for every increase of the tonnage with one ton above 70.000 tons.

According to Art. 18 the King is allowed - depending on the economic situation - to adapt these amounts.

Nevertheless the owner is not allowed to limit his liability in case it is proven that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.

For the purpose of this Article the ship's tonnage of seagoing vessels subject to the International Convention on Tonnage Measurement of Ships, 1969 shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of said Convention. For the other seagoing vessels the King will decide on the limits of liability and the criteriums and foundation of their calculation.

**CROATIA**

Yes, see Art. 409 of the Maritime Code.

**DENMARK**

The application of Article 2, paragraphs 1(d) and (e) has not been excluded. Both articles are repeated in the Danish Merchant Shipping Act as section 178, sub-section 1, number 4 respectively number 5 (previously section 235, sub-section 1, number 4 respectively number 5).

**FINLAND**

No.

**FRANCE**

Oui, en principe. La France s'est réservée le droit d'exclure l'application de l'article 2, § 1(d) et (e) de la Convention LLMC par la formule suivante:

"In accordance with article 18, paragraph 1, the Government of the French Republic reserves the right to exclude the application of article 2, paragraphs 1(d) and (e)".

**GERMANY**

The application of Article 2 (1) lit. d) and e) LLMCC has not been excluded in Germany but the government plans to do so. At the time being § 487 HGB stipulates a separate fund for those kind of claims.

**GREECE**

Cases under Article 2(1)(d) and (e) were not excluded.

**HONG KONG CHINA**

The application of Article 2(1)(d) has been excluded: see section 15(3) of the Ordinance. Article 2(1)(e) applies.

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**IRELAND**

It appears that the application of Article 2, paragraphs 1(d) and (e) have been excluded by virtue of Section 11 of the 1996 although the wording of Section 11 might suggest that only Article 2(1)(d) is excluded. Section 11(1) of the Act reads as follows:

“Notwithstanding paragraph 1(d) or 1(e) of Article 2 of the 1976 Convention, the right to limit liability under that Convention shall not apply to claims (including claims under Part IV of the Act of 1993) in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such a ship and Article 3 (claims excepted from limitation) of that Convention shall be construed accordingly.”

**JAPAN**

Yes.

**NETHERLANDS**

Yes. I refer to the copy of the Dutch treaty series (Tractatenblad) 1990, 111 of 31 July 1990 which records the Act approving the Convention and the reservations to be made upon accession (Annexes 2 and 3). Pursuant to Article 18(1) of the 1976 Convention the Netherlands has reserved the right to exclude the application of Article 2(1)(d) and (e) of the 1976 Convention.

Under the Dutch statutory provisions by means of which the 1976 Convention is implemented into Dutch law the claims mentioned in Article 2(1)(d) and (e) of the 1976 Convention are subject to limitation of liability (see Article 8:752(1)(d) and (e) DCC). The levels of limitation of liability are, however, different (see Article 8:755(1)(c) DCC). See also Mr Japikse's Summary under '5. Amounts and funds' and '6. Passenger claims'.

**NEW ZEALAND**

No.

**NORWAY**

No, the claims mentioned in article 2 paragraphs 1(d) and (e) are included, see section 172 paragraphs 4 and 5.

**POLAND**

No.

**SPAIN**

Negative. Spain did not make use of the reservation provided under Article 18.

**SWEDEN**

No.

**UNITED KINGDOM**

The United Kingdom has, by paragraph 3 of Schedule 7, Part II, and Section 185 of the 1995 MSA made a reservation in respect of Article 2(1)(d) of the 1976 Convention. Consequently, liability for claims for the cost of wreck

removal remains unlimited insofar as the operation of removal is performed pursuant to statutory powers. (Indeed, it appears that as a result of the wording in the introductory paragraph to Article 2, to the effect that the listed claims are to be the subject of limitation "whatever the basis of liability" the reservation exercised by the United Kingdom may have inadvertently taken out of limitation in the United Kingdom any claims (whether statutory or otherwise) relating to wreck removal, provided the liability does not relate to remuneration under a contract with the person liable.)

The application of Article 2(1)(e) has not been excluded. However, conflicts may arise between the provision of Articles 2(1)(d) and Article 2(1)(e). Under Article 2(1)(d) the expression "anything that is or has been on board such ship" could include cargo. But limitation is not available under 2(1)(d) in the United Kingdom. It may therefore be that in the United Kingdom, claims in respect of cargo removal, qualify for limitation before the ship is sunk, wrecked, stranded or abandoned but not after that event has occurred.

**9. *When replying to questions 3-8 please provide an English translation of the relevant statutory provisions or, if this is more convenient, a summary of such provisions.***

**AUSTRALIA**

A copy of the entire Limitation Act is attached.\*

**BAHAMAS**

Attached are copies of:\*

- Rules of the Supreme Court (RSC) Order 22
- Sections 1 and 3 thru 9 & the Second Schedule to the Merchant Shipping (Maritime Claims Limitations of Liability) Act 1989

**BARBADOS**

Already attached. See 1.2.

**CROATIA**

The relevant statutory provisions are enclosed herewith.\*

**DENMARK**

The Danish Ministry of Industry produced an official translation of the Danish Merchant Shipping Act in 1985 which has not been renewed.

As mentioned above in answer 1.2 Chapters 10 and 15 of the Danish Merchant Shipping Act were subject to some technical changes in 1994 whereby the numbering of the various chapters and sections were changed. As no substantial changes were made, however, a copy of the 1985 translation of Chapters 10 and 15 has been attached to this reply.\*

For your convenience the references made in answers 2-8 above refer to

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\* This document is not enclosed, but can be made available on request.

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the 1994 version of the Danish Merchant Shipping Act, while references made above in brackets refer to the 1985 version hereof.

**FINLAND**

There is no English translation of the relevant provisions of the FMC. However, the Swedish Maritime Code, which in the main corresponds to the FMC (Sweden has also ratified the 1976 LLMC Convention and incorporated its provisions), has been translated. Therefore, I attach a copy of the Swedish rules with corrections adapted to the Finnish provisions.\*

**FRANCE**

Il est joint à la présente réponse\* le texte des articles 58 à 69 bis de la loi du 3 janvier 1967 sur le statut des navires formant le chapitre VII de cette loi, intitulé “*Responsabilité du propriétaire du navire*” et le texte des articles 59 à 87 du décret du 27 octobre 1967 sur le statut du navire formant le chapitre VII de ce décret, intitulé “*Fonds de limitation*”.

**GERMANY**

See above 3.

**GREECE**

There was a minority view that the Convention applies only to cases where a vessel flying the flag of a contracting state is implicated and that, despite the absence of any reservations to that effect, it should not apply to vessels destined for inland navigation and to cases where interests of persons who are nationals of other States Parties are in now way involved (Piraeus Single-member Court of First Instance judgment 2717/1992); but the view that, by virtue of Article 15(1) 1, the Convention applies to all cases of limitation of liability heard by the Greek Courts, irrespective of other connecting factors, prevailed in all subsequent cases (see e.g. judgments 3424/1997, 4752/1997) and has been confirmed on appeal (Greek Supreme Court judgment 869/1999 confirming Piraeus Court of Appeal judgment 169/1998).

**HONG KONG**

Copies of the Limitation Ordinance and the relevant rules of the High Court are attached.

**IRELAND**

Copy of the text of the Merchant Shipping (Liability of Shipowners and Owners) Act 1996 enclosed herewith.\*

**JAPAN**

Regretfully, we do not have any authentic English translation of The Shipowners Limitation of Liability Act, therefore we would ask you to refer to our response made in September 1998 to the CMI Questionnaire on the same subject, when we provided a brief summary of our statute provisions.

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\* This document is not enclosed, but can be made available on request.



**NETHERLANDS**

As indicated earlier, translations into English of Articles 8:750-8:759 DCC and of Articles 642a-642z DCCP are attached (Annexes 4 and 5).

**NEW ZEALAND**

Complete copies of the relevant sections from the MTA and Rule 792 of the High Court Rules are attached.\*

**NORWAY**

See text annexed hereto.\*

**POLAND**

The relevant statutory provisions are cited in this reply. Unfortunately, we do not have any official English translation of the PMC.

**SPAIN**

There are no domestic provisions enacted to date. The Convention provisions implemented in Spain will have their corresponding text in the original English.

**SWEDEN**

(See above.)

**UNITED KINGDOM**

Attached.\*

***10.1. Does the interpretation of international conventions, if given the force of law, or of the national enactment take into account the international origin of the rules and the need for a uniform interpretation?***

**AUSTRALIA**

Australian courts accept that the international origin of rules in international conventions should be taken into account.

In *Qantas Airways Ltd v SS Pharmaceutical Co Ltd* [1991] 1 Lloyd's Rep 288, Kirby P stated that it is essential to approach the construction of international instruments "keeping in mind their international character and the desirability (so far as possible) that they should be given a consistent construction by the courts of the several contracting parties" (p 13). Kirby P warned that municipal courts should avoid parochial constructions which are ill informed about the jurisprudence which has gathered around such conventions. Further, he emphasised the importance of examining the decisions of foreign courts in the context of international transport. (See also Kirby P's comments in *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co* (1989) 15 NSWLR 448, which concerned the interpretation of the Hague Rules.)

These issues were considered by the High Court in *Shipping Corporation*

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\* This document is not enclosed, but can be made available on request.

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of *India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142. Mason and Wilson JJ noted the importance of a uniform international approach to the interpretation of rules concerning the rights and liabilities of parties to international mercantile transactions (p 159). However, it was acknowledged that in interpreting a convention, the court must also take account of previous Australian case law concerning the meaning of various words and expressions relating to international trade.

In *Great China Metal Industries Co Limited v Malaysian International Shipping Corporation Berhad (the "Bunga Seroja")* [1998] 196 CLR 161, 176

Gaudron, Gummow and Hayne JJ observed that "because the Hague Rules are intended to apply widely in international trade, it is self-evidently desirable to strive for uniform construction of them. As has been said earlier, the rules seek to allocate risks between cargo and carrier interests and it follows that the allocation of those risks that is made when the rules are construed by national courts should, as far as possible, be uniform. Only then can insurance markets set premiums efficiently and the cost of double insurance be avoided".

Both the *Bunga Seroja* and the *Gamlan Chemical* cases were cited with approval in *Emery Air Freight Corporation v Merck Sharpe and Dohme (Australia) Pty Limited* [1999] 47 NSW LR 696.

See generally "Harmonisation of Maritime laws and the Impact of International Law on Australian Maritime Law", Sir Anthony Mason, (1999) 14 MLAANZ Journal, Part 1 ([www.mlaanz.org.au](http://www.mlaanz.org.au)).

**BAHAMAS**

Yes.

**BARBADOS**

Yes.

**BELGIUM**

Normally yes.

**CROATIA**

Yes.

**DENMARK**

Should uncertainty arise regarding the interpretation of Danish legislation based on international conventions, the relevant international convention will be taken into consideration. The need for a uniform interpretation hereof will likewise be considered.

**FINLAND**

Yes, the interpretation of the national enactment takes into account the international origin of the rules and the need for a uniform interpretation.

**FRANCE**

Comme il a été dit en réponse à la question 1, les conventions internationales conservent leur statut international en droit français. C'est

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pourquoi les juges s'efforcent de tenir compte du caractère international des conventions pour les interpréter dans un sens internationalement uniforme.

**GERMANY**

Clearly yes.

**GREECE** (*reply to 10.1, 10.2 and 10.3*)

In applying international conventions or national rules enacted pursuant to such conventions, Greek Courts are always open to hear argument from the parties regarding *travaux préparatoires* and the interpretation given by the Courts in other contracting states, and also undertake independent research to the extent that this is possible from resources locally available; the Courts are normally prepared to take such points into consideration in their judgments.

The requirement to take into account the conventions' international origins and the need for a uniform interpretation are sanctioned on a formal basis by the Greek Constitution which grants enhanced statutory value to international conventions in Art. 28; the Courts also see this as a logical prerequisite when applying a non-Greek statute.

**HONG KONG CHINA**

Yes, reference can be made to see how the Convention is applied in other *common law* jurisdictions.

**IRELAND**

As a general rule the Irish Courts will try to ensure comity although a lot depends on the judge dealing with a particular case.

**JAPAN**

Yes.

**NETHERLANDS**

Yes. I refer to Mr Japikse's report 'The interpretation of International Maritime Conventions in Civil Law and Common Law', part of the Netherlands' Reports to the Thirteenth International Congress of Comparative Law, held in Montreal in 1990. A copy of this report is attached as Annexe 6.\* Although some years have passed, the report gives a good overview which is valid to this day.

**NEW ZEALAND**

Yes. The principle of uniformity of interpretation of international conventions is generally accepted by the New Zealand courts. However, where there is a difference between a convention and the enacting legislation, the inference is open to the Court to draw that Parliament intended something different to the convention. The Court may accordingly place its own construction on the legislation without regard to the need for uniform interpretation of the convention. Given the way the 1976 Convention has been

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\* This document is not enclosed, but can be made available on request.

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enacted, there is the possibility of divergence from uniform interpretation in New Zealand.

**NORWAY**

Yes.

**POLAND** (*reply to 10.1, 10.2 and 10.3*)

The Polish law contains no general rule concerning the interpretation of international conventions. However, according to the prevailing view of the Polish doctrine the international origin of the rules and the need for a uniform interpretation should be taken into account. The same goes for the role of the travaux préparatoires and the interpretation given by foreign courts.

**SPAIN**

Affirmative. Such has been the position taken by the Spanish Supreme Court in relation to the MLM 1926.

**SWEDEN**

If international conventions are given the force of law (as in the case of e.g. the CMR Convention) the Swedish Act of Incorporation will refer to the text of the Convention directly. This means that the text will have the same status as any other Swedish Act. If the text has been incorporated as such, but has been translated, and if there is a discrepancy between the translation and the Convention in its original language(s) the original text of the Convention will normally prevail. If, however, the Swedish legislator in connection with the implementation of the Convention has specifically expressed that certain interpretation of the original text is preferred, Swedish courts would tend to find accordingly.

Otherwise, if a court is uncertain in respect of the interpretation of a Convention, it would normally turn to the travaux préparatoires of the Convention.

If the implementation is made by way of transformation into Swedish law, the text of the Swedish Act will have priority. Normally, in this case there is an express explanation in the travaux préparatoires of the Swedish Act why there is a difference. If there is a non-intended discrepancy it is likely that the court would look at the original travaux préparatoires of the Convention.

**UNITED KINGDOM**

The Courts' approach to International Conventions was laid down by Macmillan L. J. in *Stag Line Ltd v. Foscolo, Mango & Co* [1932] AC at 350 where he said:

"It is important to remember that the Act of 1924 [the Carriage of Goods by Sea Act 1924] was the outcome of an international conference and the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance."

These comments were applied by the House of Lords in *Buchanan & Co v. Babco Ltd* [1978] AC 141, (a case concerning the interpretation of the Carriage of Goods by Road Act 1965, which had implemented the Convention on the Contract for the International Carriage of Goods by Road). However, in their speeches, Lord Wilberforce, Viscount Dilhorne and Lord Salmon commented that there should be no reason to abandon English methods of interpretation in favour of “continental” methods. Lord Wilberforce said:

“Furthermore, the assumed and often repeated generalisation that English methods are narrow, technical and literal, whereas continental methods are broad, generous and sensible, seems to me insecure at least as regards interpretation of international conventions...”

The English Courts seem to have acknowledged, in the context of the 1976 Convention, that different approaches to the construction of the text may lead (and perhaps have led) to different results. In the *Happy Fellow* [1997] 1 LLR 130 Longmore J. rejected Counsel’s submission that he should refuse to grant a stay of English proceedings on the grounds that French Courts, in their interpretation of article 4, allow the limit to be broken in cases of “gross negligence” rather than only in cases of intent or recklessness “with knowledge that [the] loss would probably result” and that they will make a finding of intention or recklessness by “fishing for facts”. He found that there was no evidence in support of this and that, even if there had been any evidence, it would merely be a difference of approach to the true construction of the Convention.

## ***10.2. Are the travaux préparatoires, when the conditions set in article 32 of the Vienna Convention apply, taken into consideration?***

### **AUSTRALIA**

Pursuant to article 32 of the Vienna Convention on the Law of Treaties, courts may consider supplementary means of interpreting conventions, including examining the preparatory work of the treaty and the circumstances of its conclusion. Reference to these supplementary materials may occur in order to confirm the interpretation otherwise determined or to resolve any ambiguity in the convention.

In interpreting conventions, Australian courts have indicated that *travaux préparatoires* should be considered in particular circumstances. In the *Tasmanian Dam Case* (1983) 158 CLR 1, Gibbs CJ noted that *travaux préparatoires* may help to resolve any ambiguity in the language of conventions and also to confirm the meaning which appears from the document itself. (p 94) Brennan J adopted a more cautious approach, indicating that the courts should only refer to *travaux préparatoires* if the text of the convention is not sufficiently clear in itself (p 223).

Access to *travaux préparatoires* to conventions was also accepted by the New South Wales Court of Appeal in *SS Pharmaceutical*, where Kirby P referred to *travaux préparatoires* in order to determine the meaning of a provision of the Warsaw Convention on International Carriage by Air.

**BAHAMAS**

Yes, they may be taken into consideration. (per *James Buchanan & Co. Ltd. v. Babco Forwarding and Shipping (UK) Ltd.*, HL [1978] AC 141 and *Fothergill v. Monarch Airlines Ltd.*, HL [1981] AC 251.

**BARBADOS**

Although the courts have not so far undertaken any cases in the context of the LLMC, it has been customary for "travaux préparatoires" to be taken into account in relation to Conventions other than maritime transport. Consequently, it is expected that where a matter to which the LLMC would apply comes before the courts similar action would be taken.

**CROATIA**

No, because the travaux préparatoires are not being published.

**DENMARK**

The travaux préparatoires may be taken into consideration when interpreting Danish legislation based on international conventions.

In general the travaux préparatoires of international conventions nevertheless occupy a less dominant position in the Danish courts' interpretation of Danish law. However, the travaux préparatoires of the international maritime conventions ratified seem to enjoy greater significance for the Danish interpreter than the travaux préparatoires of international conventions in general.

**FINLAND**

Yes, both the *travaux préparatoires* and foreign court practice are taken into consideration.

**FRANCE**

Oui, les juges prennent en considération les travaux préparatoires des conventions internationales dans les conditions fixées à l'article 32 de la Convention de Vienne de 1969 sur le droit des traités, à condition, notamment, qu'ils offrent quelque certitude.

**GERMANY**

Yes.

**HONG KONG CHINA**

Yes, in extreme circumstances the court may take account of the travaux préparatoires.

**IRELAND**

In the case of *Burke v. The Attorney General* [1972] I.R. 36, the Supreme Court held that, in interpreting an international convention it was a valid and proper approach to look at the Travaux Préparatoires.

**JAPAN**

Yes, if necessary.

**NETHERLANDS**

Yes. I again refer to Mr Japikse's report (Annexe 6), particularly to paragraph 3.

**NEW ZEALAND**

Yes. The New Zealand courts will have regard to the Vienna Convention and thus Article 32 (supplementary means of interpretation). However, their utility may be significantly reduced given the manner of enactment of the 1976 Convention in New Zealand.

**NORWAY**

Yes.

**SPAIN**

Affirmative. Spain follows article 32 of the Vienna Convention carefully.

**SWEDEN**

It is not possible to give a precise answer in these respects since there are no precedents. However, it is likely that the judge, notwithstanding the Article of 32 of the Vienna Convention, will seek guidance one way or the other from the travaux préparatoires in order to understand better the background and the basic ideas behind the Convention.

**UNITED KINGDOM**

In *Fothergill v. Monarch Airlines* [1981] AC 251 Wilberforce, Diplock, and Scarman L JJ considered the admissibility of travaux préparatoires as aids to interpret international conventions (the Convention at issue being the Warsaw Convention). The question will only arise, however, if the text of the convention is ambiguous.

Lord Wilberforce's view on the use of travaux préparatoires was:

"These cases should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a legislative intention."

Lord Diplock said that regard could be had:

"...to any material which those delegates themselves had thought would be available to clear up any possible ambiguities or obscurities."

Lord Scarman said:

"Mere marginal relevance will not suffice: the aid (or aids) must have weight as well. A great deal of relevant material will fail to meet these criteria. Working papers of delegates to the conference, or memoranda submitted by the delegates for consideration by the conference, though relevant, will seldom be helpful: but an agreed conference minute of the understanding upon the basis of which the draft of an article was accepted may well be of great value."

This question came up in the context of the 1976 Convention in *Caspian Basin v. Bouygues* (No.4) [1997] 2LLR 507. Rix J. was asked to look at some of the travaux préparatoires, being: a questionnaire sent out by the CMI to its

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national associations, their responses and the report subsequently submitted by the CMI to the IMO. Rix J. found that, as the meaning of the relevant part of the Convention (see below, 11.2) was clear, there was no need to refer to any of the travaux préparatoires. However, Rix J. went on to hold that he would not have referred to any of these documents in any case as they did not satisfy any of the conditions laid down by Wilberforce, Diplock and Scarman L JJ.

In the *Aegean Sea* (see below) Thomas J did refer to the travaux préparatoires to both the 1957 and 1976 Conventions. He said that the former satisfied the conditions in *Fothergill* (although this was on the assumption that they conformed with Lord Diplock's view that the material had to be that which the delegates thought would be used to clear up ambiguities), but they were silent on the issue before him. As regards the travaux préparatoires to the 1976 Convention, he did not say whether they could be used, but simply remarked that they too were silent on the issue before him.

### ***10.3. Is the interpretation given to the provisions of a Convention by the Courts of other Contracting States taken into consideration?***

#### **AUSTRALIA**

Yes, although not with binding force.

#### **BAHAMAS**

The interpretations by courts in Contracting States which are common law jurisdictions might be taken into consideration.

#### **BARBADOS**

No. However, comparative legislation in other similar jurisdictions is consulted.

#### **BELGIUM**

Normally yes.

Nevertheless I should point out that - for instance in respect with Art. 29, 1 of the CMR Convention - our Supreme Court has its own view (not in line with the case law of other "CMR countries").

The Belgian Supreme Court has ruled that - as Belgian law recognizes the notion 'wilful misconduct' - the lifting of the limitation of liability can only be ordered in case of 'wilful misconduct' (and not in case of 'default considered al equivalent to wilful misconduct/faute considérée comme équivalente au dol) on the part of the Carrier and/or his Agents or servants acting within the scope of their employment.

#### **CROATIA**

If it is possible in the respective case, given the technical problems of obtaining such information by the courts.

#### **DENMARK**

In general it seems to depend on the role of the Danish interpreter whether



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or not the interpretation given to provisions in international conventions by the courts of other contracting states will be taken into consideration. Lawyers may find it appropriate to include such interpretations in their procedure whereas judges are probably more reluctant to engage in such interpretation when the argument has not been presented by the lawyers in their procedure.

However, given the international nature of the Danish Merchant Shipping Act it must be noted that the interpretation of international maritime conventions given by courts of other contracting states does in fact occupy an important position when interpreting the Danish Merchant Shipping Act.

**FINLAND**

Yes, both the *travaux préparatoires* and foreign court practice are taken into consideration.

**FRANCE**

Oui, les juges français sont de plus en plus sensibles à cet aspect du droit comparé et s'efforcent de connaître, dans la mesure du possible, les interprétations données à des Conventions internationales par des juridictions étrangères, le problème le plus délicat étant d'accéder, dans des conditions d'authenticité, aux sources de la jurisprudence étrangère.

**GERMANY**

Hopefully, but there appears not to be a lot of experience.

**HONG KONG CHINA**

Yes, where the other contracting states is a common law jurisdiction.

**IRELAND**

The Courts in this jurisdiction will interpret a Convention according to the text of the Convention as it sees it. It will, of course, take into account the interpretation given by the Courts of other Contracting States but will not in any way feel bound by such interpretation.

**JAPAN**

Yes, if necessary.

**NETHERLANDS**

Yes. I again refer to Mr Japikse's report (Annexe 6).

**NEW ZEALAND**

Yes. The interpretation of a convention by other jurisdictions will be considered by a New Zealand Court as a principle of statutory interpretation. However, the Court is not bound by foreign decisions.

**NORWAY**

During the implementation work, interpretation of the courts of other Contracting States are usually not available yet. In the courts, such interpretations would generally be considered by the Norwegian courts if the parties presented such material. However, such foreign interpretations would not be considered an authoritative source of law, and the court would not be

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bound by them. It would be up to the discretion of the court whether the court would be inspired by such foreign interpretations.

**SPAIN**

Such interpretation as given in countries of Civil Law (namely, France, Italy, Belgium, Portugal, etc.) is taken into consideration as often pleaded by the parties in Court, but not with any binding effect.

**SWEDEN**

Yes, Of course, it is normally up to the parties – unless foreign precedents are considered already in connection with the implementation of a Convention – to present and rely on judgements by foreign courts under a Convention. It does not follow that Swedish courts feel absolutely bound by a judgement of foreign courts, but no doubt judges will feel more confident if they are able to compare how similar matters have been decided by foreign courts under the same Convention.

**UNITED KINGDOM**

The persuasiveness of a foreign court's decision on an International Convention will depend on the status of that court. In *Fothergill v. Monarch Airlines* (mentioned above) at page 284 Diplock L. J. said:

“As respects decisions of foreign Courts, the persuasive value of a particular Court's decision must depend upon its reputation and its status, the extent to which its decisions are binding upon Courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system. For instance your Lordships would not be fostering uniformity of interpretation of the Convention if you were to depart from the *prima facie* view which you had yourselves formed as to its meaning in order to avoid conflict with a decision of a French Court of Appeal that would not be binding upon other Courts in France, that might be inconsistent with an unreported decision of some other French Court of Appeal and would be liable to be superseded by a subsequent decision of the Court of Cassation that would have binding effect upon lower Courts in France.”

If there are many foreign decisions which all reach the same conclusion it is likely that the English Court, too, would follow them. In *Buchanan & Co v. Babco* (mentioned above) Lord Salmon said:

“If a corpus of law had grown up overseas which laid down the meaning of article 23, our courts would no doubt follow it for the sake of the uniformity which it would establish.”

However, he went on to say that he did not believe that there was such a corpus of law on the issue in question. A similar problem was encountered by the Court of Appeal in *Ulster-Swift Ltd v. Taunton Meat Haulage Ltd* [1977] 1 WLR 625, (a case on the Carriage of Goods by Road Act 1965) in which Megaw LJ referred to 30 foreign decisions in six States which had produced 12 different interpretations of the words at issue. In these circumstances, no notice will be taken of foreign decisions except, perhaps, notice of their very diversity.

**11.1. Has the interpretation and application of the Convention or of the national implementing legislation been the subject of any decision by your Courts?**

**AUSTRALIA**

Yes.

**BAHAMAS**

This information is not available as Bahamian cases are not reported.

**BARBADOS**

No.

**BELGIUM**

Yes.

**CROATIA**

Not as yet.

**DENMARK**

Neither the interpretation and application of the Convention nor of the Chapters 7, 9 and 12 in the Danish Merchant Shipping Act have yet been subject to decisions from any Danish court.

**FRANCE**

Oui, Pour s'en tenir à la jurisprudence de la Cour de cassation, la Convention LLMC 1976 a déjà donné lieu à au moins six arrêts, dont la liste est mentionnée au n° 11.2 ci-après.

**GERMANY**

As far as we know there is only one decision of the Oberlandesgericht Hamburg (Higher Regional Court of Hamburg) dealing with the LLMCC 1976 but not touching items of uniformity.

*Judgement of 15 September 1994 (GW 39/94) - still subject to appeal:*

*Headnote: It does not infringe the ordre public pursuant to Art. 27 no. 1 European Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters when a French Commercial Court denies the right of a German shipowner operating a German flag ship to limit his personal liability pursuant to Art. 4 of the London Convention of 1976 on the ground that the manning of the ship with only one officer, except the master, would not suffice even though the manning did comply with the German Manning Rules at the time of the collision of the ship with a pier.*

Another decision of the Higher Regional Court of Hamburg [Judgement of 26 May 1988 (6 U 187/87)] only dealt with the breakability of limitation of liability on the basis of § 486 HGB in the version of the LLMCC 1957. Decisions of the Bundesgerichtshof (Federal High Court) are not known.

**GREECE (reply to 11.1 and 11.2)**

All judgments mentioned above, and several others, deal with the

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*Annex V - Responses to the Questionnaire*

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Convention and its implementing legislation. Some of those judgments are sent herewith in translation.

**HONG KONG CHINA**

No, save in the context forum non-conveniens arguments where a party is seeking a stay of the proceedings based on the comparative merits of this Convention and the earlier 1957 Convention.

**IRELAND** (*reply to 11.1 and 11.2*)

We are not aware of any decisions in the implementation and application of the Convention in this jurisdiction.

**JAPAN**

Yes.

**NETHERLANDS**

Yes. See under 11.2 below.

**NEW ZEALAND**

There have been no reported cases and, to the best of our knowledge, only one unreported case.

**NORWAY**

The interpretation of the Convention or the national implementing legislation has not been the subject of any decision by our courts.

**POLAND** (*reply to 11.1 and 11.2*)

No reported cases. As far as we know, the problem has not been the subject of any decision by Polish courts of law.

**SPAIN**

Affirmative (see next).

**SWEDEN** (*reply to 11.1 and 11.2*)

No, at least not any reported cases. Of course, the Convention has been applied in several cases, but this has not caused any known disputes in this country. Consequently, there are no precedents.

**UNITED KINGDOM**

Yes, although the majority of cases involving the 1976 Convention in England have concerned questions of jurisdiction, procedure or fact rather than interpretation of the text of the Convention.

***11.2. If so, please provide a summary of such decisions and state if the need for a uniform interpretation of such provisions has been taken into account.***

**AUSTRALIA**

The Australian courts have considered the 1976 Convention in a limited number of cases. The relevant decisions are as follows:

*Barde v ARB Power Systems (1995) 132 ALR 358*

While unloading cargo from the "*Barde Team*" in New Zealand, certain property on board the vessel was damaged or lost. *In rem* proceedings were commenced against the vessel for damage caused to the goods and the vessel was arrested. Eventually, the shipowner provided security in the amount of US\$2.5 million and the vessel was released.

The shipowner made application to the Federal Court to have the arrest warrant set aside and the security released. The shipowner stated that it would establish a limitation fund under the 1976 Convention for the claim and, as a result, the security should be released. The limitation fund for the claim would have amounted to US\$1.15 million, less than half the amount of the security provided.

Sheppard J provided an extensive discussion of the terms of the 1976 Convention. He noted that pursuant to Article 4, the shipowner would not be entitled to limit its liability if it was proved that the loss of cargo resulted from its personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result. In the present case, the claimants had alleged that the shipowner was not entitled to limit its liability under the 1976 Convention because it was guilty of disintitling conduct specified in Article 4.

Article 11 provides that any person alleged to be liable under the terms of the Convention may constitute a limitation fund with the Court, and this fund would be available only for the payment of claims in respect of which limitation of liability may be invoked. Pursuant to Article 13, once a limitation fund has been constituted, any vessel which has been arrested and any security which has been provided must be released.

On review of the terms of the 1976 Convention, Sheppard J declined to order that the arrest warrant be set aside and the security released. He noted that if a limitation fund was established, and the claimants were successful in arguing that the shipowner was not entitled to limit its liability under Article 4, the claimants would not have access to the limitation fund. This is because Article 11 provides that the limitation fund is only available for the payment of claims for which the limitation of liability has been invoked. According to Sheppard J, if the security was released, this may produce an unfair result where the claimants do not have access to funds to satisfy any judgment obtained.

Sheppard J acknowledged that it would be extremely difficult for the claimants to establish that the shipowner was not entitled to limit its liability. Nonetheless, he found that the claimants should be given the opportunity to present this argument and the security should not be released until after this issue had been resolved.

In summary, this decision invites claimants to argue that shipowners are guilty of disintitling conduct under Article 4 of the Convention, so that shipowners must give security for the unlimited amount of the claim. Thus, shipowners may be unable to reduce the monies paid into court by establishing a limitation fund.

*Annex V - Responses to the Questionnaire**Victrawl Pty Ltd v Telstra Corporation Limited (1995) 183 CLR 595*

On 13 April 1991, the fishing vessel “Lorna Dorn” damaged a communications cable. The Limitation Act came into operation on 1 June 1991. The claimant argued that the shipowner was not entitled to limit its liability under the 1976 Convention as the incident occurred prior to the commencement of the Limitation Act.

The High Court considered whether the Limitation Act, which incorporates the 1976 Convention, has retrospective operation. The answer to this question was dependent upon whether the introduction of the 1976 Convention was merely procedural, in the sense that it would not affect pre-existing substantive rights or liabilities.

The majority (Brennan J dissenting) referred to the entitlement of shipowners to confine claims to the limits of liability prescribed by the 1976 Convention and for claimants to exercise rights against limitation funds that are established. On review of these provisions, the majority stated that the 1976 Convention could not be seen as confined to matters of mere procedure. Rather the 1976 Convention “operates to require all the State Parties to it to participate in and observe an international regime controlling and limiting substantive rights and liabilities in respect of the claims which are subjected to its provisions” (p 617).

In these circumstances, because the Convention is concerned with substantive rights and liabilities, the presumption against retrospective operation is applicable. The Court could not find anything in the terms of the Convention which would indicate that this presumption should be displaced. Therefore, the 1976 Convention did not apply to the incident involving the “Lorna Dorn” and the shipowner would be required to rely on the provisions of the 1957 Convention.

*Sanko Steamship Co Ltd v Sumitomo Australia Ltd (1995) 183 CLR 628*

This case was heard by the High Court at the same time as *Victrawl Pty Ltd v Telstra Corporation*. In *Sanko Steamship*, a ship under charter sank on 14 February 1991 with loss of its cargo, and the charterers sought to limit their liability under the 1976 Convention. A majority of the High Court (Brennan J dissenting) rejected this application, for the same reasons as specified in *Victrawl Pty Ltd v Telstra Corporation*. As a result, the incident was governed by the provisions of the 1957 Convention.

The Federal Court then delivered its judgment on the merits of the claim under the terms of the 1957 Convention. In *Sanko Steamship Co Ltd v Sumitomo Australia Ltd* (unreported, 29 November 1995), Sheppard J held that the charterers were not entitled to limit their liability under the 1957 Convention, as the charterers were guilty of actual fault or privity in grounding the vessel.

**BAHAMAS**

Likewise, this information is not available.

**BARBADOS**

Not relevant.

**BELGIUM**Decision of the Antwerp Arrest Judge of 01.03.1991 in re m/v *Independent Spirit*

In this case the Antwerp Arrest Judge ordered the lifting of several arrests made on the vessel provided and as soon as owners would put up the limitation fund pursuant to the 1976 Convention.

Arrestors had argued that, given the facts of the matter, owners were excluded from invoking their limitation of liability on basis of Article 4 of the Convention.

The Arrest Judge found in this respect that pending the survey of the vessel -the results of which were unknown at that time- and taking into account the elements brought forward by parties Owners were entitled to invoke their limitation of liability and that no conclusive evidence was given that Article 4 of the Convention should be applied.

Although the decision of the Arrest Judge does in se not contain any precise and clear rulings I nevertheless believe that it can be seen from this decision that:

- the applicability of Article 4 can be under discussion when an application for the release of an arrested vessel is made pursuant to Article 13.2 of the Convention;
- in principle the burden of proof that the conditions of Article 4 are fulfilled rests on arrestors;
- the Arrest Judge will investigate on a “prima facie” basis whether or not the conditions set forth in Article 4 are actually fulfilled.

Decision of the Antwerp Arrest Judge of 18.06.1998 in re m/v *Samia*

Seized in the frame of an application for the release of a guarantee (which had previously been put up under the threat of an arrest of the vessel) under Article 13.2 of the Convention following the constitution of a limitation fund in the Netherlands the Antwerp Arrest Judge found that she had no Jurisdiction to rule upon the requested release and that the case should be decided upon by the Antwerp Commercial Court in the substantive proceedings.

The question in this case was whether or not the limitation fund could be opposed against a claim for cleaning up expenses incurred following an oil pollution caused by a collision of two vessels. The defendant argued in this respect that his claim did fall under Article 2/1 d) and/or e) of the Convention for the applicability of which Belgium has made a reservation, so that the Guarantee should remain in place.

The Arrest Judge found that although se had Jurisdiction to rule upon a dispute in the frame of an actual arrest of a vessel she had no such Jurisdiction when the dispute occurred in the framework of the LLMC Convention in respect of a fund put up under this Convention.

This Decision is somewhat contradictory to the decision of the Arrest Judge in re m/v. *Independent Spirit*. However, the main reason why the Arrest Judge found that she had no Jurisdiction over the matter seems to have been that the legal issues involved were too complicated and fundamental and that a decision on these issues could not be reached by a mere “prima facie” assessment of the facts of the case.

*Annex V - Responses to the Questionnaire***CROATIA**

No answer.

**DENMARK**

No answer.

**FINLAND** (*reply to 11.1 and 11.2*)

The following court practice concerning the national enactment may be mentioned:

- Helsinki Court of First Instance held in the decision ND (Nordiske Domme i Sjofartsanliggender) 1993 p. 82 that identification, i.e., the question as to what person or persons and what bodies can be attributed to the operator (or other person liable) so that he loses his right to limitation of liability, was not with the master of the vessel.
- The Finnish Supreme Court held in the decision 1993 II 166 that gross negligence without knowledge of the probability of the resulting cargo damage did not deprive the carrier of his right to limit his liability.
- In the Supreme Court decision 1996:150, which concerned a collision between a combination of pusher/unmanned pushbarge and a radar beacon, it was held that liability for the damage should be based on the tonnage of the respective vessels, not on their aggregate tonnage. The vessels had different owners, but the same operator. The Supreme Court applied the provision on strict liability for vessel owners in the Water Act Chap. 1, § 25.

**FRANCE**

Voici, avec un bref résumé, les six décisions de la Cour de Cassation auxquelles la Convention LLMC 1976 a donné lieu à ce jour:

1. Cour de cassation, chambre commerciale, 28 mai 1991, navire *Mariabel* (Droit Maritime Français 1992, p. 565, note Ph. Godin). Cet arrêt décide qu'il faut appliquer la Convention (ou la législation française analogue, v. réponse à la question 1) dès lors que l'ordonnance du président du tribunal de commerce ouvrant la procédure de constitution du fonds de limitation est postérieure à l'entrée en vigueur de la Convention, soit le 1<sup>er</sup> décembre 1986. Cet arrêt ne concerne donc que le problème de l'application dans le temps de la Convention LLMC 1976.

2-3. Cour de cassation, chambre commerciale, deux arrêts des 23 novembre 1993 et 7 juin 1994, navire *Heidelberg* (Bulletin civil des arrêts de la Cour de cassation, IV<sup>e</sup> partie, 1993, n° 418 et 1994, n° 206). Ces arrêts décident qu'après la constitution du fonds de limitation conformément aux dispositions de la Convention LLMC 1976, la mainlevée de toute saisie conservatoire d'un navire de l'armateur constituant du fonds est *automatique*. L'arrêt du 5 janvier 1999, ci-après, apporte cependant à cette solution une nuance importante.

5. Cour de cassation, chambre commerciale, 12 novembre 1997, navire *Multitank Arcadia* (Droit Maritime Français, 1997, p. 1105). Cet arrêt décide que, si la Convention LLMC 1976 prévoit que le fonds doit comprendre les intérêts de la somme correspondant à la limitation entre la date de l'événement



donnant naissance à la responsabilité et celui de la constitution du fonds (article 11(1)), la Convention n'exclut pas qu'après sa constitution, le fonds puisse continuer de produire des intérêts, suivant ce que décide la loi du lieu de constitution du fonds, à laquelle l'article 14 de la Convention LLMC 1976 renvoie d'une façon générale. Tel est le cas, ajoute cet arrêt, de la loi française, applicable en l'espèce et même si le fonds prend la forme d'une garantie bancaire et non d'un versement en espèces. Le décret du 27 octobre 1967 (article 62 et 63) précise en ce sens que "les intérêts de sommes déposées grossissent le fonds" ou que "les produits de la sûreté... fournie grossissent le fonds".

6. Cour de cassation, chambre commerciale, 5 janvier 1999, navire *Gure Maiden* (Revue critique de droit international privé 1999, p. 137). Cet arrêt complète les arrêts navire *Heidelberg* (voir 2 et 3) en précisant que, si la saisie conservatoire de tout navire appartenant à l'armateur constituant d'un fonds de limitation doit être levée automatiquement après la constitution d'un tel fonds, il n'en est ainsi que lorsque le fonds est constitué dans l'un des lieux limitativement mentionnés à l'article 13 de la Convention LLMC 1976. Si le fonds est constitué en dehors d'un de ces lieux - par exemple au lieu d'arbitrage d'une partie du litige - le juge de la saisie est souverain pour apprécier s'il doit y avoir ou non mainlevée de cette mesure conservatoire.

#### **GERMANY**

We can provide you with the text of these decisions if you wish.

#### **JAPAN**

We provide you with a summary of two decisions of The Supreme Court as typical ones which had paid attention to the need for a uniform interpretation:

(1) Supreme Court Order, 5th November 1980, Minshu. Vol. 34 No. 6, pp. 765

The Court has clearly stated that the provisions of The Shipowners Limitation of Liability Act, 1975 are not contrary to the Art. 29 of The Constitution of Japan which guarantees property rights to the people.

They considered that (1) The system of limitation of liability of shipowners has been admitted in the world since very long time before, (2) The provisions of the Act was made based on those of The International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships, 1957, (3) The provisions of the Act are to replace the former abandon system under the Commercial Code to monetary system under the Convention and the limitation of liability is not admitted when the claims are caused by the actual fault or privity of the shipowner or when the claims are those of salvage or general average.

(2) Supreme Court Decision, 26th April 1985, Minshu. Vol. 39 No. 3 pp. 899

The Court has admitted that the recourse claims made by the owner of sunken ship to the owner of collided ship after execution of legal duty of wreck removal falls under the claims provided by Art. 3 para. 1 subpara. 2 of The Shipowners Limitation of Liability Act, 1975 and that the defendant owner of collided ship can allege limitation of liability.

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*Annex V - Responses to the Questionnaire*

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They considered minutely the reason for the reservation which the 1957 Convention admitted as regards the claims of wreck removal (Art. 2 para. 1(c)) and they concluded that the recourse claims to the owner of collided ship does not fall under such excluded claims.

**NETHERLANDS**

See the summaries of court decisions attached as Annexe 7.\*

**NEW ZEALAND**

*Sea Tow Limited v the ship "Katsuei Maru No. 8"* (unreported, 8 May 1996, AD736 High Court Auckland, Salmon J).

Sea Tow Limited brought an action against the *Katsuei Maru No. 8* seeking damages in respect of a collision. The owner of the defendant Japanese vessel sought to limit its liability and applied to the Court for directions as to provision of security. The plaintiff sought security for the entirety of its claim which exceeded the applicable limits under the MTA. The Court ordered the release of the vessel against provision of a letter of guarantee from a Japanese mutual limited to the amount provided for under section 87 MTA. However, the Court required that an undertaking be given by the Japanese mutual that it would provide further security if ordered by the Court in the event that the plaintiff was able to establish that the defendant was not entitled to limit its liability. A further undertaking to that effect was included in the letter of guarantee from the Japanese mutual. This case exemplifies the flexibility and discretion in the Court in setting security under the MTA.

**NORWAY**

See reply to Question 11.1.

**SPAIN**

A short summary of the decisions is provided as follows:

1. Application of International Conventions in Spain:
  - The provision of Art. 96.1 of the Spanish Constitution must be construed to the effect of not only that the state is compelled to incorporate the Conventions (*pacta sunt recipienda rule*) but also that the State must respect the Conventions' rules within the statutory ranking system (Supreme Court, Division 3, Court 6, 7-10-97).
  - The direct application of the International Conventions is always subject to whether their rules are self-executing, in which case there will be no need for further steps in the part of the domestic legislator (Supreme Court, 7-10-97, see above).
  - All the international Conventions signed by Spain after ratification and publication, become part of the Spanish Law. (Supreme Court, Division 3, 30-6-82) (Supreme Court, Division 1, 22-5-89).
  - The International Conventions, after being ratified and published in the B.O.E., pursuant to Art. 96.1 Spanish Constitution and 1.5 Civil Code,

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\* This document is not enclosed, but can be made available on request.

will have ranking priority to rule over any contrary rule of domestic law. (Supreme Court, Division 3, 16-1-95) (Supreme Court, 16-7-96).

2. Interpretation of International Conventions.

- The provision of Article 27 of the Vienna Convention is of compulsory binding effect in the matter of the relationship between the International Conventions and domestic rules (Supreme Court, Division 3, 17-7-95).
- The ILO recommendations are orientative texts which may serve for the interpretation of the International Conventions (Supreme Court, Division 2, 23-11-81).

### UNITED KINGDOM

The English Courts have always acknowledged that limitation of liability is an international concept rather than a product of English common law. In the *Abadesa* 1968 LLR at 497 Karminski J said:

“The history of limitation in Admiralty actions is a long one, extending over two and a half centuries. In the *Amalia* (1863) Br & Lush. 151, at p.152, Dr Lushington discussed the history of limitation and described its origin as political. By this word I think that Dr Lushington meant that limitation was a doctrine designed to assist international commerce, and not political in the common modern use of the word. Dr Lushington emphasised that limiting liability was unknown to the common law of England.”

The international origins of limitation were further acknowledged in the *Annie Hay* [1968] LLR 141, in which Brandon J held that, as the statute implementing the 1957 Convention was ambiguous, regard could be had to the Convention itself. At page 149 he said:

“There are two recent decisions of the Court of Appeal which show that, where domestic legislation is passed to give effect to an International Convention, there is a presumption that Parliament intended to fulfil its international obligations. If domestic legislation, apparently intended to give effect to an International Convention, plainly did not, then I do not think it would be possible to override the plain language of the statute by applying the presumption which I have mentioned. The authorities show, however, that, if there is any doubt as to the meaning of such an Act, then the Court is entitled to look at the Convention and, in a proper case, to apply that presumption.”

Brandon J. then said that the Court's job would have been easier if the Convention had been enacted in words more closely approximating to the words of the Convention itself. The 1976 Convention has, on the other hand, been incorporated into the MSA 1995 in the form of a schedule (albeit with some changes). However, it still may arise that an English word or phrase in schedule 7 may be found to be ambiguous. In these circumstances, regard may be had to the French text to help clear up the ambiguity.

Another case on the 1957 Convention which casts light on how the Courts will interpret the 1976 Convention is the *Tojo Maru* [1972] AC 242, at page 269 Lord Reid said:

“It has been said that statutory provisions providing for the limitation of

ordinary common law liability should be construed strictly. But I would not approach the construction of s.503 of the Merchant Shipping Act 1894 in that way. Its provisions must have been based on public policy that there should be no unnecessary discouragement on the operation of small vessels by companies of limited financial resources, by subjecting them to the risk of crippling damages if a large vessel should sustain extensive damage by reason of the negligent navigation of one of their vessels by their employees. Presumably it was thought that the owners of large vessels could protect themselves by insurance. Subsequent amendments of those provisions widening their scope appear to me to confirm that view. I would therefore apply these provisions to all cases which can reasonably be brought within their language. But it will require further legislation if they are to be applied to cases, probably unforeseen, which may be thought to be within the spirit of these provisions but which cannot be reasonably be brought within their language. The courts must take these provisions as they find them."

Some of the cases involving limitation after the implementation of the 1976 Convention have had to interpret its text:

In the *Capitan San Luis* [1993] 2 LLR 577 Clarke J had to determine who was to pay the costs of obtaining a limitation decree. In doing so, he had to consider the effect of the 1976 Convention on the previous case-law. Under s.503 of the Merchant Shipping Act 1894 the shipowner was entitled to limit his liability if he proved that the damage was caused without his actual fault or privity. But, being a wrong-doer, he had to pay the ordinary costs of obtaining an uncontested limitation decree (*The Alletta* (No. 2) [1972] 2 QB 399). Clarke J rejected a submission that the 1976 Convention had not changed this regime. He held that the shipowner merely had to establish that the claim fell within Article 2 of the Convention. Once he established that, he was entitled to a decree limiting his liability, unless the claimant proves the facts required by Article 4. It was a matter for the Claimant whether he wished to investigate whether Article 4 might apply. But if he did, and failed to prove that Article 4 applied, he was liable for the costs of his investigation.

In the *Breydon Merchant* [1992] 1LLR 373 it was held that Article 3 related solely to a claim by a salvor against the owner of salvaged property and had no application to the question at issue, which was whether cargo owners' claims for damages in respect of additional stevedoring and transshipment costs and freight was a claim in which the shipowners were entitled to limit their liability. Sheen J. also held that under the Convention the shipowners were entitled to limit their liability in respect of claims listed in Article 2 whether such liability arose in contract, tort or by statute. Sheen J reached his decision after considering the natural meaning of the words. Questions of uniformity do not seem to have arisen.

In *Caspian Basin v. Boutyques* (No. 4) [1997] 2LLR 507 Rix J. held that a claim in misrepresentation fell within the 1976 Convention. His decision was based on the natural meaning of the words. Another issue which Rix J had to decide was whether to grant a stay of the English proceedings on the ground that proceedings had been commenced in South Africa, where the 1957

Convention was still in force.. He made the following remark on the 1976 Convention, in the context of this issue of jurisdiction:

“[T]he 1976 Convention represents not merely English law but an internationally sanctioned and objective view of where substantial justice is now viewed as lying, and that in such circumstances the advantages of the 1976 Convention (whichever way they fall on the facts of any case) are a relevant and legitimate consideration in the overall question of where a case may be tried for the interests of all parties and the ends of justice.”

However, Rix J. went on to say that his decision not to grant a stay of English proceedings was not based on this point.

In the *Herceg Novi* the Respondents in an application for English proceedings to be stayed pending resolution of proceedings in Singapore relied on this point – that if proceedings went ahead in Singapore they would be denied the benefit of the 1976 Convention – to argue that justice required that the case be heard in England. At first instance ([1998] 2 LLR 167) they succeeded, but the Court of Appeal ([1998] 2 LLR 454) overturned this decision and made the following observations on the 1976 Convention:

“(1) The 1976 Convention has not received universal acceptance, or anything like it. It is not “an internationally sanctioned and objective view of where substantial justice is now viewed as lying”. It is simply the view of some 30 states.

(2) The International Maritime Organisation is not a legislature. It may commend the 1976 Convention to the international community. But if by doing so it were found to have enacted an international consensus, that would be to deprive sovereign states to a large extent of their right to stay with some other regime. We say that because jurisdiction could often be obtained by arresting a ship in a 1976 country, and if that action were allowed to proceed despite their being a more appropriate forum where 1957 prevailed, the 1957 country would be left with no effective use for its own law.

(3) In our view it is quite impossible to say that substantial justice is not available in Singapore, seeing that there is a significant body of agreement among civilised nations with the law as it is there administered. The preference for the 1976 Convention has no greater justification than for the 1957 regime. Loss in the cases we are considering will often be borne by insurers of one side or the other. The 1976 Convention provides a greater degree of certainty, which they will perhaps welcome. But in terms of abstract justice, neither Convention is objectively more just than the other”.

A case which ties in many of the points made above is the *Aegean Sea* [1998] 1 LLR 39 in which Thomas J. had to construe the 1976 Convention in order to determine whether Charterers had a right to limit in respect of claims made against them by Owners. Thomas J. was referred to the travaux préparatoires but found that they were silent on the issue in question. He then cited Lord Reid comments in the *Tojo Maru*, reproduced above, and said that he ought to have regard to the history of limitation in applying the 1976

*Annex V - Responses to the Questionnaire*

Convention and should apply its provisions, if possible, to all cases which could reasonably be brought within the language of the Convention. He went on to say that both sides had raised strong arguments based on considerations of policy as to why their interpretation of the Convention should be preferred. He concluded that charterers did not have a right to limit in respect of claims made against them by owners, resting his conclusion on the following two points:

- (1) The development of limitation prior to the 1976 Convention: The 1957 Convention had extended the right to limit to charterers. This was implemented in the UK by the Merchant Shipping (Liability of Shipowners and Others) Act 1958 which amended the MSA 1894 and provided by section 3(1) that those entitled to the benefit of limitation provisions should include

“any charterer and any person interested in or in possession of the ship, and, in particular, any manager or operator of the ship.”

The UK legislation did not enact the extension to charterers using the phrase in the Convention: “as they apply to an owner himself.” However, according to Thomas J. the use of this phrase made it clear that there was to be one limitation fund for the benefit of owners, charterers and others. In the circumstances it was difficult to see how charterers could limit their liability in respect of claims by owners against them, as that would have required provisions for more than one limit of liability and more than one fund.

- (2) The text of the 1976 Convention. Thomas J was influenced by the combined effect of articles 9(1)(a) and (11). He said:

“In my view the combined effect of these articles is important. As there is a provision for a fund for those categorised as shipowners and that fund is to cover both charterers and owners, it is difficult to see how charterers can claim the benefit of limitation through that fund when a claim is brought against them by owners.

Another case which may be relevant, despite the fact that it concerned the interpretation of the Warsaw Convention, is the *Lion* [1992] LLR 144. Hobhouse J. said:

“In my Judgment it is clearly important and correct that there should be a consistent approach to the construction of similar maritime conventions using similar terms and expressing similar ideas.”

Therefore, it must be borne in mind that, when interpreting the 1976 Convention, the English Court is likely to look at similar provisions in other Conventions.

**DRAFT****ANNEX VI****IMPLEMENTATION OF THE LLMC CONVENTION 1976  
BY STATES PARTIES****TABLE OF CONTENTS**

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**INTRODUCTION**

On the basis of the responses to the Questionnaire and of the material accompanying such replies and of information received from National Associations and National Authorities an analysis has been carried out of the manner in which the various provisions of the Convention have been implemented.

Such analysis is made article per article. Under each article the implementing legislation is indicated for each of the following States, in

*Annex VI - Implementation by States Parties*

respect of which information has so far been received: Australia, Bahamas, Barbados, Canada, Croatia, Denmark, Finland, France, Georgia, Germany, Greece, Hong Kong China, Ireland, Japan, Mexico, Netherlands, New Zealand, Norway, Spain, Sweden, United Kingdom.

It is hoped that other replies will be forthcoming, and that consequently this work may be expanded in the near future.

After the analysis there are published the text of the national rules of procedure relating to the conduct of the limitation proceedings, as well as the declarations, reservations and statements and the notifications communicated by the States Parties to the Depositary.

For the countries in which the official language is English or French, the analysis is based on the original provisions in force in each of them. For those in which the official language is different the analysis is based on translations into English of the national enactments and information kindly supplied by National Maritime Law Associations or Governmental Authorities.

It is thought that in order to make the analysis clearer and simpler, a short description of the national implementation legislation would be convenient.

**AUSTRALIA**

Australia has given the force of law to the LLMC Convention with the Limitation of Liability for Maritime Claims Act 1989. The complete text of the Convention constitutes a Schedule to the Act.

**BAHAMAS**

The Bahamas has given the force of law to the Convention with the Merchant Shipping (Maritime Claims Limitations of Liability) Act 1989. The text of articles 1-15 of the Convention constitutes a Schedule to the Act. Part II of that Schedule sets out provisions having effect in connection with the Convention.

**BARBADOS**

The Barbados has given the force of law to the Convention with the Barbados Shipping Act 1994-15. The text of Articles 1-15 of the Convention constitutes Part I of the Second Schedule to the Act, while Part II sets out additional provisions that have effect in connection with the Convention and prevail over those of the Convention.

**BELGIUM**

The Convention has been implemented by Law 11 April 1989. Article 1 of that law so provides:

*Les actes internationaux suivants sortiront leur plein et entier effet:*

- a) .....
- b) .....
- c) *la Convention sur la limitation de la responsabilité en matière de créances maritimes, faite à Londres le 19 novembre 1976, sauf les alinéas d et e du paragraphe 1er de l'article 2 de cette convention:*
- d) .....



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Article 2 of Law 11 April 1989 has also replaced the relevant provisions of the Code of Commerce (Articles 46-53 of Book II, Title II). The new text of Article 47 so provides in its relevant part:

*§1er. Sous réserve des dispositions des §§ 2 et 3 ci-après, le propriétaire d'un navire peut limiter sa responsabilité conformément aux dispositions de la Convention sur la limitation de la responsabilité en matière de créances maritimes, faite à Londres le 19 novembre 1976, nommée ci-après "Convention LLMC".*

*Toutefois, l'application des alinéas d et e du § 1er de l'article 2 de cette convention est exclue.*

.....  
*§4. Tout assistant n'agissant pas à partir d'un navire ou agissant uniquement à bord du navire auquel ou à l'égard duquel les services d'assistance ou de sauvetage sont fournis, peut limiter sa responsabilité à concurrence du montant fixé à l'article 6, §4, de la Convention LLMC.*

## CANADA

The policy of the Government of Canada in maritime matters has been to enact international conventions into domestic law in such statutes as The Canada Shipping Act and The Carriage of Goods by Water Act.

Canada has not ratified the 1976 Convention or 1996 Protocol. Instead, the 1976 Convention and the 1996 Protocol have been enacted into The Canada Shipping Act, Part IX, in full force and effect as of August 10, 1998.

Legislative references hereafter will refer to The Canada Shipping Act where the Convention and Protocol presently reside. There is legislation before the Parliament of Canada to move Part IX of The Canada Shipping Act into a new Marine Liability Act. The Canadian Maritime Law Association is hopeful that this legislative change will occur in the new future. However, for the purpose of this response, reference will be made to existing sections of The Canada Shipping Act.

By Section 574 of The Canada Shipping Act, the term «Convention» means the Convention on Limitation of Liability for Maritime Claims, 1976, concluded at London on November 19, 1976, as amended by the Protocol concluded at London on May 2, 1996.

## CROATIA

The Convention has been ratified and published in the Official Journal of the Republic of Croatia-International Treaties 2/92. Pursuant to the Croatian Constitution (Article 134) international treaties ratified and published become part of the national legal system. The provisions of the Convention have also been incorporated into the Croatian Maritime Code of 1994 but in case of conflict the former prevail over the latter. The position in Croatia is similar to that in the Netherlands. Although reference will hereafter be made to the provisions of the Maritime Code, it must be borne in mind that in case they differ from those of the Convention the latter prevail.

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*Annex VI - Implementation by States Parties*

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**DENMARK**

The Convention has been implemented by incorporating its provisions, with some changes, into the Danish Merchant Shipping Act.

**FINLAND**

The Convention has been implemented by incorporating its provisions, with some changes, in the Finnish Maritime Code of 1994.

**FRANCE**

The Convention has become part of the French legal system in its original texts following its ratification and publication. Pursuant to Article 55 of the French Constitution treaties, duly ratified, have upon ratification a force superior to that of the (national) laws.

**GEORGIA**

The Convention has been implemented by incorporating certain of its provisions in the Georgian Maritime Code.

**GERMANY**

The Convention has been given the force of law with § 486(1) HGB, enacted by Law 25 July 1986, which so provides:

(1) *Die Haftung für Seeforderungen kann nach den Bestimmungen des Übereinkommens vom 19 November 1976 über die Beschränkung der Haftung für Seeforderungen beschränkt werden.*

*(The liability for maritime claims may be limited pursuant the provisions of the Convention of 19 November 1976 on the Limitation of Liability for Maritime Claims)*

All provisions of the Convention, except those that will be subsequently indicated, have therefore been implemented without any change.

**GREECE**

In compliance with Article 28 of the constitution the Convention has become part of the Greek legal system in its original text, following its ratification.

**HONG KONG, CHINA**

Hong Kong China has given the force of law to the Convention with the Merchant Shipping (Limitation of Shipowners Liability) 1993 subject to the specific provisions of the Act set out in Sections 13-21. The text of Articles 1-15 of the Convention constitutes a Schedule (Schedule 2) to the Act.

**IRELAND**

Ireland has given the force of law to the Convention with the Merchant Shipping (Liability of Shipowners and Others) Act, 1996. The text of the Convention constitutes the first schedule to the Act.

**JAPAN**

The Convention has been implemented by means of the incorporation of its provisions into the Shipowners Limitation of Liability Act, 1975 as amended in 1982.

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*Implementation and interpretation of the 1976 LLMC Convention*

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**NETHERLANDS**

The LLMC Convention was ratified by the Netherlands on 15 May 1990 pursuant to law 14 June 1989 and has been published in the Dutch Treaty Series (Tractatenblad) 1990, 111 of 31 July 1990.

Article 93 of the Dutch constitution provides that provisions of international conventions of a 'self-executing' nature shall have the force of law after they have been promulgated (in the official treaty series 'Tractatenblad'). Article 94 of the Constitution further states that statute law which is not in conformity with such provisions shall not be applied. It is commonly held that, unlike the 1957 Convention, substantive provisions of the 1976 Convention are of a 'self-executing' nature. These provisions themselves have therefore obtained the force of law in the Netherlands on 1 September 1990.

The substantive provisions of the LLMC Convention were, however, also enacted in the Dutch Commercial Code (Articles 740a-740j), which enactment also entered into force on 1 September 1990.

In view of the continuing legislative operation aiming at the transfer of transport related provisions from the Dutch Commercial Code to Book 8 of the revised Civil Code, the Articles 740a-740j of the Commercial Code have been re-enacted as Articles 8:750-8:759 (the '8:' refers to Book 8) of the Dutch Civil Code.

It must be stressed, however, that in cases where the conditions for application of the LLMC Convention laid down in Article 15(1) are met, the substantive provisions of the Convention of a 'self-executing' nature apply in the Netherlands in their own right. The national enactment of the substantive rules on limitation of liability (or, for that matter, other general Dutch statutes) could then only apply in cases where the Convention remains silent in respect of certain issues or permits additions or departures which were adopted by the Netherlands (the Netherlands i.a. adopted departures permitted under Articles 15(2) and 18(1) of the Convention). Furthermore, the domestic Dutch limitation rules could find application (instead of those of the Convention) where a court of a non-Contracting State does not have to apply the Convention (Article 15) and, applying its own choice of law rules on the facts of the case, holds that Dutch law should be applicable and, on the interpretation of that court's conflict of law rules, 'Dutch law' is judged to refer to Dutch domestic law only, thereby excluding the Convention from the notion of 'Dutch law'. See also the Summary under 12. Applicable law.'

Reference to the domestic provisions enacted in the Civil Code will be made, therefore, only where one of the situations mentioned above materializes.

**MEXICO**

The Convention has been given the force of law with Article 132 of the Navigation Law of 23 December 1993 which so provides in its relevant part:

*Shipowners, operators, charterers and salvors may limit their liability according to the Convention on Limitation of Liability for Maritime Claims.*

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*Annex VI - Implementation by States Parties*

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**NEW ZEALAND**

New Zealand inserted specific provisions of the Convention into the Shipping and Seamen Act 1952, without adopting the language of the Convention verbatim. The Act was reviewed and in 1994 the Maritime and Transport Act was passed. In the same year New Zealand acceded to the Convention without giving it the force of law, the Convention having already been enacted in summary form in 1987.

**NORWAY**

The Convention has been implemented by incorporating its provisions, with some changes, into the Maritime Code.

**POLAND**

The Convention has become part of the Polish legal system. Pursuant to Art. 91.1 of the 1997 Constitution international conventions ratified and promulgated in the Journal of Laws become a part of the domestic legal order and are applied by courts and administrative authorities. Under art. 91.2 of the Constitution and according to art. 1 § 1a of the Polish Maritime Code rules of international conventions take priority over rules of the national law.

In addition, Article 308(1) of the Polish Maritime Code so expressly provides:

*The liability of a debtor for maritime claims may be limited in accordance with the provisions of the Convention on Limitation of Liability for Maritime Claims done at London on 19 November 1976 (Journal of Laws of 1986, No. 35, item 175), hereinafter called "Convention on Limitation of Liability".*

However, pursuant to Article 308(2) of the Polish Maritime Code the provisions of the Convention concerning the limits of liability apply on condition of reciprocity. Article 308(2) so in fact provides:

*To a foreign creditor having, at the time when the claim is brought, his permanent place of domicile or principal place of business in a State which established a lower limit of liability than that determined according to Convention on Limitation of Liability, the debtor is liable (to the extent of) that lower limit of liability.*

**SPAIN**

The Convention has become part of the Spanish legal system in its original (Spanish) text following its ratification and publication in the State Official Bulletin on 22 October 1981, in compliance with Article 96.1 of the Constitution.

**SWEDEN**

The Convention has been implemented by incorporating its provisions, with some changes into the Maritime Code.

**UNITED KINGDOM**

The Convention has been given the force of law by Section 17 of the Merchant Shipping Act 1979 and then by Section 185 of the Merchant

Shipping Act 1995. The text of Articles 1-15 paragraph 1 (first sentence) now constitutes Part I of Schedule 7 to the MSA 1995. Additional provisions are set out in Part II of the said Schedule.

## **ARTICLE 1**

### ***Persons entitled to limit liability***

*1. Shipowners and salvors, as hereinafter defined, may limit their liability in accordance with the rules of this Convention for claims set out in Article 2.*

*2. The term shipowner shall mean the owner, charterer, manager and operator of a sea-going ship.*

*3. Salvor shall mean any person rendering services in direct connexion with salvage operations. Salvage operations shall also include operations referred to in Article 2, paragraph 1(d), (e) and (f).*

*4. If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.*

*5. In this Convention the liability of a shipowner shall include liability in an action brought against the vessel herself.*

*6. An insurer of liability for claims subject to limitation in accordance with the rules of this Convention shall be entitled to the benefits of this Convention to the same extent as the assured himself.*

*7. The act of invoking limitation of liability shall not constitute an admission of liability.*

#### **AUSTRALIA**

This Article has been enacted without any change.

#### **BAHAMAS**

This Article has been enacted without any change.

#### **BARBADOS**

This Article has been enacted without any change.

#### **BELGIUM**

This Article has been enacted without any change.

#### **CANADA**

By section 575(1) of The Canada Shipping Act Articles 1 to 6 and 8 to 15 of the Convention have the force of law in Canada.

By Section 575(2) of The Canada Shipping Act, Article 7 of the Convention has the force of law in Canada on the coming into force of Section 578 of The Canada Shipping Act.

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Article 1 paragraph 2 of the Convention defines the term shipowner and refers to a “seagoing ship”. For the purposes of limitation of liability in Canada, The Canada Shipping Act has expanded upon the definition of “ship” and “shipowner” by Section 576(3) as follows:

*‘Ship’ means any vessel or craft design, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion and includes*

*(a) a ship in the process of construction from the time that it is capable of floating and*

*(b) a ship that has been stranded, wrecked or sunk and any part of a ship that has been broken up,*

*does not include an air-cushioned vehicle or a floating platform constructed for the purpose of exploring or exploiting the natural resources or the subsoil of the sea-bed;*

*‘Shipowner’ means an owner, charterer, manager or operator of a ship, whether sea going or not, and includes any other person having an interest in or possession of a ship from and including the launching of it.*

It can be seen that for Canada, the Convention and Protocol apply to all vessels, whether seagoing or not.

#### **CROATIA**

In the Maritime Code reference is made to the operator instead than to the owner and, consequently, the definition of the term “operator” includes the owner, but not the operator. It is not certain whether the definition of salvor is as wide as under the Convention. In view, however, of the fact that the Convention in its original text is part of Croatian law, no problem arises.

#### **DENMARK**

The definition of shipowner is the following (section 234(1) of the Danish Merchant Shipping Act:

*The shipowner may limit his liability according to the rules of this Part of the Act. This same right is due to a holder of title to a ship, who is not a shipowner, operator, charterer, manager and any other person who performs service in direct connection with salvage work, hereunder the work mentioned in section 235(1), nos. 4, 5 and 6.*

It emerges from the preparatory work for the implementation of the LLMC Convention that the committee when preparing the implementation intentionally avoided defining the term “ship owner” in respect of limitation of liability in order not to prejudice the interpretation of the term in respect of other rules of the Danish Merchant Shipping Act. However, it was not thereby intended to deviate from the scope of application set forth in Article 1 of the Convention and the definition therein of ship owner was intended to be covered by the wording of section 234 (today section 171) of the Danish Merchant Shipping Act. The definition of salvor seems to be the same as that under the Convention. In fact section 235(1)(4), (5) and (6) corresponds to Article 2(1)(d), (e) and (f) of the Convention.

**FINLAND**

Section 1 of Chapter 9 of the Maritime Code so provides in its relevant part:

*The operator of a vessel shall be entitled to limit his liability according to the provisions of this chapter. This applies also to an owner of a vessel who does not operate the vessel and to a person who manages the vessel in the owner's place, and also to a charterer, shipper and to any one performing services directly connected with salvage. For this purpose, salvage shall include measures taken in accordance with section 2 first paragraph items 4, 5 and 6.*

As in Croatia, reference is made to the operator rather than to the shipowner and then the shipowner is included amongst the persons entitled to limit. As in Denmark, Norway and Sweden, reference is then made to the persons providing the services referred to in Article 2(1)(d), (e) and (f). The persons entitled to limit, however, go beyond those included in the definition of "shipowner" in the Convention, since they include the shipper.

**FRANCE**

Article 1 has become part of French law in its original text.

**GEORGIA**

Article 337 of the Maritime Code refers only to the shipowner. Although the notion of "shipowner" in Georgian law should be clarified, it seems likely that it does not include the charterer and the manager. In addition, the salvor, who does not operate from a ship, does not appear to be entitled to limit his liability.

**GERMANY**

Article 1 has been enacted without any change.

**GREECE**

Article 1 has become part of Greek law without any change.

**HONG KONG, CHINA**

Article 1 is in force in its original text, with no changes or additions.

**IRELAND**

Article 1 has been given the force of law without any change.

**JAPAN**

Article 1 has been incorporated into the Limitation of Liability of Shipowners Act.

**MEXICO**

Article 1 is in force in its original text.

**NETHERLANDS**

Article 1 is in force in its original text.

**NEW ZEALAND**

The structure of the provisions corresponding to those of Article 1 of the Convention is different. Section 85(1) of the Maritime Transport Act 1994 (MTA) indicates the persons who are entitled to limit their liability, while section 84 gives the definition of each of such persons.

Pursuant to section 85 the persons entitled to limit their liability are the following:

- (a) Owners of ships, and any master, seafarer, or other person for whose act, omission, neglect, or default the owner of the ship is responsible;*
- (b) Salvors, and any employee of a salvor or other person for whose act, omission, neglect, or default the salvor is responsible;*
- (c) Insurers of liability for claims subject to limitation of liability, to the extent that the person assured is entitled to such limitation.*

Owner is so defined in section 84:

*"Owner", in relation to a ship:*

- (a) Means every person who owns the ship or has any interest in the ownership of the ship;*
- (b) In any case where the ship has been chartered, means the charterer;*
- (c) In any case where the owner or charterer is not responsible for the navigation and management of the ship, includes every person who is responsible for the navigation and management of the ship.*

The meaning of the words "who ... has any interest in the ownership of the ship" is not entirely clear. Its clarification would be certainly useful for the purpose of ascertaining whether it is wider than that of the word "owner" in the Convention.

While in the Convention the definition of "owner" includes, in addition to the charterer, the manager and the operator, section 84 includes "every person (other than the owner and the charterer) who is responsible for the navigation and management of the ship". This expression is more general than "manager and operator".

In order to establish whether it includes categories of persons other than the manager and the operator it would be necessary to clarify the concept of responsibility for the navigation and management: these words were used in the 1957 Limitation Convention (article 1(1)(b)) and have been replaced by the term "operation". It is thought, therefore, that the meaning of the words used in section 85 MTA does not differ from that of the words used in the Convention.

The other persons mentioned in section 85(a) correspond to those mentioned in Article 1(4) of the Convention.

The definition of "salvor" in section 84 is the same as that in Article 1(3) of the Convention and this is the case also for the definition of "salvage operations", since in section 84 there are expressly mentioned, under (a) and (b) the wreck removal operations described in Article 2(1)(d) and (e) and referred to in Article 1(3) of the Convention.

Because New Zealand has reworked the Convention into the MTA rather than simply giving it force of law, difficulties in interpretation can arise.



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However, it is not thought that the law of New Zealand differs from the Convention on this issue.

Under the Convention, "salvage operations" is defined at article 1(3) to include the "operations" referred to in article 2(1)(d), (e) and (f). The "operations" described in paragraph 2(1)(d) - (f) of the Convention are reproduced as paragraphs (a), (b) and (c) of the definition of "salvage operations" in the definitional section 84 of the MTA.

There may be some confusion because in the Convention the (non exclusive) definition of "salvage operations" is contained in article 1(3) which refers to article 2(1)(d), (e) and (f) of the Convention. Article 2(1) lists the "claims" subject to liability. However, the type of claim which is subject to limitation is not the criteria by which article 1 defines who is entitled to limit liability. It is the "operations" not the "claims" described in article 2(1)(d)-(f) which are the criteria used to determine the person who may claim limitation.

In summary, for the purposes of defining a "salvor" in terms of article 1, it is only the "operations" of the salvor concerned that matter not the fact that some other person may have a claim in terms of article 2(1)(f). That appears to be the explanation for section 84 being as it is.

Section 86(f) of the MTA is the section that, in conformity with article 2(1)(f), clearly sets out that it is only claims of persons other than the person liable which are subject to limitation.

Section 84 MTA includes also the following definition of ship:

*"Ship" means every description of vessel (including barges, lighters, and like vessels) used or intended to be used in navigation, however propelled; and includes any structure (whether completed or not) launched and intended for use as a ship or part of a ship; and also includes any ship used by or set aside for the New Zealand Defence Force.*

This definition, which adopts a wide notion of ship and seems also to include ships intended for navigation on inland waterways, is not in conflict with the Convention.

#### **NORWAY**

The relevant provisions (Articles 171 and 172 of the Maritime Code) are the same as in Denmark.

#### **POLAND**

Article 1 is in force in its original text.

#### **SPAIN**

Article 1 has become part of Spanish law in its original text.

#### **SWEDEN**

The provision of the Swedish Maritime Code is identical to that of the Finnish Maritime Code. The same comments therefore apply.

**UNITED KINGDOM**

This Article has been enacted without any change, except that Part II of Schedule 7 to the Merchant Shipping Act 1995 in which the provisions supplementing (and prevailing over) the provisions of the Convention are set out, states that the right to limit applies to any ship, whether seagoing or not. This is certainly not in conflict with the Convention which, although referring to seagoing ships in Article 1, then impliedly makes the Convention applicable also to ships intended for navigation on inland waterways by granting in Article 15(2) the right to States Parties to regulate by specific provisions the system of limitation of liability applicable to those ships.

**ARTICLE 2***Claims subject to limitation*

*1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:*

*(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;*

*(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;*

*(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connexion with the operation of the ship or salvage operations;*

*(d) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship;*

*(e) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;*

*(f) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention, and further loss caused by such measures.*

*2. Claims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. However, claims set out under paragraphs 1(d), (e) and (f) shall not be subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable.*

**AUSTRALIA**

Article 2 is in force in its original text except for paragraph 1(d) and (e) which, pursuant to section 6 of the Act, do not have the force of law. Further, the owner of a ship is not entitled to limit his, her or its liability in respect of any claim of a kind specified in paragraph 1(a) of Article 2 of the Convention made by a servant of the owner whose duties are connected with the ship or an heir or dependent or any other person who, under Article 3(e), is entitled to make a claim: Section 59B of the Navigation Act 1913 (Cth).

**BAHAMAS**

Article 2 has been implemented without any change except for paragraph 1(d) in respect of which provision has been made as in the United Kingdom.

**BARBADOS**

Article 2 has been implemented in the same manner as in the Bahamas.

**BELGIUM**

This Article has been enacted without any change except for paragraph 1(d) and (e), the application of which has been excluded by Article 47(1) of Law 11 April 1989.

**CANADA**

Article 2 is in force in its original text except that by Section 576(1) of The Canada Shipping Act the term "carriage by sea" in Article 2, paragraph 1(b) is defined to mean "carriage by water".

**CROATIA**

Article 408 of the Maritime Code corresponds to Article 2(1) and (2) of the Convention, save that it does not include the claims set out in paragraph 1(d) and (e) in respect of which a reservation is permitted by Article 18(1). It does not appear, however, that such reservation has actually been made by Croatia and, therefore, Article 2 of the Convention is almost certainly in force in its complete original text.

**DENMARK**

The claims subject to limitation, set out in section 235(1) (now section 172) of the Merchant Shipping Act, are the same as those set out in Article 2 of the Convention except for the claims enumerated in sub-paragraph (a). The corresponding provision of section 235 is in fact worded as follows:

- 1) *personal injury or damage to property if the damage or injury occurs on board the ship or in direct connection with the operation of the ship or with salvage.*

Reference to loss of life has been omitted because under Danish law personal injury includes loss of life. As regards the omission of the words which in Article 2(1)(a) are in brackets, it emerges from the preparatory work for the implementation of the Convention that those words were found unnecessary, since they are included in section 235(1)(1) (now section 172(1)(1)) of the Merchant Shipping Act. Finally, reference to consequential

loss has been omitted since such loss is generally recoverable under Danish law.

## **FINLAND**

Section 2 of Chapter 9 of the Maritime Code corresponds to Article 2(1) of the Convention, except that the sentence which in Article 2(1)(a) of the Convention appears in brackets is omitted.

## **FRANCE**

This article has been implemented without any change. See comments under Article 1.

## **GEORGIA**

The claims subject to limitation are set out in Article 337(1) of the Maritime Code.

There are three omissions as respects Article 2(1) of the Convention. The first is in sub-paragraph (a) of the Convention, where the words “and consequential loss resulting therefrom” are missing; the second is in sub-paragraph (e), which corresponds to sub-paragraph (d) of the Convention, where the words “including anything that is or has been on board such ship” are also missing; the third consists in the total absence of sub-paragraph (f).

There are instead two additions. The first consists in the repetition in sub-paragraph (f) of the claims in respect of loss of life or personal injury or of loss of or damage to property occurring outside the ship but in direct connection with its operation. The second consists in the reference to claims by members of the crew in respect of wages including costs of repatriation and social insurance contributions “payable on their behalf”.

This latter addition does not seem to be in conflict with the provisions of the Convention. In fact claims by servants of the shipowners (thus including the members of the ship’s complement) are excluded from limitation pursuant to Article 3(e) of the Convention if under the law governing the contract of service the shipowner is not entitled to limit his liability in respect of such claims or is only permitted to limit his liability to an amount greater than that provided for in Article 6 of the Convention. That means that the Convention permits that such claims be subject to limitation. It is not clear, however, how the provision whereby claims of the crew for wages are subject to limitation can be reconciled with the subsequent provision, in Article 339(b) corresponding to that in Article 3(e) of the Convention to which reference will be made subsequently.

## **GERMANY**

This article has been implemented except for sub-paragraphs (d) and (f) in respect of which, following the reservation made at the time of ratification, § 487(1) provides as follows:

- (1) *Das Haftungsbeschränkungsübereinkommen (§ 486 Abs. 1) ist auf Ansprüche auf Erstattung der Kosten für*
  1. *die Hebung, Beseitigung, Vernichtung oder Unschädlichmachung eines gesunkenen, havarierten, gestrandeten oder verlassenen Schiffes.*

*samt allem, was sich an Bord eines solchen Schiffes befindet oder befunden hat, oder*

*2. die Beseitigung, Vernichtung oder Unschädlichmachung der Ladung des Schiffes*

*mit der Maßgabe anzuwenden, daß für diese Ansprüche, unabhängig davon, auf welcher Rechtsgrundlage sie beruhen, ein gesonderter Haftungshöchstbetrag gilt.*

## **GREECE**

Article 2 has become part of Greek law without any change. Greece has not availed itself of the right, granted by article 18(1), to exclude the application of paragraphs (d) and (e).

## **HONG KONG, CHINA**

Article 2 is in force in its original text, with no changes but Hong Kong has availed itself of the reservation granted to States Parties under Article 18 in respect of the claims set out in paragraph 1(d). Section 15(3) of the Ordinance so in fact provides:

*(3) Paragraph 1(d) of Article 2 of the Convention shall not apply unless an order has been made under subsection (1).*

Subsection (1) so in turn provides:

*(1) The Governor may by order provide for:*

*(a) the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction, in consequence of paragraph 1(d) of Article 2 of the Convention, of amounts recoverable by them in claims of the kind there mentioned; and*

*(b) the maintaining of such a fund by contributions from such authorities raised and collected by them in respect of vessels in the same manner as other sums so raised by them.*

## **IRELAND**

Ireland has availed itself of the right to exclude the application of paragraph (d) and (e). Section 11 of the MSA 1996 so provides:

*11. (1) Notwithstanding paragraph 1(d) or 1(e) of Article 2 of the 1976 Convention, the right to limit liability under that Convention shall not apply to claims (including claims under Part IV of the Act of 1993) in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including any thing that is or has been on board such a ship and Article 3 (claims excepted from limitation) of that Convention shall be construed accordingly.*

*(2) Subsection (1) shall have effect in lieu of section 53 of the Act of 1993.*

*(3) In this section "the Act of 1993" means the Merchant Shipping (Salvage and Wreck) Act, 1993.*

## **JAPAN**

In the Limitation of Liability of Shipowners Act there are provisions

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corresponding to those of paragraph 2(a), (b), (c) and (f) and of paragraph (2). Japan has in fact reserved the right to exclude paragraph 1(d) and (e).

**MEXICO**

Article 2 is in force in its original text.

**NETHERLANDS**

Since the Netherlands has made a reservation in respect of paragraph 1(d) and (e), these provisions do not apply *proprio vigore*. However, they have been enacted in article 8:752(d) and (e) of the Civil Code, and, therefore, such latter provisions apply.

**NEW ZEALAND**

Paragraph 1 of Article 2 has been implemented almost word for word by section 86(1) MTA. The first sentence of paragraph 2 is missing, but probably was not necessary. The second sentence has instead been moved to the provision in which the claims excepted from limitation are set out (section 86(2)).

**NORWAY**

Section 172 of the Maritime Code is identical to Section 2 of Chapter 9 of the Finnish Maritime Code.

**POLAND**

Article 2 is in force in its original text.

**SPAIN**

This Article has been implemented without any change. See comments under Article 1.

**SWEDEN**

Section 2 of Chapter 9 of the Maritime Code is identical to the corresponding section of the Finnish Maritime Code.

**UNITED KINGDOM**

Article 2 has been implemented without any change except for paragraph 1(d), which does not apply unless provision has been made for the setting up and management of a fund to be used in order to cover the reduction of the amount payable in respect of claims of harbour or conservancy authorities for the operations referred to in that paragraph. Section 3(1) of Part II of Schedule 7 to the Merchant Shipping Act 1995 so provides:

*Paragraph 1(d) of article 2 shall not apply unless provision has been made by an order of the Secretary of State for the setting up and management of a fund to be used for the making to harbour or conservancy authorities of payments needed to compensate them for the reduction in consequence of the said paragraph 1(d), of amounts recoverable by them in claims of the kind there mentioned, and to be maintained by contributions from such authorities raised and collected by them in respect of vessels in like manner as other sums so raised by them.*

**ARTICLE 3***Claims excepted from limitation*

*The rules of this Convention shall not apply to:*

- (a) *claims for salvage or contribution in general average;*
- (b) *claims for pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution Damage, dated 29 November 1969 or of any amendment or Protocol thereto which is in force;*
- (c) *claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage;*
- (d) *claims against the shipowner of a nuclear ship for nuclear damage;*
- (e) *claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims for their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servants the shipowner or salvor is not entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in Article 6.*

**AUSTRALIA**

Article 3 is in force in its original text including letter (e).

**BAHAMAS**

Similarly to the United Kingdom, section 4 of Part II of the Second Schedule to the Merchant Shipping (Maritime Claims Limitation of Liability) Act 1989 (the "Act") sets out some complementary provisions to Article 3 of the Convention, and more specifically in respect of sub-paragraphs (b) and (c):

4. (1) *The claims excluded from the Convention by paragraph (b) of Article 3 are claims in respect of any liability incurred under section 20 of the Merchant Shipping (Oil Pollution) Act, Chapter 253.*
- (2) *The claims excluded from the Convention by paragraph (c) of Article 3 are claims made by virtue of either of sections 10 and 11 of the Nuclear Installations Act 1965 (U.K.) as extended to The Bahamas by the Nuclear Installations (Bahamas) Order 1972 modified and adapted as in the Schedule thereto.*

The Bahamas, as the United Kingdom, has not given the force of law to the CLC 1969 but has implemented, with some changes, its provisions with the Merchant Shipping (Oil Pollution) Act.

As regards sub-paragraph (c) reference is made to the comments in respect of the United Kingdom.

*Annex VI - Implementation by States Parties***BARBADOS**

The position is practically identical to that previously indicated for the Bahamas. Section 4 of Part II of the Second Schedule to the Shipping Act 1994 so in fact provides:

4. (1) *The claims excluded from the Convention by paragraph (b) of Article 3 are claims in respect of any liability incurred under section 20 of the Barbados Shipping (Oil Pollution) Act, 1991.*
- (2) *The claims excluded from the Convention by paragraph (c) of Article 3 are claims made by virtue of either of sections 10 and 11 of the Nuclear Installations Act (U.K.) 1965 as extended to Barbados as modified and adapted in the Schedule thereto.*

**BELGIUM**

This Article has been enacted without any change. Since there are no special rules in respect of the limitation of liability for the claims mentioned in paragraph (e), those claims are not excepted from limitation.

**CANADA**

Article 3 is in force in the original text including paragraph (e).

**CROATIA**

The claims excepted from limitation are set out in Article 409 of the Maritime Code as follows:

Paragraph (a) corresponds to paragraph (a) of Article 3 of the Convention.

Paragraph (b) does not make reference to the CLC 1969 or to the 1992 Protocol (ratified by Croatia), but to the provisions of the Code with which the Convention has been implemented (articles 839-849). The definition of pollution damage in article 839(2) is the same as that in article 1(6) of CLC 1969.

Paragraph (c) corresponds to paragraph (c) of Article 3 of the Convention.

Paragraph (d) makes reference to the provisions of the Code in respect of damage caused by a nuclear ship (articles 850-864).

Paragraph (e) corresponds to the first part of paragraph (e) of Article 3 of the Convention and, therefore, claims of the servants of the owner are excepted from limitation. This is confirmed by article 410 of the Code.

**DENMARK**

The claims excepted from limitation, set out in section 235 (now section 172) of the Merchant Shipping Act, correspond only in part to those set out in Article 3 of the Convention. Their analysis seems therefore necessary.

*1) claims for salvage money, general average contributions or considerations according to contract for measures as mentioned in section 235(1), nos. 4, 5 or 6.*

The claims set out in section 235(1) under 4), 5) and 6) correspond to the claims set out in Article 2(1)(d), (e) and (f) of the Convention which, pursuant to Article 2(2) of the Convention, are not subject to limitation to the extent that they relate to remuneration under a contract with the person liable.



*2) claims as a result of damage or costs of the kind mentioned in section 267 and which are comprised by section 282(1).*

Section 267 of the Merchant Shipping Act (now sections 191 and 210) implements in part Articles 1 and 3 of the CLC 1969 while section 282(1) regulates the scope of application of section 267 and of all the subsequent sections regulating the liability of the owner for oil pollution. It follows that section 235(2) implements Article 3(b) of the Convention.

*3) claims subject to international convention or national law which regulates or prohibits limitation of liability for nuclear damage*

This provision corresponds to that in Article 3(c) of the Convention.

*4) claims as a result of nuclear damage caused by a nuclear powered ship*

This provision corresponds to that in Article 3(d) of the Convention.

*5) claims as a result of damage to person or property incurred on persons mentioned in section 234(1) and who perform work in the service of the ship or in connection with salvage*

This provision corresponds to that in Article 3(e) of the Convention but is expressed in very different terms. Instead of mentioning the claimants (who in the Convention are the "servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations" including "their heirs, dependants or other persons entitled to make such claims"), this provision indicates the persons against whom the claims are made, who are the shipowner, other person holding title to the ship, the operator, charterer, manager and the salvor. It is however expressly stated in the preparatory work that the claims mentioned in section 236(1), no. 5 also include claims from heirs, dependants and other persons entitled to make such claims.

*6) claims for interest and costs of proceedings*

There is no corresponding provision in the Convention. The Convention does not state whether the cost of the proceedings relating to claims subject to limitation is included in the limit or not. Therefore, this provision does not appear to be in conflict with the Convention.

One significant omission in section 236 is that claims for oil pollution damage are not mentioned.

#### **FINLAND**

Section 3 of Chapter 9 of the Maritime Code is identical to the corresponding section of the Swedish Maritime Code, except that in subsection 2 reference is made to Section 2 of Chapter 10. Reference is therefore made to the comments on the Swedish provision.

#### **FRANCE**

This Article is in force in its original text, including letter (e).

#### **GEORGIA**

The claims excepted from limitation as set out in Article 339 of the Maritime Code as follows:

Paragraph (a) corresponds to paragraph (a) of Article 3 of the Convention.

Paragraph (b) corresponds to paragraph (e).

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Paragraph (c) excludes claims in respect of wreck removal.

Paragraph (d) corresponds to paragraph (b) of Article 3 of the Convention (ratified by Georgia) but makes reference, rather than to the Convention, to the provisions on liability for oil pollution damage of the Code with which the Convention has been implemented.

Paragraph (e) refers generally to nuclear damage as regulated by the provisions of the Code.

**GERMANY**

This article is in force in its original text, including letter (e).

**GREECE**

Article 3 has become part of Greek law without any change, including, therefore, the whole of sub-paragraph (e). Claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations are excepted from limitation since neither of the two alternatives mentioned in that sub-paragraph materialize.

**HONG KONG, CHINA**

Article 3 is in force in its original text but the claims set out in paragraphs (b) and (c) are identified by a reference to the Acts implementing the CLC 1969 and the Vienna Convention of 1963 on Civil Liability for Nuclear Damages.

Section 16 of the Ordinance so in fact provides:

*(1) The claims excluded from the Convention by paragraph (b) of Article 3 of the Convention are claims in respect of any liability incurred under section 6 of the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Cap. 414).*

*(2) The claims excluded from the Convention by paragraph (c) of Article 3 of the Convention are claims made by virtue of section 10 or 11 of the Nuclear Installations Act 1965 (1965 c. 57 U.K.) as applied to Hong Kong.*

**IRELAND**

Article 3 has been given the force of law with the addition of the following provision in Section 12 of the MSA 1996:

*12. The reference in Article 3 of the 1976 Convention to a nuclear ship includes a reference to a ship carrying nuclear material (whether or not the ship is powered by such material).*

**JAPAN**

In the Limitation of Liability of Shipowners Act there are provisions corresponding to those of paragraphs (a)-(e).

**MEXICO**

Article 3 is in force in its original text.

**NETHERLANDS**

Article 3 is in force in its original text.

**NEW ZEALAND**

The relevant provision of MTA 1994 (section 86(2)) differs from Article 3 of the Convention in that in respect of the claims for pollution damage reference is made to the claims subject to Part XXV of the Act which deals with the CLC Convention in respect of oil pollution claims. New Zealand has implemented the 1992 Protocol. However, in the same way as for the 1976 Limitation Convention, New Zealand has paraphrased the CLC Convention in the MTA rather than directly giving it force of law.

No reference is made to claims against the owner of a nuclear ship for nuclear damage and, finally, no reference is made to claims by servants of the shipowner or salvor.

None of the above variations and omissions entails a material change as respects the Convention. In fact Part XXV of the Act should be seen broadly as meeting the intent of article 3(b) of the Convention although it should be noted that the CLC regime of strict liability and limits has been extended in New Zealand to all ships, not just CLC ships.

As regards claims against the owner of a nuclear ship for nuclear damage those claims are, it is thought, covered by the general exception of all claims in respect of nuclear damage; claims by servants of the shipowner or salvor ought to have been mentioned only if they had been made subject to a different limitation regime or if they had been excepted from limitation: the omission indicates that they are subject to the same limitation as the other claims.

**NORWAY**

The provisions of Section 173 of the Norwegian Maritime Code are similar, but not identical, to those of Section 236 of the Danish Maritime Code and, therefore, they are worthy of being considered.

*1) claims for salvage reward, including special compensation according to Section 449, contributions to general average, or remuneration pursuant to a contract relating to measures as mentioned in subparagraphs 4, 5 or 6 in the first paragraph of Section 172*

This provision corresponds to that in Section 236(1) of the Danish Maritime Code and the comments made in respect of that section apply.

*2) claims for oil pollution damage of the kind mentioned in Section 191*

This provision, which is missing in Section 236 of the Danish Maritime Code, does not differ in substance from that in Article 3(b) of the Convention, since Section 191 governs the liability and damages under the CLC 1969 and the Fund Convention 1971.

*4) claims in respect of nuclear damage caused by a nuclear ship*

This provision is substantially the same as that in Article 3(d) of the Convention.

*5) claims in respect of injury to an employee covered by the second paragraph of Section 171 and whose duties are connected with the operation of the ship or with salvage*

This provision corresponds to that in Section 236(5) of the Danish Maritime Code except that it refers only to (death or) personal injury and not to damage to (or loss of) property. Save for that, the same comments apply.

*Annex VI - Implementation by States Parties**6) claims for interest and legal costs*

See the comments in respect of Section 236(6) of the Danish Maritime Code.

**POLAND**

Article 3 is in force in its original text.

**SPAIN**

This Article is in force in its original text, including letter (e).

**SWEDEN**

Section 3 of Chapter 9 of the Swedish Maritime Code is similar, but not identical, to Section 236 of the Danish Maritime Code and to Section 173 of the Norwegian Maritime Code. It will be considered on the background of both such provisions.

*1. claims for salvage or contribution to general average or any contractual claim for payment in respect of measures referred to in Section 2 first paragraph items 4, 5 or 6.*

This provision corresponds to those in Section 236(1) of the Danish Maritime Code and in Section 173(1) of the Norwegian Maritime Code. The comments made in their respect apply.

*2. claims for oil pollution damage covered by sections 1 and 2 first paragraph of the Act (1973:1198) Concerning Liability in Case of Oil Pollution at Sea*

The comments made in respect of Section 173(2) of the Norwegian Maritime Code apply.

*3. claims subject to any international convention or national legislation governing or prohibiting limitation of liability for nuclear damage*

This provision is the same as that in Article 3(d) of the Convention.

*4. claims in respect of nuclear damage caused by a nuclear vessel*

This provision is the same as that in Section 173(4) of the Norwegian Maritime Code.

*5. claims on account of damage or injury caused to a pilot or any person employed by one referred to in section 1 first paragraph and whose duties are connected with the ship or the salvage operation*

This provision corresponds to that in Section 173(5) of the Norwegian Maritime Code except that reference is made also to damage (to property).

*6. claims for interest or compensation for costs of the action.*

See the comments in respect of Section 236(6) of the Danish Maritime Code.

**UNITED KINGDOM**

Section 4 of Part II of Schedule 7 to the MSA 1995 sets out certain complementary provisions to Article 3 of the Convention.

As respects Article 3(a) it so provides:

*(1) The claims excluded from the Convention by paragraph (a) of article 3 include claims under article 14 of the International Convention on Salvage, 1989, as set out in Part 1 of Schedule 11 and corresponding claims under a contract.*

After the adoption of the 1996 Protocol the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 provided that in the text of the Convention, as set out in Part I of Schedule 7, for paragraph (a) of Article 3 there shall be substituted the following:

*(a) claims for salvage, including, if applicable, any claim for special compensation under Article 14 of the International Convention on Salvage 1989, as amended, or contribution in general average;*

*(2) The claims excluded from the Convention by paragraph (b) of article 3 are claims in respect of any liability incurred under section 153 of this Act.*

The substitution for the reference to the CLC 1969 of the reference to section 153 of the MSA 1995 is due to the fact that the United Kingdom has not given the force of law to the CLC 1969 but has incorporated with several changes its provisions as amended by the 1992 Protocol, in the Merchant Shipping Act 1995.

*(3) The claims excluded from the Convention by paragraph (c) of article 3 are claims made by virtue of any of sections 7 to 11 of the Nuclear Installations Act 1965.*

#### ARTICLE 4

##### *Conduct barring limitation*

***A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.***

##### AUSTRALIA

This Article is in force in its original text.

##### BAHAMAS

Article 4 of the Convention is in force in its original text.

##### BARBADOS

Article 4 of the Convention is in force in its original text.

##### BELGIUM

This Article has been enacted without any change.

##### CANADA

Article 4 is in force in its original text.

##### CROATIA

In the English translation of the relevant provision of the Croatian

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Maritime Code (article 410) in lieu of the word “recklessly” the words “by gross negligence” are used and the provision reads:

*The ship operator's right to avail himself of the limitation of liability provided in Article 408 of this Law shall be forfeited if it is proved that the damages arose as the result of acts or omissions which the ship operator performed wilfully or by gross negligence with the knowledge that the damages could probably arise.*

Although of course the original text of Article 4 is in force in Croatia, the use in the corresponding provision of the Maritime Code of the term “gross negligence” may be relevant for the interpretation of Article 4. It would appear that there has been some problem when Article 410 of the Maritime Code was drafted because in Croatian law the Roman dictum “*culpa lata dolo equiparatur*” applies, but it was overcome by the consideration that the reckless action had a nature similar to the “*dolus eventualis*”.

**DENMARK**

The English translation of section 237 of the Merchant Shipping Act is almost identical to the translation of article 410 of the Croatian Maritime Code. It in fact reads as follows:

*The responsible party cannot limit his liability if it is proved that he himself has caused the loss or damage intentionally or grossly negligently and with the understanding that such damage would probably be caused.*

The same comments therefore apply.

**FINLAND**

The relevant provision of the Finnish Maritime Code (section 4 of chapter 8) corresponds word for word to that of the Swedish Maritime Code which is practically identical to that of the Danish Maritime Code. The comments made in respect of Croatia therefore apply also in this case.

**FRANCE**

Article 4 is in force in its original text.

**GEORGIA**

Article 338 of the Maritime Code so provides in the English translation made available by the Georgian Maritime Administration:

*The shipowner's liability may not be limited if it is proved that the damage was the result of his own action or omission committed with the intention of causing such damage or out of presumption, with the awareness of the possibility of causing it.*

It is thought that the meaning of the word in Russian, translated with “out of presumption” is, probably, the same as that of the word “recklessly” or, in French, “*temerairement*”.

**GERMANY**

Article 4 is in force in its original text.

**GREECE**

Article 4 has become part of Greek law without any change.

**HONG KONG, CHINA**

Article 4 is in force in its original text.

**IRELAND**

Article 4 has been given the force of law without any change or addition.

**JAPAN**

Article 4 has been incorporated into the Limitation of Liability of Shipowners Act.

**MEXICO**

Article 4 is in force in its original text.

**NETHERLANDS**

Article 4 is in force in its original text.

**NEW ZEALAND**

The difference between section 85(2) MTA and article 4 of the Convention is not material and does not affect its meaning.

**NORWAY**

The English translation of section 174 of the Norwegian Maritime Code corresponds to that of the relevant provision of the Danish Maritime Code and, therefore, the same comments apply.

**POLAND**

Article 4 is in force in its original text.

**SPAIN**

Article 4 is in force in its original text.

**SWEDEN**

See the comments made in respect of Finland.

**UNITED KINGDOM**

This article is in force in its original text.

**ARTICLE 5**  
*Counterclaims*

*Where a person entitled to limitation of liability under the rules of this Convention has a claim against the claimant arising out of the same occurrence, their respective claims shall be set off against each other and the provisions of this Convention shall only apply to the balance, if any.*

**AUSTRALIA**

This article is in force in its original text.

**BAHAMAS**

This article is in force in its original text.

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**BARBADOS**

This article is in force in its original text.

**BELGIUM**

This Article has been enacted without any change.

**CANADA**

Article 5 is in force in its original text.

**CROATIA**

This provision is in force in its original text even if it is not included in the Croatian Maritime Code.

**DENMARK**

This provision has been enacted without any material change in section 235(2) of the Merchant Shipping Act.

**FINLAND**

This provision has been enacted without any material change in the last paragraph of section 2 of chapter 9.

**FRANCE**

Article 5 is in force in its original text.

**GEORGIA**

This provision has been enacted without any material change in article 341 of the Maritime Code.

**GERMANY**

This article is in force in its original text.

**GREECE**

Article 5 has become part of Greek law without any change.

**HONG KONG, CHINA**

This article is in force in its original text.

**IRELAND**

Article 5 has been given the force of law without any change or addition.

**JAPAN**

Article 5 has been incorporated into the Limitation of Liability of Shipowners Act.

**MEXICO**

Article 5 is in force in its original text.

**NETHERLANDS**

Article 5 is in force in its original text.

**NEW ZEALAND**

While there is no direct enactment in New Zealand of the set-off



provisions contained in this article of the Convention, there is nothing which would fetter the application of normal principles of set-off. The result under the MTA is therefore perhaps unlikely to be any different from the result intended by the Convention absent specific contractual position to the contrary between the person liable and the claimant.

#### **NORWAY**

This provision has been enacted without any material change in section 172 of the Maritime Code.

#### **POLAND**

Article 5 is in force in its original text.

#### **SWEDEN**

Same as Finland.

#### **UNITED KINGDOM**

This article is in force in its original text.

### **ARTICLE 6**

#### *The general limits*

- 1. The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:*
  - (a) in respect of claims for loss of life or personal injury,*
    - (i) 333,000 Units of Account for a ship with a tonnage not exceeding 500 tons,*
    - (ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):*
      - for each ton from 501 to 3,000 tons, 500 Units of Account;*
      - for each ton from 3,001 to 30,000 tons 333 Units of Account;*
      - for each ton from 30,001 to 70,000 tons, 250 Units of Account;*
      - and*
      - for each ton in excess of 70,000 tons, 167 Units of Account,*
  - (b) in respect of any other claims,*
    - (i) 167,000 Units of Account for a ship with a tonnage not exceeding 500 tons,*
    - (ii) for a ship with a tonnage in excess thereof the following amount in addition to that mentioned in (i):*
      - for each ton from 501 to 30,000 tons, 167 Units of Accounts;*
      - for each ton from 30,001 to 70,000 tons, 125 Units of Account;*
      - and*
      - for each ton in excess of 70,000 tons, 83 Units of Account.*
- 2. Where the amount calculated in accordance with paragraph 1(a) is insufficient to pay the claims mentioned therein in full, the amount calculated in accordance with paragraph 1(b) shall be available for*

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*payment of the unpaid balance of claims under paragraph 1(a) and such unpaid balance shall rank rateably with claims mentioned under paragraph 1(b).*

*3. However, without prejudice to the right of claims for loss of life or personal injury according to paragraph 2, a State Party may provide in its national law that claims in respect of damage to harbour works, basins and waterways and aids to navigation shall have such priority over other claims under paragraph 1(b) as is provided by that law.*

*4. The limits of liability for any salvor not operating from any ship or for any salvor operating solely on the ship to, or in respect of which he is rendering salvage services, shall be calculated according to a tonnage of 1,500 tons.*

*5. For the purpose of this Convention the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.*

**AUSTRALIA**

Paragraphs (1), (2), (4) and (5) of article 6 are in force in their original text. Pursuant to paragraph (3), section 8 of the Act provides that claims in respect of damage to harbour works, basins, waterways and aids to navigation have priority over any other claim under paragraph 1(b) of article 6.

**BAHAMAS**

Paragraphs (1), (2) and (4) are in force in their original text and the option granted by paragraph (3) has not been exercised. In connection with paragraph (5) the following provisions are made in section 5(2) and (3) of Part II of the Second Schedule to the Act:

*(2) For the purposes of Article 6 and this paragraph a ship's tonnage shall be its gross tonnage calculated in such manner as may be prescribed by an order made by the Minister.*

*(3) Any order under this paragraph shall, for far as appears to the Minister to be practicable, give effect to the regulations in Annex I of the International Convention on Tonnage Measurement of Ships 1969.*

**BARBADOS**

The position is the same as in the Bahamas.

**BELGIUM**

This Article has been enacted without any change except that:

(a) special limits are set out by Article 18 of Law 11 April 1989 for claims by the public authority in respect of the raising, removal, destruction or the rendering harmless of a ship, referred to in Article 2(1)(d) and (e), which has not been implemented. Article 18 of Law 11 April 1989 so provides:

*Le propriétaire d'un navire de mer, qui - en vertu de l'article 16 - est débiteur du paiement des frais, peut limiter sa responsabilité lors de ce paiement, aux montants suivants:*

1° Pour son navire dont la jauge ne dépasse pas 500 tonneaux: quinze millions de francs.

2° Pour son navire dont la jauge dépasse 500 tonneaux, le montant indiqué au 1° majoré de:

- dix-huit mille francs par tonneau de jauge pour chaque tonneau supplémentaire de 501 à 6 000 tonneaux;
- sept mille francs par tonneau de jauge pour chaque tonneau supplémentaire de 6 001 à 70 000 tonneaux;
- cinq mille francs par tonneau de jauge pour chaque tonneau supplémentaire au delà des 70 000 tonneaux.

L'assureur du propriétaire susvisé peut invoquer la même limitation.

Le Roi peut à tout moment adapter les montants susvisés en tentant compte de la situation économique.

Le propriétaire responsable n'est pas en droit de limiter sa responsabilité s'il est prouvé que le dommage résulte de son fait ou de son omission personnels, commis avec l'intention de provoquer un tel dommage, ou commis témérement et avec conscience qu'un tel dommage en résulterait probablement.

Pour l'application de cet article il est entendu par tonneau de jauge, pour les navires de mer soumis à la Convention internationale de 1969 sur le jaugeage des navires, le tonnage brut calculé conformément aux règles de mesure, prévues à l'Annexe 1 de cette Convention.

Pour les autres navires de mer, le Roi détermine les limites de responsabilité ainsi que les critères et le base de leur calcul.

Belgium has not availed itself of the option granted by Article 6(3).

(b) Special limits are set out for ships and other craft intended for navigation on inland waterways.

Article 2 of Decree 8 November 1989 so provides:

§1. Pour l'application du premier paragraphe de l'article 6 de la Convention LLMC, les limites de responsabilité et la base de calcul de la limitation de la responsabilité à l'égard des créances autres que celles mentionnées à l'article 3 du présent arrêté et nées d'un même événement, sont établies comme suit:

a) à l'égard des créances pour mort ou lésions corporelles:

(i) pour un bâtiment non affecté au transport de marchandises, notamment un bâtiment à passagers: dix mille francs pour chaque mètre cube de déplacement d'eau du bâtiment à l'enfoncement maximal autorisé;

(ii) pour un bâtiment affecté au transport de marchandises: dix mille francs par tonne de port en lourd du bâtiment;

(iii) pour un pousseur ou remorqueur: trente cinq mille francs pour chaque KW de la puissance de ses machines de propulsion;

(iv) pour les engins flottants: leur valeur au moment de l'événement dommageable;

b) à l'égard de toutes les autres créances, la moitié des montants visés à la lettre a).

§2. Les limites de la responsabilité de celui qui assiste un bâtiment ou engin

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*flottant et qui, ce faisant, n'agit pas à partir d'un navire de mer, d'un bâtiment ou d'un engin flottant, ou qui, ce faisant, agit uniquement à bord de ce bâtiment ou engin flottant, sont calculées selon une jauge de 350 tonnes de port en lourd.*

Article 1(1), (2) and (3) of Decree 24 November 1989 so provides:

§1. *Sont assimilés aux bateaux de navigation intérieure pour l'application des articles 2 et 3, tant qu'ils servent exclusivement sur les eaux intérieures:*

*1° les sortes suivantes de bâtiments:*

- *les bâtiments exploités par une autorité publique ou par un service public, quel que soit le propriétaire de ces bâtiments;*
- *les bâtiments affectés à la plaisance ou à la recherche scientifique;*
- *les hydroglisseurs;*
- *les bacs;*
- *les pousseurs;*

*2° les engins flottants comme les dragues, grues, élévateurs et tous autres engins et outillages flottants et mobiles de nature analogue.*

§2. *Ne sont pas des bâtiments ou des engins flottants dans le sens du paragraphe 1er: les planches à voile et les autres engins de plage ou de récréation aquatique.*

§3. *Sont considérées être les eaux intérieurs pour l'application du paragraphe 1er; les eaux visées au premier alinéa de l'article 5 de la Convention sur la mer territoriale et la zone contiguë faite à Genève le 29 avril 1958, ainsi que les eaux des ports, établis par le règlement de police et de navigation de la mer territoriale, des ports et plages du littoral belge.*

## CANADA

Paragraph (1) is in force in the text of the 1996 Protocol. The limits under Article 6(1) of the 1976 Convention as amended by the 1996 Protocol are set out below:

1. *The limits of liability for claims other than those mentioned in Article 7, arising on any distinct occasion, shall be calculated as follows:*
  - (a) *in respect of claims for loss of life or personal injury,*
    - (i) *2 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,*
    - (ii) *for a ship with a tonnage in excess thereof, the following amount, in addition to that mentioned in (i):*  
*for each ton from 2,001 to 30,000 tons, 800 Units of Account;*  
*for each ton from 30,001 to 70,000 tons 600 Units of Account;*  
*for each ton in excess of 70,000 tons, 400 Units of Account,*
  - (b) *in respect of any other claims,*
    - (i) *1 million Units of Account for a ship with a tonnage not exceeding 2,000 tons,*
    - (ii) *for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):*  
*for each ton from 2,001 to 30,000 tons, 400 Units of Accounts;*

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*for each ton from 30,001 to 70,000 tons, 300 Units of Account; and for each ton in excess of 70,000 tons, 200 Units of Account."*

Article 6, paragraphs (2), (4) and (5) are in force in their original text. The option granted by Paragraph (3) has not been exercised.

**CROATIA**

Paragraphs (1), (2), (4) and (5) have been enacted in article 411 of the Maritime Code without any change, except that the increases provided in the Convention in respect of ships of over 500 tons do not apply to "boats". Article 419 so in fact provides:

*The provisions of articles 406 to 476 of this Law shall also apply to boats, provided that for the application of the provisions a boat is considered a ship of 500 gross tons.*

**DENMARK**

Paragraphs (1), (2), (4) and (5) have been enacted in section 238(2), (3), (5) and (6) of the Merchant Shipping Act without any material change except that reference is directly made in these provisions to the SDR and that a limit for special categories of ship calculated on a minimum tonnage of 5,000 tons is provided for warships and ships employed on a non-commercial service. Article 243(1) of the Maritime Code so in fact provides:

*For warships and other ships which are used for national non-commercial purposes, the liability limits shall in no event be calculated according to a tonnage under 5,000 ton. The liability cannot be limited for loss or damage which is due to the special properties of the ship or its use while it is being used for national non-commercial purposes. The provision of the first and second clauses hereof does not apply to icebreakers and ships which are mainly used in connection with salvage.*

The option granted by article 6(3) of the Convention has not been exercised.

**FINLAND**

The position is the same as in Denmark. The relevant provisions have been enacted in section 5(2), (3), (5) and (6) of chapter 9 of the Maritime Code. The provision relating to the minimum tonnage in respect of warships and ships employed on a non-commercial service is in the following terms:

*The limits of liability for warships and other vessels which at the time of the event are owned or used by a State and are used exclusively for State purposes and not commercially may in no case be less than the limits applicable to a vessel having a tonnage of 5,000. Nevertheless, if a claim is for compensation for loss or damage caused by the special characteristics or employment for such a vessel, there shall be no right to limit liability. The provisions of this paragraph do not apply to vessels used primarily for ice breaking or salvage.*

**FRANCE**

Paragraphs (1), (2), (4) and (5) are in force in their original text and the option granted by paragraph (3) has not been exercised.

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**GEORGIA**

Paragraphs (1) and (2) have been enacted in article 340(1) and (2) without any change, while paragraphs (4) and (5) have not been enacted. It is not clear, however, whether the option granted by article 15(2)(b) of the Convention has been exercised or not. In fact article 340(4) of the Maritime Code so provides:

*For the purposes of determining the limit of the shipowner's liability a ship of less than 300 units capacity is considered to be a ship of 300 units capacity.*

In fact a tonnage (it is assumed that "capacity" is used with the meaning of tonnage) of 300 tons would be relevant only if a lower limit for ships of such a tonnage were adopted. The option granted by article 6(3) of the Convention has not been exercised.

**GERMANY**

Paragraphs (1), (2), (4) and (5) are in force in their original text and the option granted by paragraph (3) has not been exercised.

**GREECE**

Article 6 has become part of Greek law without any change including, therefore, paragraph (3). Greece, however, has not availed itself of the right granted to States Parties thereunder.

**HONG KONG, CHINA**

Article 6 is in force in its original text except that in connection with its paragraph (5) the following provisions are made in section 17 (2) and (3) of the Ordinance:

*(2) For the purposes of Article 6 of the Convention and this section a ship's tonnage is its gross tonnage calculated in such manner as may be prescribed by an order made by the Governor.*

*(3) Any order under this section shall, so far as appears to the Governor to be practicable, give effect to the regulations in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.*

Since, pursuant to section 12 of the Ordinance, the Convention has the force of law subject to Part III of the Ordinance when the implementing rules (including those of section 17) are set out in Hong Kong, the gross tonnage is calculated in accordance with the tonnage measurement rules contained in Annex I to the 1969 Convention on Tonnage Measurement of Ships only if it appears to the Hong Kong competent authority to be practicable to apply such rules.

**IRELAND**

Article 6 has been given the force of law without any change or addition.

**JAPAN**

Paragraphs (1), (2), (4) and (5) have been incorporated into the Limitation of Liability of Shipowners Act. The option granted by paragraph (3) has not been exercised.

**MEXICO**

Article 6 is in force in its original text.

**NETHERLANDS**

Paragraphs (1), (4) and (5) are in force in their original text. However the option granted by article 15(2)(b) of the Convention has been exercised and the following provision is contained in article 8:755(2) Civil Code:

*For ships which, according to their construction, are exclusively or principally destined to carry persons and which have a tonnage not exceeding 300 tons, the amount to which liability for the claims set out in Paragraph (1) (introduction) and (b)(1°) may be limited in accordance with this Title, may be set at a lower number of units of account than that referred to in Paragraph (1)(b)(1°).*

Also the option granted by article 6(3) has been exercised and, in addition to the limits in respect of death and personal injury (referred to as “life fund”) and of other claims (referred to as “property fund”) special limits have been provided in respect of the claims set out in article 8:752(1)(d) and (e) Civil Code (corresponding to article 2(1)(d) and (e) of the Convention). Article 8:755(1)(c) so in fact provides:

*(c) In respect of claims as referred to in Article 752(1)(d) and (e) (wreck fund)*

*(1°) 262 000 units of account for a ship with a tonnage not exceeding 500 tons;*

*(2°) for a ship with a tonnage in excess of 500 tons, the amount mentioned under (1°) is increased by*

*- 333 units of account for each additional ton from 501 to 6000;*

*- 125 units of account for each additional ton from 6 001 to 70 000;*

*- 83 units of account for each additional ton in excess of 70 000 tons.*

**NEW ZEALAND**

Paragraphs (1), (2), (4) and (5) have been enacted without any change in section 87(1), (3), (4) and (5)(a) (b) of the MTA 1994 save that the option granted by article 15(2)(b) has been exercised and section 87(3) of the MTA 1994 so provides:

*The limit of liability in respect of any claim other than a claim for which a limit is set under subsection (1) or subsection (2) of this section shall be:*

*(a) in the case of a ship of not more than 300 gross tons, 83,333 units of account;*

*(b) in the case of a ship of more than 300 gross tons, but not more than 500 gross tons, 167,000 units of account;*

*(c) in the case of a ship of more than 500 gross tons, 167,000 units of account plus a further number of units of account calculated as follows:*

The claims in respect of which limits are set out in subsections (1) and (2) are those for loss of life of and personal injury to passengers and to other persons. The limits for ships with a tonnage in excess of 500 tons are those set out in the Convention. The following provision has also been added, for the purpose of calculation of the tonnage in section 5(c):

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*Where the gross tonnage of a ship is unable to be ascertained:*

- (i) The Director, on receiving from or by the direction of the Court hearing the case in which the tonnage of the ship is in question such evidence of the dimensions of the ship as is available, shall estimate what the gross tonnage of the ship would have been if the ship had been duly measured in accordance with the relevant tonnage measurement rules, and give a certificate of the tonnage as estimated by the Director; and*
- (ii) The tonnage so estimated shall be taken to be the gross tonnage of the ship.*

The option granted by article 6(3) of the Convention has not been exercised.

#### **NORWAY**

The position is the same as in Denmark. The relevant provisions have been enacted in section 175(2), (3), (5) and (6) of the Maritime Code. The provision relating to the minimum tonnage in respect of special categories of ships is in the following terms:

*The limits of liability for warships and other ships engaged in non-commercial State activities, cf. subsections 2 and 3 of Section 175, shall in no case be calculated according to a lower tonnage than 5,000 tons. The right to limitation of liability does not extend to claims relating to damage or loss due to the particular characteristics or use of warships. The same applies correspondingly to damage or loss caused by other ships being used in non-commercial State activities. The provisions of this paragraph do not apply to ships mainly used in ice-breaking or salvage.*

#### **POLAND**

Paragraphs (1), (2) and (4) are in force in their original text. The option granted by paragraph (3) has been exercised by Poland.

#### **SWEDEN**

The position is the same as in Finland.

#### **UNITED KINGDOM**

Paragraphs (1), (2) and (4) are in force in their original text and the option granted by paragraph (3) has not been exercised. In connection with paragraph (5) the following provisions have been made in section 5(2) and 5(3) of Part II of Schedule 7 to the Act:

*(2) For the purposes of article 6 and this paragraph a ship's tonnage shall be its gross tonnage calculated in such manner as may be prescribed by an order made by the Secretary of State.*

*(3) Any order under this paragraph shall, so far as appears to the Secretary of State to be practicable, give effect to the regulations in Annex I of the International Convention on Tonnage Measurement of Ships, 1969.*



**ARTICLE 7***The limit for passenger claims*

*1. In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 46,666 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate, but not exceeding 25 million Units of Account.*

*2. For the purpose of this Article "claims for loss of life or personal injury to passengers of a ship" shall mean any such claims brought by or on behalf of any person carried in that ship:*

*(a) under a contract of passenger carriage, or*

*(b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.*

**AUSTRALIA**

This Article is in force in its original text.

**BAHAMAS**

The implementation, without any change, of article 7 of the Convention has been accompanied by the following provisions contained in section 6 of Part II of the Second Schedule to the MSA 1989:

*(1) In the case of a passenger steamer within the meaning of Part IV of the Merchant Shipping Act Chapter 246, the ship's certificate mentioned in paragraph 1 of article 7 shall be the certificate issued under section 17 of that Act.*

*(2) In paragraph 2 of Article 7 the reference to claims brought on behalf of a person includes a reference to any claim in respect of the death of a person under the Fatal Accidents Act Chapter 61 of the Laws of The Bahamas.*

**BARBADOS**

The implementation, without any change of article 7 has been accompanied by the following provision contained in section 6(1) of Part II of the Second Schedule to the Shipping Act, 1994:

*In paragraph 2 of Article 7 the reference to claims brought on behalf of a person includes a reference to any claim in respect of the death of a person under the Accidents Compensation (Reform) Act, Cap. 193A of the Laws of Barbados.*

**BELGIUM**

This Article has been implemented without any change except that special limits are set out for passenger claims in respect of ships intended for navigation on inland waterways. Article 3 of Decree 24 November 1989 so provides:

*§1. Dans le cas des créances résultant de la mort ou de lésions corporelles*

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*des passagers d'un bâtiment et nées d'un même événement, la limite de la responsabilité du propriétaire du bâtiment est fixée à une somme de 5 500 000 francs par capita multipliée par le nombre de passagers effectivement transportés par le bâtiment au moment de l'événement.*

*Ces limites ne peuvent pas être inférieures à trente six millions de francs par bâtiment ou supérieures aux montants suivants:*

- a) cent cinquante millions de francs pour les bâtiments transportant au maximum 100 passagers;*
- b) trois cents millions de francs pour les bâtiments transportant au maximum 180 passagers;*
- c) six cents millions de francs pour les bâtiments transportant plus de 180 passagers.*

§2. *Aux fins du présent article, "créances résultant de la mort ou de lésion corporelles des passagers d'un bâtiment" signifie toute créance formée par toute personne transportée sur ce bâtiment ou pour le compte de cette personne:*

- a) en vertu d'un contrat de transport de passagers, ou*
- b) qui, avec le consentement du transporteur, accompagne un véhicule ou des animaux vivants faisant l'objet d'un contrat de transport de marchandises.*

**CANADA**

By section 575(2) of The Canada Shipping Act, Article 7 of the Convention has the force of law in Canada on the coming into force of Section 578 of the Act. Article 7(1) has been amended in accordance with the 1996 Protocol as follows:

*1. In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.*

*2. For the purpose of this Article "claims for loss of life or personal injury to passengers of a ship" shall mean any such claims brought by or on behalf of any person carried in that ship:*

- (a) under a contract of passenger carriage, or*
- (b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.*

By Section 579 of The Canada Shipping Act, on the recommendation of the Minister of Transport, the Governor in Council may, by Order, declare that any amendments to the limits specified in paragraph 1 of Article 6 or 7 of the Convention made in accordance with Article 8 of the Protocol have the force of law in Canada.

**CROATIA**

Article 7 of the Convention has been enacted without any material change in article 412 of the Maritime Code.

**DENMARK**

Article 7(1) has been enacted without any material change in section 238(1) of the Merchant Shipping Act. Article 7(2) has not been enacted.

**FINLAND**

The position is the same as in Denmark. The relevant provision is section 5(1) of chapter 9 of the Maritime Code.

**FRANCE**

Article 7 is in force in its original text.

**GEORGIA**

Article 7 of the Convention has not been enacted in the Maritime Code.

**GERMANY**

Article 7 is in force in its original text.

**GREECE**

Article 7 has become part of Greek law without any change.

**HONG KONG**

Article 7 is in force in its original text. The following implementing provisions have been enacted in section 18 of the Ordinance:

*(1) In the case of a passenger ship within the meaning of Part II of the Merchant Shipping (Safety) Ordinance (Cap. 369) the ship's certificate mentioned in paragraph 1 of Article 7 of the Convention is the passenger ship's certificate issued under section 14 of that Ordinance.*

*(2) In paragraph 2 of Article 7 of the Convention the reference to claims brought on behalf of a person includes a reference to any claim in respect of the death of a person under the Fatal Accidents Ordinance (Cap. 22).*

**IRELAND**

Article 7 has been given the force of law without any change or addition.

**JAPAN**

Article 7 has been incorporated into the Limitation of Liability of Shipowners Act.

**MEXICO**

Article 7 is in force in its original text.

**NETHERLANDS**

Article 7 is in force in its original text.

**NEW ZEALAND**

Article 7 has been enacted without any material change in sections 87(2) and 87(4)(d) of the MTA 1994.

**NORWAY**

Only Article 7(1) has been enacted, without any change, in section 175(1) of the Maritime Code.

*Annex VI - Implementation by States Parties***POLAND**

Article 7 is in force in its original text.

**SWEDEN**

The position is the same as in Finland.

**UNITED KINGDOM**

To Article 7 of the Convention, which is in force in its original text, there has been added in Part II of Schedule 7 to the MSA 1995 the following provision:

*Limit for passenger claims*

6. (1) *In the case of a ship for which there is in force a Passenger Ship Safety Certificate or Passenger Certificate, as the case may be, issued under or recognised by safety regulations, the ship's certificate mentioned in paragraph 1 of article 7 shall be that certificate.*
- (2) *In paragraph 2 of article 7 the reference to claims brought on behalf of a person includes a reference to any claim in respect of the death of a person under the Fatal Accidents Act 1976, the Fatal Accidents (Northern Ireland) Order 1977 or the Damages (Scotland) Act 1976.*

**ARTICLE 8***Unit of account*

*1. The Unit of Account referred to in Articles 6 and 7 is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in Articles 6 and 7 shall be converted into the national currency of the State in which limitation fund shall have been constituted, payment is made, or security is given which under the law of the State is equivalent to such payment. The value of a national currency in terms of the Special Drawing Right, of a State Party which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right, of a State Party which is not a member of the International Monetary Fund, shall be calculated in a manner determined by that State Party.*

*2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 may, at the time of signature without reservation as to ratification, acceptance or approval or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as follows:*

- (a) in respect of Article 6, paragraph 1(a) at an amount of:*
  - (i) 5 million monetary units for a ship with a tonnage not exceeding 500 tons;*

- (ii) *for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):*
  - for each ton from 501 to 3,000 tons, 7,500 monetary units;*
  - for each ton from 3,001 to 30,000 tons, 5,000 monetary units;*
  - for each ton from 30,001 to 70,000 tons, 3,750 monetary units; and*
  - for each ton in excess of 70,000 tons, 2,500 monetary units; and*
- (b) *in respect of Article 6, paragraph 1(b), at an amount of:*
  - (i) *2.5 million monetary units for a ship with a tonnage not exceeding 500 tons;*
  - (ii) *for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):*
    - for each ton from 501 to 30,000 tons, 2,500 monetary units;*
    - for each ton from 30,001 to 70,000 tons, 1,850 monetary units; and*
    - for each ton in excess of 70,000 tons, 1,250 monetary units; and*
- (c) *in respect of Article 7, paragraph 1, at an amount of 700,000 monetary units multiplied by the number of passengers which the ship is authorized to carry according to its certificate, but not exceeding 375 million monetary units.*

*Paragraphs 2 and 3 of Article 6 apply correspondingly to subparagraphs (a) and (b) of this paragraph.*

3. *The monetary unit referred to in paragraph 2 corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of this sum into the national currency shall be made according to the law of the State concerned.*

4. *The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 shall be made in such a manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 6 and 7 as is expressed there in units of account. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1, or the result of the conversion in paragraph 3, as the case may be, at the time of the signature without reservation as to ratification, acceptance or approval, or when depositing an instrument referred to in Article 16 and whenever there is a change in either.*

#### AUSTRALIA

Article 8 is in force in its original text.

#### BAHAMAS

The first part of article 8(1), which is the relevant part for a State member of the IMF, is in force in its original text, but additional provisions have been enacted in part II of the First Schedule to the MSA 1989, in terms identical to those enacted in the United Kingdom, except that the authority competent is the Central Bank.

#### BARBADOS

The position is the same as in the Bahamas.

*Annex VI - Implementation by States Parties***BELGIUM**

This Article has been implemented without any change. Article 48 of Book II, Title II of the Code of Commerce, as amended by Law 11 April 1989, provides that the amounts mentioned in Articles 6 and 7 of the Convention shall be converted into the Belgian currency at the time when the Court verifies provisionally that the limits indicated by the person seeking the benefit of limitation are correct.

**CANADA**

Article 8 is in force in its original text with respect to its wording. Article 8 paragraph 2 reflects the revised limits of the 1996 Protocol and incorporates the 1996 Protocol as follows:

2. *Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 may, at the time of signature without reservation as to ratification, acceptance or approval or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as follows:*

*(a) in respect of Article 6, paragraph 1(a) at an amount of:*

*(i) 30 million monetary units for a ship with a tonnage not exceeding 2,000 tons;*

*(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):*

*for each ton from 2,001 to 30,000 tons, 12,000 monetary units;*

*for each ton from 30,001 to 70,000 tons, 9,000 monetary units; and*

*for each ton in excess of 70,000 tons, 6,500 monetary units; and*

*(b) in respect of Article 6, paragraph 1(b), at an amount of:*

*(i) 15 million monetary units for a ship with a tonnage not exceeding 2,000 tons;*

*(ii) for a ship with a tonnage in excess thereof, the following amount in addition to that mentioned in (i):*

*for each ton from 2,001 to 30,000 tons, 6,000 monetary units;*

*for each ton from 30,001 to 70,000 tons, 4,500 monetary units; and*

*for each ton in excess of 70,000 tons, 3,000 monetary units; and*

*(c) in respect of Article 7, paragraph 1, at an amount of 2,625,000 monetary units multiplied by the number of passengers which the ship is authorized to carry according to its certificate.*

*Paragraphs 2 and 3 of Article 6 apply correspondingly to subparagraphs (a) and (b) of this paragraph.*

**CROATIA**

In articles 411 and 412 of the Maritime Code, where the limits are set out, reference is made to the SDR. Then article 413 provides as follows:

*The sum specified in Articles 411 and 412 of this Law are converted into the local currency in conformity with the value of the currency on the date the fund was constituted and payment shall be effected or and adequate guarantee offered.*

It appears, therefore, that the relevant part of Article 8 of the Convention has been enacted in the Code without any material change.

#### **DENMARK**

The limits of liability are indicated in SDRs, rather than in units as in the Convention and for the definition of the SDR reference is made in section 238 to section 366 of the Merchant Shipping Act which provides as follows:

*By SDR shall be understood the Special Drawing Rights (SDR) used by the International Monetary Fund. The conversion of SDR to Danish currency is made according to the rate of exchange on the date when security is placed for the liability or if security is not placed on the date of payment. If a limitation fund is established according to Part 10 or 12 hereof, the conversion is, however, made according to the rate of exchange on the date where the limitation fund is deemed to have been established according to section 353(3), unless before the establishment of the fund security is provided for the liability.*

This provision is in line with art. 8(1) and art. 11(1) of the Convention.

#### **FINLAND**

Also in Finland the limits are indicated in SDRs, but there does not appear to be in the Maritime Code a definition of SDR, nor any provision on the date of conversion.

#### **FRANCE**

Article 8 is in force in its original text.

#### **GEORGIA**

Article 346 of the Maritime Code so provides:

*The unit of accounts is the "special drawing rights" unit as defined by the IMF. The rate is determined by the IMF. The sums mentioned in Points 340.1 are converted into the national currency of the state in whose court the case is being examined.*

There does not appear to be any provision in respect of the date of the conversion.

#### **GERMANY**

Article 8 is in force in its original text.

#### **GREECE**

Article 8 has become part of Greek law without any change. Paragraphs (2) and (3), however, are not operative since Greece is a member of the International Monetary Fund.

#### **HONG KONG**

Article 8 is in force in its original text. Since the provisions of paragraph (1) are applicable, those of paragraphs (2) and (3) are not operative.

#### **IRELAND**

Section 13 of the MSA 1996 so provides:

13. (1) *For the purpose of the limits of liability specified in Articles 6 and 7*

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*of the 1976 Convention, the value in the currency of the State of the unit of account specified in that Convention shall be taken to be the value, ascertained in accordance with Article 8 of that Convention, in that currency of such a unit of account on the relevant day specified in the said Article or, if its value on that day cannot be so ascertained, its value in that currency on the latest day before such day on which it can be so ascertained.*

*(2) For the purposes of this section a certificate purporting to be signed by an officer of the Central bank and stating that:*

- (a) a specified amount in the currency of the State is the value of such a unit of account on a specified day, or*
- (b) the value in the currency of the State of such a unit of account on a specified day cannot be ascertained in accordance with the 1976 Convention and that a specified amount in the currency of the State is the value, calculated in accordance with that Convention, of such a unit of account on a specified day (being the latest day before the first-mentioned specified day on which such value can be ascertained as aforesaid)*

*shall be admissible as evidence of the facts stated in the certificate.*

**JAPAN**

Article 8(1) has been incorporated into the Limitation of Liability of Shipowners Act.

**MEXICO**

Article 8 is in force in its original text.

**NETHERLANDS**

Article 8 is in force in its original text. Its provision are supplemented by Article 8:759(1) Civil Code which so provides:

*The unit of account referred to in Articles 755 and 756 is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in Articles 755 and 756 shall be converted into Dutch currency according to the exchange rate at the day the person liable complies with a court order rendered in accordance with Article 642c of the Code of Civil Procedure. The value of the Dutch currency in terms of the special drawing rights shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the day in question for its operations and transactions.*

**NEW ZEALAND**

The provision corresponding to Article 8(1) of the Convention is section 88(1) and (2) of the MTA 1994 which so provides:

*(1) For the purposes of determining the monetary value of the number of units of account calculated in any case to be the relevant limit of liability under this Act:*

- (a) The units of account shall be converted to their monetary value according to the value of the New Zealand currency at the date*



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*on which the limitation fund is constituted, or payment is made on the claims, or satisfactory security for any such payment is given; and*

*(b) The value of the New Zealand currency in terms of the special drawing right shall be treated as equal to such a sum in New Zealand currency as is fixed by the International Monetary Fund as being the equivalent of one special drawing right for:*

*(i) the relevant date; or*

*(ii) if no sum has been fixed for that date, the last preceding date for which a sum has been so fixed.*

*(2) For the purposes of subsection (1)(b) of this section, a certificate given by or on behalf of the Secretary to the Treasury stating:*

*(a) that a particular sum in New Zealand currency has been fixed as the equivalent of one special drawing right for a particular date; or*

*(b) that no sum has been fixed for that date, and that a particular sum has been so fixed for the date most recently preceding a particular date,*

*shall, in any proceedings, be received in evidence and, in the absence of proof to the contrary, be sufficient evidence of the value of the New Zealand currency for the purposes of subsection (1)(b) of this section.*

Also this provision is in line with that of the Convention.

**NORWAY**

In section 175 of the Maritime Code, where the limits of liability are set out in SDRs, reference is made to section 505.

**POLAND**

Article 8 is in force in its original text.

**SWEDEN**

The relevant provision is the same as in Finland.

**UNITED KINGDOM**

The first two sentences of Article 8 of the Convention have been enacted without any change. Additional provisions have then been enacted in section 7 of Part II of Schedule 7 to the MSA 1995 which so provides:

*Units of Account*

7. *(1) For the purpose of converting the amounts mentioned in articles 6 and 7 from special drawing rights into sterling one special drawing right shall be treated as equal to such a sum in sterling as the International Monetary Fund have fixed as being the equivalent of one special drawing right for:*

*(a) the relevant date under paragraph 1 of article 8; or*

*(b) if no sum has been so fixed for that date, the last preceding date for which a sum has been so fixed.*

*(2) A certificate given by or on behalf of the Treasury stating:*

*(a) that a particular sum in sterling has been fixed as mentioned in sub-paragraph (1) above for a particular date; or*

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*(b) that no sum has been so fixed for that date and that a particular sum in sterling has been so fixed for a date which is the last preceding date for which a sum has been so fixed, shall be conclusive evidence of those matters for the purposes of those articles; and a document purporting to be such a certificate shall, in any proceedings, be received in evidence and, unless the contrary is proved, be deemed to be such a certificate.*

Section 7(1) is in line with Article 8(1) while section 7(2) adds some procedural rules.

## **ARTICLE 9**

### *Aggregation of claims*

**1. The limits of liability determined in accordance with Article 6 shall apply to the aggregate of all claims which arise on any distinct occasion:**

- (a) against the person or persons mentioned in paragraph 2 of Article 1 and any person for whose act, neglect or default he or they are responsible; or**
- (b) against the shipowner of a ship rendering salvage services from that ship and the salvor or salvors operating from such ship and any person for whose act, neglect or default he or they are responsible; or**
- (c) against the salvor or salvors who are not operating from a ship or who are operating solely on the ship to, or in respect of which, the salvage services are rendered and any person for whose act, neglect or default he or they are responsible.**

**2. The limits of liability determined in accordance with Article 7 shall apply to the aggregate of all claims subject thereto which may arise on any distinct occasion against the person or persons mentioned in paragraph 2 of Article 1 in respect of the ship referred to in Article 7 and any person for whose act, neglect or default he or they are responsible.**

#### **AUSTRALIA**

Article 9 is in force in its original text.

#### **BAHAMAS**

Article 9 is in force in its original text.

#### **BARBADOS**

Article 9 is in force in its original text.

#### **BELGIUM**

This Article has been implemented without any change.

#### **CANADA**

Article 9 is in force in its original text.

**CROATIA**

Article 9 has been enacted in the Code without any material change. The relevant provision of the Croatian Maritime Code is article 414.

**DENMARK**

The provisions of Article 9 have been enacted only in part and annexed to the provisions on the limits of liability. Section 238(4) of the Merchant Shipping Act implements Article 9(1)(a) as follows:

*(4) The limits of liability mentioned under subsections (1)-(3) above apply to the sum of all claims which arise out of the same occurrence against the shipowner, title holder, operator, charterer and manager and the persons for whom they are responsible.*

Section 238(5) implements in its second sentence Article 9(1)(c):

*(5) If salvors do not operate from ship or operate only from the ship which the salvage concerns, the limits of liability are calculated according to a tonnage of 1,500 tons. The limits of liability apply to the sum of all claims arising out of the same occurrence against salvors and the persons for whom they are responsible.*

The provisions of Article 9(1)(b) and (2) do not appear to have been implemented.

**FINLAND**

The position is the same as in Denmark, the relevant provisions being in section 5(4) and (5) of chapter 9 of the Maritime Code.

**FRANCE**

Article 9 is in force in its original text.

**GEORGIA**

Only Article 9(1)(a) has been implemented. The relevant provision is article 341 which so provides:

*The limits of liability provided for in Article 340 of the present Code apply to the combination of all claims arising from any one incident and laid against one shipowner and the persons named in Article 347 of the present Code.*

It must be considered that Georgia has not implemented the provisions of the Convention relating to the limitation of liability of salvors.

**GERMANY**

Article 9 is in force in its original text.

**GREECE**

Article 9 has become part of Greek law without any change.

**HONG KONG, CHINA**

Article 9 is in force in its original text.

**IRELAND**

Article 9 has been given the force of law without any change or addition.

*Annex VI - Implementation by States Parties***JAPAN**

Article 9 has been incorporated into the Limitation of Liability of Shipowners Act.

**MEXICO**

Article 9 is in force in its original text.

**NETHERLANDS**

Article 9 is in force in its original text.

**NEW ZEALAND**

Section 86(3) and (4) of the MTA 1994 so provides:

(3) *The limitation of liability under this Part of this Act:*

(a) *Applies to the aggregate of relevant claims arising on any distinct occasion:*

(i) *against the owner of the ship, and any seafarer or other person for whose act, omission, neglect, or default the owner is responsible; or*

(ii) *against the owner of a ship rendering salvage services, and the salvor operating from that ship, and any employee of the salvor or other person for whose act, omission, neglect, or default that owner or salvor is responsible; or*

(iii) *against a salvor who is not operating from a ship, or is operating solely on the ship to or in respect of which the salvage services are rendered, and any employee of the salvor or other person for whose act, omission, neglect, or default the salvor is responsible; and*

(b) *relates to all relevant claims for loss or injury or damage arising on any distinct occasion, whether or not the loss or injury or damage is sustained by more than one person; and*

(c) *applies in respect of each distinct occasion, without regard to any liability arising on any other distinct occasion; and*

(d) *applies, subject to subsection (4) of this section, whether the liability arises at common law or under any other enactment, and notwithstanding anything in any other enactment.*

(4) *This section shall not limit or affect section 110 of this Act, or section 208 of the Harbours Act 1950, or anything in [the Accident Insurance Act 1998] or Parts XVIII to XXVI of this Act or the Carriage of Goods Act 1979.*

Subsection 3(a), (b) and (c) implements Article 9 of the Convention without any material change. Subsection 3(d) deals with an issue of domestic law while subsection (4) preserves the effect of certain named statutes or statutory provisions that might otherwise be affected or impliedly revoked. The areas left unaffected by limitation are:

- The Receiver of Wreck is entitled to recover the whole of his expenses of removal of a wrecked ship from the owner/operator of the ship where the Receiver of Wreck is directed to remove it by the Director of Maritime Safety (section 110 of the MTA and the now repealed section 208 Harbours Act 1950);
- With certain exceptions, the Accident Insurance Act 1998 provides no

fault compensation to persons who suffer personal injury or death in New Zealand. There is a statutory bar to personal injury actions in the Courts where the Act applies which will be unaffected by the limitation provisions of the MTA;

- Marine pollution provisions including clean up, compliance costs and various fines and penalties that are imposed on owners and operators in respect of pollution incidents (Parts XVIII-XXVI of the MTA);
- The Carriage of Goods Act 1979) contains limitations of liability which apply when damage occurs after international carriage has been completed. The limits will be unaffected by the limitation provisions of the MTA.

#### **NORWAY**

The position is the same as in Denmark, the relevant provision being section 175(4) and (5) of the Maritime Code.

#### **POLAND**

Article 9 is in force in its original text.

#### **SPAIN**

Article 9 is in force in its original text.

#### **SWEDEN**

The position is the same as in Denmark, the relevant provision being section 5(4) and (5) of chapter 9 of the Maritime Code.

#### **UNITED KINGDOM**

Article 9 is in force in its original text.

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Although the phrase “distinct occasion” might have been expected to give rise to difficulties of interpretation in different States, this does not seem to have occurred.

### **ARTICLE 10**

#### ***Limitation of liability without constitution of a limitation fund***

*1. Limitation of liability may be invoked notwithstanding that a limitation fund as mentioned in Article 11 has not been constituted. However, a State Party may provide in its national law that, where an action is brought in its Courts to enforce a claim subject to limitation, a person liable may only invoke the right to limit liability if a limitation fund has been constituted in accordance with the provisions of this Convention or is constituted when the right to limit liability is invoked.*

*2. If limitation of liability is invoked without the constitution of a limitation fund, the provisions of Article 12 shall apply correspondingly.*

*3. Questions of procedure arising under the rules of this Article shall be decided in accordance with the national law of the State Party in which action is brought.*

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**AUSTRALIA**

Article 10 is in force in its original text. Australia has not exercised the option granted by paragraph (1).

**BAHAMAS**

Article 10 is in force in its original text. Bahamas has not exercised the option granted by paragraph (1).

**BARBADOS**

Article 10 is in force in its original text. Barbados has not exercised the option granted by paragraph (1).

**BELGIUM**

Belgium has not availed itself of the option granted by Article 10(1).

**CANADA**

Article 10 is in force in its original text. Canada has not exercised the option granted by paragraph (1).

**CROATIA**

The constitution of a fund is not at present required. The relevant provisions of Article 10 have been enacted in article 415 of the Maritime Code which so provides:

*The ship operator may be entitled to the limitation of liability even in case the limitation fund has not been constituted according to Article 416 of this Law.*

*If the ship operator is entitled to the limitation of liability and the limitation fund has not been constituted, the provision of Article 417 shall be applied accordingly.*

It would appear, however, that this provision will very likely be amended so to make the constitution of the fund compulsory.

**DENMARK**

The constitution of a fund is not required. Section 242 of the Merchant Shipping Act so provides:

*(1) Even if no limitation fund has been established, the responsible person may limit the liability. In such event the Court shall solely consider the claims invoked in the course of the case. If the responsible person makes such a claim, the decision passed shall, however, make a reservation that other claims as well, subject to the same liability limit, shall be taken into account in the limitation of liability.*

*(2) A decision according to subsection (1) hereof may be enforced according to the general rules of the Administration of Justice Act to this effect. If a reservation is made the decision as mentioned in subsection (1) above, and a limitation fund has been established before such a period has passed to make it possible to enforce the decision, section 241, however, shall apply.*

This provision incorporates the rule set out in Article 12(4) of the Convention, thereby replacing the general statement made in Article 10(2).

**FINLAND**

Also in Finland the constitution of a fund is not required. The provisions of section 9 of chapter 9 of the Maritime Code are similar to those in force in Denmark. They are the following:

*Limitation of liability may be invoked notwithstanding that a limitation fund has not been constituted.*

*If suit has been brought concerning a claim subject to limitation of liability and if a limitation fund has not been constituted, the Court in applying the provisions of this chapter shall take account only of the claim concerned in the lawsuit. If the defendant wants any other claim subject to the same liability amount to be considered with regard to limitation of liability, a reservation to that effect shall be made in the judgment.*

*A judgment without a reservation according to the second paragraph may be enforced notwithstanding the provision of section 8. If the judgment contains such reservation as aforesaid, it may still be enforced unless a limitation fund has been constituted and the Court trying the application of section 8 finds cause to refuse enforcement.*

*If a limitation fund has not been constituted, the parties may submit the question of the amount of the limitation of liability and the distribution to examination and decision by an average adjuster. Provisions concerning appeal against the adjuster's statement are found in chapter 21.*

**FRANCE**

Article 10 is in force in its original text. France has not exercised the option granted by paragraph (1).

**GEORGIA**

Article 10 of the Convention has not been enacted. The constitution of a fund, however, seems to be optional since article 343 of the Maritime Code provides, as Article 11 of the Convention, that the person liable may constitute a fund.

**GERMANY**

Article 10 is in force in its original text. Germany has not exercised the option granted by paragraph (1).

**GREECE**

Article 10 has become part of Greek law without any change. Greece, however, has not availed itself of the right, granted under paragraph (1), to require the constitution of a limitation fund as a condition for a person being able to invoke the right to limit liability.

As regards the rules of procedure applicable in Greece, the following response has been given by the Greek MLA to Question 3 of the Questionnaire:

*No special rules were enacted to enable the conduct of limitation proceedings. The existing provisions dealing with the procedure for limiting liability under the previous regime set out in the Fifth Title of the*

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*Greek Code of Private Maritime Law (Act 3816/1958) are applied, with some adjustments, by the Greek Courts in the conduct of limitation proceedings under the Convention.\* It is argued, however, that the procedure enacted for the purposes of limitation in CLC cases (Presidential Decree 666/1982) would have been more appropriate for LLMC cases than the system provided in the Code.*

*By way of comment on the manner in which limitation is conducted, one could perhaps raise the issue of possible delay in obtaining the judgment permitting the constitution of a limitation fund through production of a guarantee: the combined effect of the requirement, placed by Article 11 § 2 of the Convention, for Court intervention in confirming the adequacy of the security and of the submission of the proceedings for the constitution of the fund to the procedure for security measures in Article 91 CPML may result in the release of the vessel delaying by some weeks in case the application is put on the ordinary Court list.*

*The issue of whether claims subject to limitation continue to bear interest after the constitution of the fund is currently disputed in the Piraeus Courts.*

\* The relevant provisions (Articles 88-104) are reproduced in Annex VII.

**HONG KONG, CHINA**

Article 10 is in force in its original text. Hong Kong has not availed itself of the right, granted to States Parties by paragraph (1) to require the constitution of a fund in order for the person liable to invoke the right to limit liability.

**IRELAND**

Article 10 has been given the force of law without any change or addition.

**JAPAN**

Japan has exercised the option granted by paragraph (1). The constitution of a fund is required to invoke limitation.

**MEXICO**

Article 10 is in force in its original text.

**NETHERLANDS**

The constitution of a fund is required. Article 642a(1) of the Code of Civil Procedure so provides:

*A person who wishes to avail himself of the provisions of Article 750, 751, 1060 or 1061 of Book 8 of the Civil Code to limit his liability shall apply to the district court of the place where the ship is registered in the register referred to in Article 193 or 783 of Book 8 of the Civil Code, or, if the ship is not registered in any of these registers, to the District Court of Rotterdam, requesting that the court determine the amount or amounts to which his liability will be limited (the amount of the limitation fund or funds) and order the institution of proceedings for the purpose of distributing the fund to be constituted.*



Article 642c(2) so in turn provides:

*Upon granting the application, the court shall determine the amount of the limitation fund or funds, expressed in units of account, with the observance of Articles 755 and 756 of Book 8 of the Civil Code or the general administrative order referred to in Article 1065 of Book 8 of the Civil Code. The court shall order the applicant to constitute the fund on a day which it shall determine, but in any event no later than one month following the day of the order, by:*

- a. depositing into court the amount of the funds, as calculated in accordance with Articles 755, 756 and 759 of Book 8 of the Civil Code or the general administrative order referred to in Article 1065 of that Book, increased by statutory interest pursuant to Article 757 or that general administrative order and by an amount covering the costs of the proceedings; or*
- b. providing security for the amount referred to under (a) in some other way, as the court shall determine, increased by statutory interest due from the day on which this security is provided until the day on which the clerk of court issues the summons referred to in Article 642v.*

The Dutch legislative history of the Act by means of which the LLMC Convention was ratified (Explanatory Note, 19769, Nr. 3, p. 13), mentions that Dutch law (Article 320a of the Code of Civil Procedure) (now Article 642a of the Code of Civil Procedure) contains a condition to constitute a fund, as a result of which the claimant whose claim is limited, has security that the (limited) claim shall be satisfied.

The Dutch legislative history of the Act by means of which the LLMC Convention was implemented in Dutch statutory law (Explanatory Note, 19768, Nr. 3, p. 2), mentions that the text of the proposed Act maintains the previous system (i.e. to require the constitution of a fund) as this system leads to a more convenient procedure, while the fact that the fund may be constituted by means of posting security (see Article 642c(2)(b) of the Code of Civil Procedure) may prevent cash flow being affected.

#### **NEW ZEALAND**

Although Article 10 of the Convention has not been enacted, the constitution of a fund is not required in order that limitation may be invoked.

#### **NORWAY**

Limitation may be invoked without constitution of a limitation fund. Section 18 of the Maritime Code is almost identical to section 9 of chapter 9 of the Finnish Maritime Code.

#### **POLAND**

According to art. 309 of the Polish Maritime Code the constitution of the limitation fund is not required to invoke the right to limit liability. However, if it is likely that more creditors would appear, the Court may make limitation of liability conditional upon the establishment of the limitation fund.

*Annex VI - Implementation by States Parties***SWEDEN**

The position is the same as in Finland.

**SPAIN**

Article 10 is in force in its original text. Spain has not exercised the option granted by paragraph (1).

**UNITED KINGDOM**

The constitution of a limitation fund is not required. Article 10 of the Convention has been enacted without the second sentence of paragraph 1.

**ARTICLE 11***Constitution of the fund*

*1. Any person alleged to be liable may constitute a fund with the Court or other competent authority in any State Party in which legal proceedings are instituted in respect of claims subject to limitation. The fund shall be constituted in the sum of such of the amounts set out in Articles 6 and 7 as are applicable to claims for which that person may be liable, together with interest thereon from the date of the occurrence giving rise to the liability until the date of the constitution of the fund. Any fund thus constituted shall be available only for the payment of claims in respect of which limitation of liability can be invoked.*

*2. A fund may be constituted, either by depositing the sum, or by producing a guarantee acceptable under the legislation of the State Party where the fund is constituted and considered to be adequate by the Court or other competent authority.*

*3. A fund constituted by one of the persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2 of Article 9 or his insurer shall be deemed constituted by all persons mentioned in paragraph 1(a), (b) or (c) or paragraph 2, respectively.*

**AUSTRALIA**

Article 11 is in force in its original text. The procedure for the determination of the limit of liability is set out in section 9 of the Act, which so provides:

*Applications to the Court under the applied provisions*

9. (1) *Where a claim is made, or is expected to be made, against a person in respect of any liability of the person that may be limited under the applied provisions, the person may apply:*
  - (a) *where a claim has been made against the person in proceedings in the Supreme Court of a State or Territory-to that Court; or*
  - (b) *in any other case-to the Supreme Court of any State or Territory; to determine the limit of that liability under the applied provisions, and the Court may determine that limit.*
- (2) *In making the determination, the Court may make any order with respect to the constitution, administration and distribution, in*

*accordance with the applied provisions, of a limitation fund in respect of claims subject to the limitation.*

*(3) The Court may, at any stage of the proceedings, upon application or of its own motion, by order, transfer the proceedings to another Supreme Court.*

*(4) Where proceedings are transferred from a Court to another Court:*

*(a) all documents filed of record, and moneys lodged, in the first-mentioned Court shall be transmitted to the other Court; and*

*(b) the other Court shall proceed as if the proceedings had been instituted and pursued in that Court.*

*(5) This section does not exclude or limit the operation of section 25 of the Admiralty Act 1988.*

It would appear, therefore, that the determination of the limit of liability may be requested even before proceedings are brought against the person invoking the benefit of limitation in which event the request may be addressed "to the Supreme Court of any State or Territory", but subsequently the proceedings may be transferred to another Court.

#### **BAHAMAS**

In connection with article 11(1), which has been implemented without any change, section 8(1) of Part II of the Second Schedule to the Act provides that the Minister may from time to time, with the concurrence of the Central Bank, prescribe the rate of interest to be applied.

#### **BARBADOS**

In section 8(1) of Part II of the Second Schedule to the Shipping Act 1994 there is a provision identical to that mentioned above in respect of the Bahamas.

#### **BELGIUM**

This Article has been implemented without any change and, therefore, proceedings must be commenced before a fund is constituted.

The provision in Article 48 relating to interest is, when the fund is constituted in a sum of money, the same as that in Article 11 of the Convention. When the fund is constituted by producing a guarantee, pursuant to Article 48(3) interest must be added for the period the Court will deem proper.

#### **CANADA**

Article 11 is in force in its original text.

#### **CROATIA**

Article 416 of the Maritime Code corresponds to article 11 of the Convention. The minor differences in the wording of the English translation are almost certainly due to a language problems.

#### **DENMARK**

Section 240 of Merchant Shipping Act so provides in its first two paragraphs:

*(1) If in this country arrest is requested, legal action is instituted or other*

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*legal steps are requested to be taken as a result of claims which, according to their nature, may be limited, a limitation fund may be established with the Maritime and Commercial Court of Copenhagen.*

*(2) The fund is deemed to have been established with effect for all persons who may invoke the same liability limit and to cover all such claims which the liability limit applies to. Only claims for which limitation may be invoked, can be requested to be covered by the fund.*

Except for the absence of any provision on interest, this section corresponds to Article 11.

**FINLAND**

The provisions of the Finnish Maritime Code (section 7(1) and (2) of Chapter 9) are similar, albeit not identical to those of the Danish Maritime Code. They are the following:

*If on account of a claim subject to limitation in this country, suit has been brought or arrest or other legal proceedings have been instituted, a limitation fund may be constituted. The fund shall be constituted with the Court where suit has been brought or otherwise with the Maritime Court competent for the place where arrest or other legal action has been applied for.*

*A limitation fund shall be deemed to have been constituted with effect for all persons who can claim the same limit of liability. It is intended for payment only of claims of the kind to which that limit of liability applies.*

**FRANCE**

Article 11 is in force in its original text. However pursuant to article 59 of décret No. 67-967 of 27 October 1967 on the statute of ships the application for the constitution of the fund must be addressed to the president of the Tribunal de Commerce of the port of registration of the ship, if the ship is registered in France or, if the ship is foreign, to the president of the Tribunal de Commerce of the French port where the accident took place or of the first French port of call after the accident, or, in the absence of one of these ports of the place of the first arrest or the place where the first security was provided. The provisions on limitation proceedings enacted in the above decree were meant to implement the 1957 Limitation Convention but they continue to apply also after the LLMC Convention has entered into force, replacing the 1957 Convention.

**GEORGIA**

Articles 343 and 344 of the Maritime Code so provide:

*Article 343*

*1. For the purposes of securing his liability the shipowner may set up a fund in the court or other competent body where the claim is being made against him.*

*2. The fund is set up to the sum comprising the maximum liability of the shipowner by making over sums of money (deposit) or providing other security acknowledged as acceptable and sufficient by the court or other competent body where the fund is being set up.*

*Article 344*

*The fund set up in accordance with Article 343 of the present Code is designated only for meeting claims under which liability may be limited.*

Although the wording differs, probably due, at least in part, to translation problems, from that of article 11(1) and (2) of the Convention, the meaning is the same, except for the omission of the reference to the interest. A provision corresponding to that of article 11(3) is, however, missing.

**GERMANY**

In Germany the debtor may choose between the constitution of a limitation fund and the declaration of a defence during the court proceedings. The constitution of a limitation fund leads to an *in rem* limitation having effect on any claim directed against the debtor even if it is not pending before the court. In case of the declaration of a defence the debtor bears the risk that other claimants who are not bound to the first court decision might raise further claims resulting in an additional (limited) payment irrespective of the first payment. Therefore, the debtor should prefer to constitute a fund if there is more than one claimant.

**GREECE**

Although this Article has become part of Greek law without any change, the right to limit liability may be invoked whether legal proceedings in respect of claims subject to limitation have already be instituted or not.

**HONG KONG, CHINA**

Article 11 is in force in its original text but limitation proceedings can be commenced before the High Court irrespective of legal proceedings having been instituted against the person liable in respect of claims subject to limitation. This seems to be implied in section 37(1) and (2) of the Rules of the High Court which so provides:

*(1) In a limitation action the person seeking relief shall be the plaintiff and shall be named in the writ by his name and not described merely as the owner of, or as bearing some other relation to, a particular ship or other property.*

*(2) The plaintiff must make one of the persons with claims against him in respect of the casualty to which the action relates defendant to the action and may make any or all of the others defendants also.*

**IRELAND**

Ireland has not availed itself of the right to provide for the constitution of the limitation fund as a condition for invoking the benefit of limitation. As regards interest, section 14 of the MSA 1996 so provides:

*14. The Minister may, with the consent of the Minister for Finance, prescribe by order the rate of interest to be applied for the purposes of paragraph 1 of Article 11 of the 1976 Convention.*

**JAPAN**

Article 25(3) of the Shipowners Limitation of Liability Act provides that the Court must dismiss the application to commence limitation proceedings,

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inter alia, when the person seeking the benefit of limitation does not comply with the provisions of Article 19(1). Article 19(1) in turn provides that the Court must order the person applying for limitation of liability to deposit the limitation fund, in the amount specified by the Court together with interest at the rate of 6% per annum from the date of the occurrence.

**MEXICO**

Article 11 is in force in its original text.

**NETHERLANDS**

Although it is necessary that judicial proceedings be commenced in respect of claims subject to limitation before a fund may be constituted, while pursuant to article 11(1) of the Convention there is a link between the proceedings instituted in respect of claims subject to limitation and the constitution of the fund, pursuant to article 642(a)(1) of the Dutch Code of Civil Procedure (quoted in the comments on article 10 of the Convention) the court competent for the conduct of the limitation proceedings, with which, therefore, the fund must be constituted, is the Court of the place where the ship is registered in the Netherlands or, if the ship is not registered in the Netherlands, with the District Court (Arrondissemmentrechtbank) of Rotterdam.

Article 642(c)(2) of the Code of Civil Procedure provides that the Court shall determine the amount of the limitation fund or funds with the observance of the articles of the Civil Code setting out the limits (articles 755 and 756 of book 8). Article 757 Civil Code so in turn provides:

*To the amounts referred to in Articles 755 and 756 shall be added the statutory interest calculated from the day of the occurrence giving rise to the liability until the day upon which the person who filed an application for limitation of his liability has complied with the court order imposed on him in accordance with Article 642c of the Code of Civil Procedure.*

**NEW ZEALAND**

There are no provisions corresponding to those of article 11 of the Convention. However the combination of High Court Rule 792 and section 89 of the MTA allow a person to apply for a decree fixing the amount to which his liability is to be limited in accordance with the limitation provisions of Part VII of the MTA. It would be almost inevitable that the Court would order security or a fund to be constituted as a condition of the decree. The definition of "limitation of liability" in section 84 of the MTA arguably achieves what is sought to be achieved by article 11(3) of the Convention.

**NORWAY**

The provisions of article 11 are scattered in several section of the Maritime Code. The first sentence of article 11(1) has been enacted in section 177 which so provides in its first paragraph:

*If in this country suit has been brought or arrest or other enforcement proceedings are applied for in connection with a claim which by its*

*nature is subject to limitation, a limitation fund may be constituted at the Court in question.*

The second sentence has been enacted in section 232 which so provides in its first paragraph:

*The global fund shall correspond to*

*a) the total of the amounts which according to section 175 are the limits of the liability for the claims for which limitation of liability is being invoked and which arose from one and the same event, and*

*b) interest on the amounts mentioned under letter a) for the time from the event to the constitution of the fund, calculated at the rate laid down according to Section 3 of Act of December 17, 1976, No. 100 Relating to Interest on Overdue Payments.*

The third sentence has been enacted in section 176 which so provides in its first and second paragraphs:

*Each liability amount shall be distributed among the claims to which limitation applies in proportion to the amounts of the proven claims.*

*If the amount mentioned in subparagraph 2 of Section 175 does not fully satisfy the claims to which the amount relates, the remainder shall be paid on an equal footing with other claims out of the amount mentioned in subparagraph 3 of Section 175.*

Provisions corresponding to those of article 11(2) may be found in the first paragraph of section 233 which so provides:

*The person applying for the constitution of a limitation fund shall pay the amount of the fund to the Court or give such security for the amount as the Court finds satisfactory.*

Finally, provisions corresponding to those of article 11(3) may be found in the second paragraph of section 177 which so provides:

*The fund shall be regarded as constituted with effect for all persons who can claim the same limit of liability, and to meet only those claims to which the limit applies.*

#### **POLAND**

According to Art. 314 § 2 of the Polish Maritime Code only the District Court in Gdansk is exclusively competent for the constitution of the fund.

#### **SPAIN**

Article 11 is in force in its original text.

#### **SWEDEN**

The position is the same as in Finland.

#### **UNITED KINGDOM**

Article 11 is in force in its original text. Provisions on the rate of interest may be found in section 8 of Part II of Schedule 7 to the MSA 1995 which so provides:

*(1) The Secretary of State may, with the concurrence of the Treasury, by order prescribe the rate of interest to be applied for the purposes of paragraph 1 of article 11.*

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- (2) Any statutory instrument containing an order under sub-paragraph (1) above shall be laid before Parliament after being made.
- (3) Where a fund is constituted with the court in accordance with article 11 for the payment of claims arising out of any occurrence, the court may stay any proceedings relating to any claim arising out of that occurrence which are pending against the person by whom the fund has been constituted.

## ARTICLE 12

### *Distribution of the Fund*

1. Subject to the provisions of paragraphs 1, 2 and 3 of Article 6 and of Article 7, the fund shall be distributed among the claimants in proportion to their established claims against the fund.

2. If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention.

3. The right of subrogation provided for in paragraph 2 may also be exercised by persons other than those therein mentioned in respect of any amount of compensation which they may have paid, but only to the extent that such subrogation is permitted under the applicable national law.

4. Where the person liable or any other person establishes that he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which such person would have enjoyed a right of subrogation pursuant to paragraphs 2 and 3 had the compensation been paid before the fund was distributed, the Court or other competent authority of the State where the fund has been constituted may order that a sufficient sum shall be provisionally set aside to enable such person at such later date to enforce his claim against the fund.

#### AUSTRALIA

Section 25 of the Admiralty Act 1988 (Cth) is in the following terms:

25. *Limitation of liability under Liability Conventions*

(1) A person who apprehends that a claim for compensation under a law (including a law of a State or a Territory) that gives effect to provisions of a Liability Convention may be made against the person by some other person may apply to the Federal Court to determine the question whether the liability of the first-mentioned person in respect of the claim may be limited under that law.

(2) Subsection (1) does not affect the jurisdiction of any other court.

(3) On an application under subsection (1), the Federal Court may, in accordance with the law referred to in that subsection:

- (a) determine whether the applicant's liability may be so limited and, if it may be so limited, determine the limit of that liability;
- (b) order the constitution of a limitation fund for the payment of



*claims in respect of which the applicant is entitled to limit his or her liability; and*

*(c) make such orders as are just with respect to the administration and distribution of that fund.*

*(4) Where a court has jurisdiction under this Act in respect of a proceeding, that jurisdiction extends to entertaining a defence in the proceeding by way of limitation of liability under a law that gives effect to provisions of a Liability Convention.*

Further, Rules 61 to 64 of the Admiralty Rules make provision for such procedural matters as service of initiating process, advertising and the setting aside of limitation determinations.

Beyond these provisions, the constitution and distribution of the fund, to the extent not regulated by the Convention, are matters for the court.

#### **BAHAMAS**

. The position is the same as in the United Kingdom.

#### **BARBADOS**

The position is the same as in the United Kingdom.

#### **BELGIUM**

This Article has been given effect without any change. The provision of its paragraph (1) is repeated in Article 51 of Book II, Title II of the Code of Commerce as amended.

#### **CANADA**

Article 12 is in force in its original text.

#### **CROATIA**

Article 12 is in force in its original text. Only paragraph 4 of article 12 has been enacted in article 435 of the Maritime Code which so provides:

*If the proposer makes it credible that some claims should be settled from the limitation fund abroad, the court may, at his proposal, order that the sum which would be necessary for the settlement of his claim be set aside from the fund in proportion to other reported claims and to the limitation fund.*

*A proposal as referred to in Paragraph 1 of this Article may be submitted until the holding of the first hearing for the distribution of the constituted limitation fund.*

*The sum set aside according to the provision of Paragraph 1 of this Article shall be kept in a separate deposit for ten years from the date the ruling on the final distribution of the constituted limitation fund became final.*

*The court may even before the expiration of the term referred to in Paragraph 3 of this Article order that the sum set aside be in whole or in part returned to the general deposit of the limitation fund, if according to the circumstances it can be concluded that other requirements for setting aside the sum have ceased exist (Paragraph 1).*

*After the expiration of the term referred to in Paragraph 3 of this Article*

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*the court shall return the sum set aside to the general deposit of the limitation fund.*

Provisions are then made in article 438 on payments on account, which do not appear to be in conflict with the Convention.

**DENMARK**

The provisions of Article 12 have been enacted in section 239(1), (3) and (4) of the Merchant Shipping Act as follows:

*(1) Each limitation amount shall be distributed among the claimants according to their claims.*

*(2) If in pursuance of section 238(2) hereof the amount is not sufficient to cover those claims, the uncovered part, in equal proportion with other claims, shall be covered by the amount of limitation mentioned in section 238(3).*

*(3) The person who has paid a claim wholly or partly before the limitation amounts have been distributed, enters in the claimant's right to cover in proportion to the paid amount.*

*(4) If any person establishes that he will later be compelled to pay such a claim in whole or in part and that he will thereby enter into the claimant's right to cover, the court may decide that a sufficient amount shall be reserved so that he may have his claim covered later according to subsection (3) hereof.*

**FINLAND**

In section 7 of chapter 8 of the Maritime Code there are provisions almost identical to those of section 239 of the Danish Maritime Code.

**FRANCE**

Article 12 is in force in its original text. Provisions similar to those of paragraph (4) are set out in article 69 of Decree No. 67-967 in the following terms:

*Lorsque le requérant établit qu'il pourrait être ultérieurement contraint de payer en tout ou en partie une des créances visées à l'article 65 de la loi n° 67-5 du 3 janvier 1967 portant statut des navires et autres bâtiments de mer, le juge-commissaire peut ordonner qu'une somme suffisante soit provisoirement réservée pour permettre au requérant de faire ultérieurement valoir ses droits sur le fonds, aux conditions indiquées audit article 65 de la loi précitée.*

Article 65 of Law No. 67-5 of 3 January 1967 so in turn provides:

*Si, avant la répartition du fonds, le propriétaire d'un navire a payé en tout ou en partie une des créances indiquées aux articles 58, 59 et 61, il est autorisé à prendre, à due concurrence, les lieu et place de son créancier dans la distribution du fonds, mais seulement dans la mesure où, selon le droit du pays où le fonds est constitué, ce créancier aurait pu faire reconnaître sa créance contre le propriétaire.*

There does not appear to be any conflict between the above provisions and those of article 12(4) of the Convention. In any event, if there were any such conflict, the latter would prevail.

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*Implementation and interpretation of the 1976 LLMC Convention*

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**GEORGIA**

It would appear that only the provision of article 12(1) has been enacted. Article 345(2) so in fact provides:

*The fund is distributed among the creditors in proportion to their claims as established by the court.*

**GERMANY**

Article 12 is in force in its original text.

**GREECE**

Article 12 has become part of Greek law without any change.

**HONG KONG, CHINA**

Article 12 is in force in its original text.

**IRELAND**

Article 12 has been given the force of law without any change but with the following additional provision in section 16 of the MSA 1996:

*16. No lien or other right in respect of any ship or property shall affect the propositions in which under Article 12 of the 1976 Convention the fund mentioned in that Article is distributed among the several claimants concerned.*

**JAPAN**

Article 12 has not been enacted expressly into the Limitation of Liability of Shipowners Act, but its paragraph 1 is deemed to be applicable as a matter of course.

**MEXICO**

Article 12 is in force in its original text.

**NETHERLANDS**

Article 12 is in force in its original text.

**NEW ZEALAND**

The rule laid down in article 12(1) appears to have been enacted in section 89 of the MTA 1994 which so provides:

*(1) Where two or more claims are made or expected against any person who is alleged to have incurred liability in respect of any claim of a kind referred to in section 86(2) of this Act, that person may apply to the High Court to have the claims consolidated.*

*(2) On any such application, the Court may:*

*(a) Determine the amount of the applicant's liability, and distribute that amount rateably among the several claimants; and*

*(b) Stay any other proceedings pending in the same or any other Court in relation to the same matter; and*

*(c) Proceed in such manner and give such directions relating to the joining or excluding of interested persons as parties, the giving of security, the payments of costs, or otherwise, as the Court thinks just.*

The other provisions of article 12 do not appear to have been enacted.

**NORWAY**

The provisions of article 12 have been implemented in section 176 of the Maritime Code. The provision of article 12(3), whereby the right of subrogation may also be exercised by persons other than those mentioned in the preceding paragraph to the extent that such subrogation is permitted under the applicable national law, has been omitted, but in the third paragraph of section 176, corresponding to article 12(2), the reference to the person liable or his insurer is replaced by a reference to "a person" (who has paid a claim) generally.

**POLAND**

Article 12 is in force in its original text.

**SWEDEN**

The position is the same as in Finland.

**UNITED KINGDOM**

Article 12 of the Convention is in force in its original text. In addition it is provided that the fund must be distributed in proportion of the established claims which implies that no priorities are recognized. This is expressly stated in section 9 of Part II of the Second Schedule to the MSA 1989 in the following terms:

*No lien or other right in respect of any ship or property shall affect the proportions in which under Article 12 the fund is distributed among several claimants.*

**ARTICLE 13*****Bar to other actions***

*1. Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.*

*2. After a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State. However, such release shall always be ordered if the limitation fund has been constituted:*

- (a) at the port where the occurrence took place, or, if it took place out of port, at the first port of call thereafter; or*
- (b) at the port of disembarkation in respect of claims for loss of life or personal injury; or*
- (c) at the port of discharge in respect of damage to cargo; or*
- (d) in the State where the arrest is made.*

**3. *The rules of paragraphs 1 and 2 shall apply only if the claimant may bring a claim against the limitation fund before the Court administering that fund and the fund is actually available and freely transferable in respect of that claim.***

**AUSTRALIA**

This Article is in force in its original text.

**BAHAMAS**

The position is the same as in the United Kingdom.

**BARBADOS**

The position is the same as in the United Kingdom.

**BELGIUM**

This Article has been implemented without any change. Article 48(5) of Book II, Title II of the Code of Commerce, as amended, provides that Article 13 of the Convention applies as from the time of the order of the Court by which the proper constitution of the fund is acknowledged.

**CANADA**

Article 13 is in force in its original text.

By Section 580 of The Canada Shipping Act, the Admiralty Court being the Federal Court of Canada has exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund under Articles 11 to 13 of the Convention.

By Section 582 of The Canada Shipping Act, certain procedures are described with respect to release of a vessel as follows:

582. (1) *Where a ship or other property is released pursuant to paragraph 2 of Article 13 of the Convention, the person who applies for the release is deemed, in any case other than a case in which a fund has been constituted in a place described in paragraphs 2(a) to (d) of that Article, to have submitted to the jurisdiction of the court that ordered the release for the purpose of determining the claim.*

(2) *In considering whether to release a ship or other property referred to in subsection (1), the court shall not have regard to a limitation fund that is constituted in a country other than Canada unless the court is satisfied that the country is a state that is a party to the Convention.*

**CROATIA**

This Article is in force in its original text even though its provisions have not been enacted in the Maritime Code.

**DENMARK**

The rules laid down in paragraphs (1) and (2) of Article 13 have been enacted in section 241 of the Merchant Shipping Act in slightly different terms according to whether the limitation fund has been constituted in Denmark or in Finland, Norway or Sweden or in another State Party, the difference being that the limits as to the place of constitution of the fund set

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out in Article 13(2) operate only if the fund is constituted in a State Party other than a Scandinavian State. Section 241 so in fact provides:

*(1) If a claim is notified to a limitation fund which is established according to section 240 above, cf. Part 15, or according to similar rules in another convention State, no arrest or execution may be made for this claim, nor any other rights be exercised over a ship or other property belonging to any person on whose behalf the fund is established and who has a right to liability limitation.*

*(2) After a limitation fund has been established in Denmark or in Finland, Norway or Sweden, no arrest or execution may be levied or other rights be exercised over the ship or other property belonging to any person on whose behalf the fund is established and who is entitled to limitation of liability for claims which may be invoked against the fund, cf., however, section 242(2). If arrest is levied on a ship or property or security is provided to avoid arrest, the arrest shall in such cases be lifted or the security be released.*

*(3) After a limitation fund has been established in another convention State, the Court may refuse a request for arrest or execution, cf., however, section 242(2). If arrest has been levied or security provided to avoid arrest, the arrest may be lifted or the security be released. The request for arrest shall be refused, an arrest levied after the establishment of a fund be lifted and security to prevent such arrest be released provided the fund was established:*

*1) in the port where the liability incurring occurrence took place or if it did not take place in a port, in the first port of call after the occurrence,*

*2) the port of disembarkation if the claim relates to personal injury,*

*3) in the port of discharge if the claim relates to damage to cargo.*

*(4) The rules of subsections (1) and (3) may be applied correspondingly if it is substantiated that a limitation fund, established in a State which is not a convention State, may be compared to a limitation fund as mentioned in section 240.*

*(5) The rules of subsections (1)-(4) shall apply solely if the claimant may make claims against the fund before the Court of law which administers it and the fund is actually at disposal and may freely be transferred to cover the claim.*

*(6) Convention State means in this Part of the Act a State which is bound by the London Convention of 1976 on Limitation of Liability for Claims subject to Maritime Law.*

As it appears from sub-section 4, the rules applicable when the fund is constituted in a State Party other than a Scandinavian State are extended, under certain conditions, also to limitation funds constituted in non-party State. This is a sensible provision, which can yield to the advantage of owners of ships flying the flag of States Parties.

## FINLAND

In section 8 of Chapter 9 of the Maritime Code there are provisions almost identical to those of the Danish Maritime Code.

**FRANCE**

Article 13 is in force in its original text.

**GEORGIA**

The provisions of article 13 have not been enacted in the Georgian Maritime Code.

**GREECE**

Article 13 has become part of Greek law without any change.

**HONG KONG, CHINA**

Article 13 is in force in its original text.

**IRELAND**

Sections 15 and 17 of the MSA 1996 so provide:

*15. Where a fund is constituted with a court in accordance with Article 11 of the 1976 Convention for the payment of claims arising out of any occurrence, the court may stay any proceedings relating to any claim arising out of that occurrence which are pending in that court, or any court of lower jurisdiction to that court, against the person by whom the fund has been constituted.*

*17. Where the release of a ship or other property is ordered under paragraph 2 of Article 13 of the 1976 Convention the person on whose application it is ordered to be released shall be deemed to have submitted to the jurisdiction of the court to adjudicate on the claim for which the ship or property was arrested or attached.*

**JAPAN**

Article 13 has been incorporated into the Limitation of Liability of Shipowners Act.

**MEXICO**

Article 13 is in force in its original text.

**NETHERLANDS**

Article 13 is in force in its original text. Its provisions are supplemented by Article 642e of the Dutch Code of Civil Procedure which so provides:

*1. If, after the granting of an application under Article 750 or 751 of Book 8 of the Civil Code, no claimants have objected to limitation of liability by the person liable within the period of time referred to in Article 642g, or if an irrevocable decision has been made rejecting a [particular] claimant's objection, and a fund has been constituted with respect to which the court has issued a declaration as referred to in Article 642c(6) and the fund is actually available to the claimant and the claimant can enforce his claim against the fund, the court may, at the request of the persons for whose benefit the fund was constituted, order the release of arrests or attachments, which may have been levied in respect of the claims for which the fund was constituted, or order that any security which was provided be returned.*

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2. If the requirements set forth in paragraph 1 are met, the court shall, upon the submission of an application as referred to in paragraph 1, issue an order as referred to in that paragraph if the fund has been constituted:

- a. at the port where the accident from which liability arose took place, or, if the accident took place out of port, at the ship's first port of call thereafter; or
- b. at the port of disembarkation of the persons involved, if the damage arose from loss of life or personal injury; or
- c. at the port of discharge in respect of damage to cargo; or
- d. in the State where the arrest was made.

3. Paragraphs 1 and 2 of this Article shall only apply if the fund can be freely transferred to the claimant in respect of his claim.

**NEW ZEALAND**

New Zealand has not enacted an equivalent to Article 13 of the Convention in the MTA.

Section 91 of MTA 1994 so provides:

*(1) Where any ship or other property is arrested or seized in respect of a claim that appears to be one for which liability is limited by this Part of this Act, or security has been given to prevent or obtain release from any such arrest or seizure, the High Court may, on the application of the owner of the ship or other property or any other person having an interest in the ownership of the ship or other property, order the release of the ship, property, or security if the conditions specified in subsection (2) of this section are met.*

*(2) The conditions for the making of an order under subsection (1) of this section are as follows:*

*(a) That security of a kind that, in the opinion of the Court, is satisfactory (in this section referred to as the guarantee) has previously been given, whether in New Zealand or elsewhere, in respect of the claim; and*

*(b) That the Court is satisfied:*

*(i) That if the claim is established the amount of the guarantee will in fact be available to the claimant; and*

*(ii) That the amount, either by itself or together with any further security that the Court may require to be given, is at least equal to the maximum amount that may be allowed to the claimant in accordance with the provisions of sections 86 and 87 of this Act.*

The first possible difference between the above provision and Article 13 is that Section 91 does not appear to make the release conditional to the constitution of the fund but to the provision of security in respect of the particular claim for which the arrest has been applied for. However, it nevertheless has the effect of requiring the owner to put up security for the full limitation amount. That is the result of the reference in section 91(2)(b)(ii) to sections 86 and 87. The bar to other actions can be achieved under section 89(2)(b).



The second more probable difference consists in that the relief that is mandatory under Article 13 of the Convention (bar to actions against other assets and relief in certain circumstances) is left in the Court's discretion under the MTA.

#### **NORWAY**

Article 13 has been enacted in section 178 of the Maritime Code, in terms practically identical to those of the corresponding provision of the Danish Maritime Code.

#### **POLAND**

Article 13 is in force in its original text.

#### **SWEDEN**

Section 8 of Chapter 9 of the Maritime Code is worded as the corresponding section of the Finnish Maritime Code.

#### **UNITED KINGDOM**

Article 13 has been implemented without any change. In addition, section 10 of Part II of Schedule 7 to the MSA 1995 so provides:

*Where the release of a ship or other property is ordered under paragraph 2 of article 13 the person on whose application it is ordered to be released shall be deemed to have submitted to (or, in Scotland, prorogated) the jurisdiction of the court to adjudicate on the claim for which the ship or property was arrested or attached.*

### **ARTICLE 14**

#### ***Governing law***

***Subject to the provisions of this Chapter the rules relating to the constitution and distribution of a limitation fund, and all rules of procedure in connexion therewith, shall be governed by the law of the State Party in which the fund is constituted.***

The States that have given effect to the Convention by enacting in whole or in part its provisions in their domestic laws have implemented article 14 by enacting rules relating to the constitution and distribution of the fund.

Most of the States that have given the force of law to the Convention and have incorporated its provisions in a schedule to the act whereby such force of law was given, have not included article 14 in the schedule. Amongst such States are the Bahamas, Barbados, United Kingdom. An exception is Australia, which has enacted Article 14 in its original text.

Only the States that pursuant to whose Constitution international treaties become part of the law of the land upon their ratification, article 14 has been automatically enacted, irrespective of special rules of procedure for the constitution and distribution of the limitation fund having been enacted or not.

The rules of procedure enacted in States Parties are mentioned hereafter.

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**AUSTRALIA**

This Article is in force in its original text.

**BAHAMAS**

This Article is in force in its original text. No special rules on the constitution and distribution of the limitation fund appear to have been enacted.

**BARBADOS**

The position is the same as in the Bahamas.

**BELGIUM**

The rules of procedure relating to the constitution and distribution of the funds have been enacted by Law 11 April 1989 and are set out in Article 48 of Book II, Title II of the Code of Commerce, as amended by that law, as well as in certain provisions on bankruptcy proceedings, set out in Articles 496-500, 502-504 and 508 of Book III of the Code of Commerce, reference to which is made in Article 48(3) and (5). Such provisions are reproduced in Annex VII.

**CANADA**

Article 14 is in force in its original text. The Canadian Rules of Procedure are set out in Annex VII.

**CROATIA**

The rules that have been enacted in respect of the constitution and distribution of the limitation funds are quoted in Annex VII.

**DENMARK**

Also Denmark has given the force of law to the Convention by enacting its provisions in its Merchant Shipping Act. The procedural rules that have been adopted are quoted in Annex VII.

**FINLAND**

The position is the same as in Denmark. The rules of procedure on the constitution and distribution of the limitation fund may be found in chapter 12 of the Maritime Code. They are reproduced in Annex VII.

**GEORGIA**

It does not appear that special rules of procedure have been enacted in respect of the constitution and distribution of the limitation fund.

**FRANCE**

This Article is in force in its original text. The rules of procedure relating to the constitution and distribution of the funds had been enacted by Decree 27 October 1967 on the status of ships (*statut des navires*), articles 59-87, quoted in Annex VII.

**GERMANY**

The procedure how to establish a limitation fund is laid down in the Schiffahrtsrechtliche Verteilungsordnung (Regulation on the Distribution of

Claims in Shipping Matters - SVertO). In general, claims subject to limitation of liability can be pursued only in accordance with the SVertO [§ 8 (2)]. Legal proceedings which have already been commenced before a limitation fund has been constituted are to be interrupted until the claims are accepted or the distribution procedure is revoked or suspended [§ 8 (3)]. Execution proceedings are inadmissible [§8 (4)].

#### **GREECE**

Article 14 has become part of Greek law without any change. The applicable rules of procedure are those set out in articles 88-104 of the Code of Private Maritime Law (Annex VII). See also the comments under Article 10.

#### **HONG KONG, CHINA**

Article 14 is in force in its original text.

#### **IRELAND**

Article 14 has been given the force of law without any change or addition. For a summary of the applicable rules of procedure see Annex VII.

#### **JAPAN**

The rules of procedure applicable to the limitation of liability are set out in the Supreme Court Rules for the Procedure of the Limitation of Liability of Shipowners and others. For a summary of such Rules see Annex VII.

#### **MEXICO**

Article 14 is in force in its original text.

#### **NETHERLANDS**

Rules of procedure have been enacted in articles 642a-642z of the Code of Civil Procedure. They are quoted in Annex VII.

#### **NEW ZEALAND**

There is no specific provision in the MTA, nor in New Zealand's High Court Rules of procedure, for the constitution and distribution of the limitation funds. However, section 88(1)(a) envisages that a fund may be constituted and the wide discretion of the Court found in section 89 and High Court Rule 792 on limitation of liability would provide the framework for the constitution and distribution of a fund as necessary.

#### **NORWAY**

The rules of procedure are set out in chapter 12 of the Maritime Code. They are quoted in Annex VII.

#### **POLAND**

Article 14 is in force in its original text.

#### **SPAIN**

No special rules of procedure have been enacted and the general rules set out in the Civil Procedure Act of 1984 (Ley del Enjuiciamiento Civil) in

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respect of issues incidental to the main proceedings apply. These rules are quoted in Annex VII.

**SWEDEN**

The rules of procedure are set out in Chapter 12 of Part IV of the Maritime Code. They are almost identical to those in force in Finland.

**UNITED KINGDOM**

This Article is in force in its original text. The rules of procedure are contained in the Admiralty Practice Direction to Part 49 of the Civil Procedure Rules, section 9. These rules are set out in Annex VII.

**ARTICLE 15***Scope of application*

*1. This Convention shall apply whenever any person referred to in Article 1 seeks to limit his liability before the Court of a State Party or seeks to procure the release of a ship or other property or the discharge of any security given within the jurisdiction of any such State. Nevertheless, each State Party may exclude wholly or partially from the application of this Convention any person referred to in Article 1, who at the time when the rules of this Convention are invoked before the Courts of that State does not have his habitual residence in a State Party, or does not have his principal place of business in a State Party or any ship in relation to which the right of limitation is invoked or whose release is sought and which does not at the time specified above fly the flag of a State Party.*

Of the State Parties in respect of which replies to the Questionnaire have been received only Poland has availed itself of the right granted under the second sentence of this paragraph. Article 308(3) of the Polish Maritime Code so in fact provides:

*The right of limitation is not vested in the foreign debtor who, at the time when he invokes the right of limitation, has his permanent place of domicile or principal place of business in a State, the law of which does not provide the limitation of liability for claims of this type: where this law provides higher limit than that determined in the Convention on Limitation of Liability, this higher limit is applicable.*

*2. A State party may regulate by specific provisions of national law the system of limitation of liability to be applied to vessels which are:*

- (a) according to the law of that State, ships intended for navigation on inland waterways;*
- (b) ships of less than 300 tons.*

*A State Party which makes use of the option provided for in this paragraph shall inform the depositary of the limits of liability adopted in its national legislation or of the fact that there are none.*

**A) APPLICATION OF THE CONVENTION TO SHIPS INTENDED FOR NAVIGATION ON INLAND WATERWAYS**

**AUSTRALIA**

Australia has not availed itself of the option granted by this Article. However, it is doubted that Australian courts would regard “ships intended for navigation on inland waterways” as “seagoing ships” within the meaning of paragraph 2 of Article 1 of the Convention.

Further, the Western Australian Marine Act applies the provision of the 1957 Limitation Convention to inland waterways vessels and ferries.

**BAHAMAS**

The Convention applies to such vessels.

**BARBADOS**

Barbados has no inland waters.

**BELGIUM**

Art. 273 of Book II, Title II of the Code of Commerce provides that subject to paragraphs 2-4 thereof Articles 1-15, except for the limits of liability and for the calculation of the tonnage, shall apply to ships intended for navigation on inland waterways and other craft treated as such ships pursuant to an order of the King. The text of Article 273 is the following:

*§1<sup>er</sup>. Sous réserve des paragraphes 2 à 4, sont applicables aux bâtiments de navigation intérieure et aux bâtiments et engins flottants y assimilés par le Roi:*

*1° les articles 1 à 15 compris, sauf l'article 6, § 5, de la Convention sur la limitation de la responsabilité en matière de créances maritimes, faite à Londres le 19 novembre 1976, nommée ci-après Convention LLMC.*

*L'article 2, § 1<sup>er</sup>, lettres d et e, de la Convention LLMC est applicable aux bâtiments de navigation intérieure ainsi qu'aux bâtiments et engins flottants y assimilés.*

*2° les articles 46, 48 à 58 et 67 de ce Livre.*

*3° les articles 12 à 14, 16 et 17 de la loi du 11 avril 1989 portant approbation et exécution de divers actes internationaux en matière de navigation maritime.*

*§2. Pour l'application du § 1<sup>er</sup> du présent article la notion de navire de mer est, où elle se trouve dans les articles visés, remplacée par “bâtiment de navigation intérieure”.*

*§3. Les limites de responsabilité visées aux articles 6, paragraphes 1<sup>er</sup> et 4, et 7 de la Convention LLMC, et la base de calcul de la limitation de la responsabilité sont établies par le Roi.*

*Le Roi peut à tout moment adapter les données ci-dessus en tenant compte de la situation économique.*

*§4. Les créances visées à l'article 2, paragraphes 1<sup>er</sup>, d et e de la Convention LLMC comprennent aussi les créances de l'autorité causées par des mesures et opérations visées à l'article 14 de la loi visée au paragraphe 1<sup>er</sup>, 3°.*

*Annex VI - Implementation by States Parties***CANADA**

Paragraph 2 is in force in its original text. The Canada Shipping Act has expanded upon the definition of "ship" and "shipowner" by Section 576(3) as follows:

*"Ship" means any vessel or craft design, used or capable of being used solely or partly for navigation, without regard to method or lack of propulsion and includes*

*(a) a ship in the process of construction from the time that is capable of floating and*

*(b) a ship that has been stranded, wrecked or sunk and any part of a ship that has been broken up,*

*does not include an air-cushioned vehicle or a floating platform constructed for the purpose of exploring or exploiting the natural resources or the subsoil of the sea-bed;*

*"Shipowner" means an owner; charterer; manager or operator of a ship, whether sea going or not, and includes any other person having an interest in or possession of a ship from and including the launching of it.*

It can be seen that for Canada, the Convention and Protocol apply to all vessels, whether seagoing or not.

**CROATIA**

The Inland Navigation Act enacted in 1998 in its Article 1 par. 2 states that all the issues not covered by that Act, one of which is the limitation of liability shall be governed by the corresponding provisions of the Maritime Code. Therefore, the vessels intended for navigation on inland waterways are subject to the same regime as regards the limitation of liability as the seagoing ships.

**DENMARK**

The committee that prepared the implementation of the Convention into the Danish Merchant Shipping Act was of the opinion that a different system of limitation of liability for vessels intended for navigation on inland waterways was unnecessary given the fact that navigation on inland waterways only occurs to a limited extent in Denmark. Consequently, Chapters 7, 9 and 12 (previously Chapters 10 and 15) of the Danish Merchant Shipping Act also apply to such vessels.

**FINLAND**

The Convention applies also to vessels intended for navigation on inland waterways.

**FRANCE**

The Convention does not apply to vessels intended for navigation on inland waterways. France has given notice that no limits of liability are provided for such vessels.

**GERMANY**

From 1<sup>st</sup> September 1998 the SVertO (which then changed its name from

Seerechtliche Verteilungsordnung to Schifffahrtsrechtliche Verteilungsordnung) has been extended to the limitation of liability for claims originating from the use of inland waterway ships. This was due to the ratification of the Strasbourg Convention on the Limitation of Liability in Inland Waterway Shipping (CLNI) which entered into force on 1<sup>st</sup> July 1999. Thus, the same system with some particularities applies to inland waterway ships too.

#### **GREECE**

Although Greece has not enacted special provisions in order to regulate the system of limitation of liability applicable to vessels which are intended for navigation on inland waterways, the provisions of the Convention do not apply to such ships since, under Greek law, they do not qualify as "ships".

#### **HONG KONG, CHINA**

Pursuant to section 14 of the Ordinance the Convention applies to any ship "whether seagoing or not".

#### **IRELAND**

Section 10 of the MSA 1996 so provides:

*10. The right to limit liability under the 1976 Convention shall apply in relation to any ship whether seagoing or not and the definition of "shipowner" in paragraph 2 of Article 1 of that Convention shall be construed accordingly.*

#### **JAPAN**

The liability regime applicable to ships intended for navigation on inland waterways differs from that of the Convention in that limitation of liability is not permitted in respect of death of and personal injury to passengers.

#### **MEXICO**

Mexico has not exercised the option granted under Article 15(2)(a).

#### **NETHERLANDS**

The Netherlands has availed itself of the option granted by this paragraph. The text of the communication made to the depositary pursuant to article 15(2) of the Convention is quoted in Appendix B.

Since reference is made in paragraph 2(a) to ships intended for navigation on inland waterways according to the law of the relevant State, the definition of such ships in the Dutch Civil Code becomes relevant. Article 8:3 defines them as:

*(...) ships which are entered in the register referred to in article 783 (i.e. the register for inland waterway ships), as well as ships which are registered neither in this register nor in the register referred to in article 193 (i.e. the register for seagoing ships), and which, according to their construction, are neither exclusively nor principally destined to float at sea.*

The substantive rules of the limitation of liability in the Netherlands with regard to inland waterway ships are laid down in the Convention de Strasbourg

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sur la limitation de la responsabilité en navigation intérieure (CLNI), Strasbourg, 4 November 1988, to which the Netherlands is a party (entry into force on 1 September 1997). The provisions of the CLNI are also implemented in Dutch statutory law by means of Articles 8:1060-8:1066 Civil Code.

At the time of ratification of the LLMC Convention the limits of liability with regard to inland waterway ships were laid down in the Royal Decree (Order in Council) of 19 February 1990, Stb. 1990, 96. Pursuant to Article 15(2), final paragraph, of the LLMC Convention the Netherlands has informed the depositary of these limits of liability.

The Royal Decree of 19 February 1990 has, however, been replaced by a more recent Royal Decree of 29 November 1996, Stb. 1996, 587. Although Article 15(2), final paragraph, of the LLMC Convention is not very clear on this point, the text may imply that the depositary should also be kept informed of changes in the limits of liability adopted in the national legislation pursuant to Article 15(2) of the LLMC Convention. Current information suggests that the depositary has not been informed of the latest Royal Decree, although it contains limits of liability which differ from those contained in the previous Royal Decree.

The procedural provisions of Articles 642a-642z of the Code of Civil Procedure apply to the limitation of liability regarding both sea-going ships and inland waterway ships.

**NEW ZEALAND**

New Zealand has not availed itself of the option granted by this article. The provisions of MTA in fact apply to ships intended for navigation on inland waterways.

**NORWAY**

The position is the same.

**POLAND**

The Convention applies only to sea-going vessels.

**SPAIN**

The position is the same.

**SWEDEN**

The position is the same.

**UNITED KINGDOM**

Section 503 of the MSA 1894 granted the rights to limit in the United Kingdom to ships whether sea-going or not. Paragraphs 2 and 12 of Part II to Schedule 7 and Section 185(1) of the 1995 MSA make it clear that in the United Kingdom the limitation provisions of the 1976 Convention are to continue to be applied in relation to any ship whether sea-going or not and that the word "ship" shall include "any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship".



**B) APPLICATION OF THE CONVENTION TO SHIPS OF LESS THAN 300 TONS.****AUSTRALIA**

The option granted by this provision has not been exercised.

**BAHAMAS**

The Convention applies, but lower limits are provided. The following provision has been included in section 5 of Part II of the Second Schedule to the MSA 1989:

*In the application of Article 6 to a ship with a tonnage less than 300 tons that Article shall have effect as if:*

*(a) paragraph (a)(i) referred to 166,667 Units of Account; and*

*(b) paragraph (b)(i) referred to 83,333 Units of Account.*

Paragraph 5 has been replaced by the following provisions in Part II, section 5(2) and (3) of the Second Schedule to the MSA 1989:

*(2) For the purposes of Article 6 and this paragraph a ship's tonnage shall be its gross tonnage calculated in such manner as may be prescribed by an order made by the Minister.*

*(3) Any order under this paragraph shall, so far as appears to the Minister to be practicable, give effect to the regulations in Annex 1 of the International Convention on Tonnage Measurement of Ships 1969.*

**BARBADOS**

The option granted by this provision has not been exercised.

**BELGIUM**

Article 11 of Law 11 April 1989 provides that the King shall establish the limit of liability applicable to ships of less than 300 tons but Article 4(1) of Decree 14 November 1989 provides that the limits set out in Article 6(1)(a)(i) and (b)(i) of the Convention shall apply to such ships.

**CANADA**

Canada, by Section 577 of The Canada Shipping Act, has enacted national law in accordance with Article 15 paragraph 2 of the Convention. Section 577(1) of The Canada Shipping Act describe the limits for vessels less than 300 tons:

*The maximum liability of a shipowner for claims arising on any distinct occasion involving a ship with a tonnage of less than 300 tons, other than claims mentioned in section 578, is:*

*(a) in respect of claims for loss of life or personal injury, \$ 1,000,000;*

*(b) in respect of any other claims, \$500,000.*

**CROATIA**

The option granted by this provision has not been exercised and article 419(1) of the Maritime Code provides that articles 406-476 which set out the rules governing limitation of liability, apply also to "boats" which shall be deemed to be ships of 500 tons.

**DENMARK**

The option granted by this provision has not been exercised.

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**FINLAND**

The position is the same as in Denmark.

**FRANCE**

France has given notice to the depositary that “as far as ships with a tonnage of less than 300 tons are concerned, the general limits of liability are equal to half those established in article 6 of the Convention for ships with a tonnage not exceeding 500 tons”. Since reference is made only to article 6, the limit for passenger claims set out in article 7 of the Convention is applicable to such ships.

**GERMANY**

Germany has exercised the option granted by this provision and given notice to the depositary in the following terms:

*In accordance with art. 15, par. 2, first sentence, sub-par. (b) of the Convention, the system of limitation of liability to be applied to ships up to a tonnage of 250 tons is regulated by specific provisions of the law of the Federal Republic of Germany to the effect that, with respect to such a ship, the limit of liability to be calculated in accordance with art. 6, par. 1(b) of the Convention is half of the limitation amount to be applied with respect to a ship with a tonnage of 500 tons.*

**GREECE**

No special rules have been enacted in respect of ships of less than 300 tons. The Convention limits, therefore, apply to such ships except those of less than 10 tons, which do not qualify as “ships” under Greek law.

**HONG KONG, CHINA**

Section 17(1) of the Ordinance so provides:

*(1) In the application of Article 6 of the Convention to a ship with a tonnage less than 300 tons that Article has effect as if:*

- (a) paragraph 1(a)(i) referred to 166 667 Units of Account; and*
- (b) paragraph 1(b)(i) referred to 83 333 Units of Account.*

**IRELAND**

The MSA 1996 has not made separate provision for ships of less than 200 tons.

**JAPAN**

Although it does not appear that Japan has given any notice to the depositary, the reply to question 5 is to the effect that there is a special limit of 56,000 SDRs in respect of wooden ships of less than 100 tons.

**MEXICO**

Mexico has not exercised the option granted under Article 15(2)(b).

**NETHERLANDS**

The Netherlands has availed itself of the option and has given notice to the depositary in the following terms:

*The act of June 14th 1989 (Staatsblad 241) relating to the limitation of*

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*liability for maritime claims provides that with respect to ships which are according to their construction intended exclusively or mainly for the carriage of persons and have a tonnage of less than 300, the limit of liability for claims other than for loss of life or personal injury may be established by Order in Council at a lower level than under the Convention.*

*The Order in Council of February 19th 1990 (Staatsblad 97) provides that the limit shall be 100,000 Units of Account.*

*The Unit of Account is the Special Drawing Right as defined in Article 8 of the Convention on Limitation of Liability for Maritime Claims, 1976.*

The Royal Decree 19 February 1990 has been replaced by the Royal Decree 29 November 1996 but the limit has not been changed. It does not appear that notice of such latter act has been given to the depositary.

**NEW ZEALAND**

In respect of claims for loss of life or personal injury, the limit for a ship of not more than 300 tons is 166,677 units of account instead of the 333,000 provided for in article 6 of the Convention (refer section 87(1)(a)). In respect of other claims, the limit is 83,333 units of account instead of the 167,000 provided for in article 6 of the Convention (refer section 87(3)(a)).

**NORWAY**

The limits are the same.

**POLAND**

Poland has adopted specific provisions concerning limitation of liability to be applied to ships of less than 300 tons. According to Art. 312 § 1 of the Polish Maritime Code the limits of liability shall be calculated as follows:

- 100.000 units of account in respect of claims for loss of life, bodily injury and disturbance of health;
- 50.000 units of account in respect of any other claims.

**SPAIN**

The limits are the same.

**SWEDEN**

The limits are the same.

**SWITZERLAND**

Switzerland has exercised the option granted by this provision and has given notice to the depositary in the terms quoted in Appendix B.

**UNITED KINGDOM**

The United Kingdom has exercised the option granted by this provision and given notice to the depositary in the following terms:

*With regard to article 15, paragraph 2(b), the limits of liability which the United Kingdom intend to apply to ships of under 300 tons are 166,677 units of account in respect of claims for loss of life or personal injury, and 83,333 units of account in respect of any other claims.*

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The limits are instead unvaried for passenger ships.

Section 5 of Part II of Schedule 7 to the MSA 1995 so provides:

- (1) *In the application of article 6 to a ship with a tonnage less than 300 tons that article shall have effect as if:*  
 (a) *paragraph 1(a)(i) referred to 166,667 Units of Account; and*  
 (b) *paragraph 1(b)(i) referred to 83,333 Units of Account.*

As respects paragraph (5) the following provisions have been enacted in section 5(2) and (3) of Part II of Schedule 7 to the MSA 1995:

- (2) *For the purposes of article 6 and this paragraph a ship's tonnage shall be its gross tonnage calculated in such manner as may be prescribed by an order made by the Secretary of State.*  
 (3) *Any order under this paragraph shall, so far as appears to the Secretary of State to be practicable, give effect to the regulations in Annex I of the International Convention on Tonnage Measurement of Ships 1969.*

**3. *A State Party may regulate by specific provisions of national law the system of limitation of liability to be applied to claims arising in cases in which interests of persons who are nationals of other States Parties are in no way involved.***

**AUSTRALIA**

No special provisions have been enacted.

**BAHAMAS**

No special provisions have been enacted.

**BARBADOS**

The position is the same.

**BELGIUM**

The position is the same.

**CANADA**

No special provisions have been enacted with respect to this paragraph.

**CROATIA**

The position is the same.

**DENMARK**

The position is the same.

**FINLAND**

The position is the same.

**FRANCE**

The position is the same.

**GERMANY**

The position is the same.

**GREECE**

This paragraph has become part of Greek law without any change. Greece, however, has not availed itself of the right granted to States Parties thereunder.

**HONG KONG, CHINA**

Hong Kong has not availed itself of the right granted to States Parties under this paragraph.

**IRELAND**

The position is the same.

**JAPAN**

The position is the same.

**MEXICO**

The position is the same.

**NETHERLANDS**

The position is the same.

**NEW ZEALAND**

The position is the same.

**NORWAY**

The position is the same.

**SPAIN**

It is not settled in Spain whether the provisions of the Convention apply when all parties are Spanish nationals.

**SWEDEN**

The position is the same as in Norway.

**UNITED KINGDOM**

The position is the same. The following explanations are given in the response to question 6 of the Questionnaire.

*Under the Convention the deemed minimum tonnage for limitation purposes is 500 tons both in relation to claims for loss of life or personal injury and property damage. Section 1(1) of the 1958 Act provided that a deemed minimum tonnage of 300 tons would apply to loss of life or personal injury claims only and did not apply to property claims. However, by virtue of paragraph 5 of Schedule 7, Part II, and Section 185 of the 1995 MSA, there is a new minimum level of limitation for ships of less than 300 tons in respect of all claims falling within Article 6. These provisions do not apply to claims made by passengers. Article 7 of the 1976 Convention provides that limitation in respect of this type of claim to be based on a global fund calculated not by reference to the tonnage of the ship but by reference to the number of passengers which the ship is certificated to carry.*

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*Currently passenger claims in the UK are more likely to be covered by the Athens Convention except where the vessel involved is non sea-going.*

**4. The Courts of a State Party shall not apply this Convention to ships constructed for, or adapted to, and engaged in, drilling:**

*(a) when that State has established under its national legislation a higher limit of liability than that otherwise provided for in Article 6; or*

*(b) when that State has become party to an international convention regulating the system of liability in respect of such ships.*

*In a case to which sub-paragraph (a) applies that State Party shall inform the depositary accordingly.*

**AUSTRALIA**

The Convention applies.

**BAHAMAS**

The Convention does not apply.

**BARBADOS**

The Convention does not apply.

**BELGIUM**

Pursuant to Article 1 of Book II, Title II of the Code of Commerce vessels of 25 tons or more normally used for the carriage of goods or persons, for fishing, towing or for any other profitable shipping operation at sea are deemed to be vessels for the purpose of the application of the law. Since drilling is considered to be a “profitable shipping operation at sea” the Convention and Articles 47-58 of the Code apply.

**CANADA**

This paragraph applies in its original text.

**CROATIA**

The Convention does not apply.

**DENMARK**

The following response has been given by the Danish MLA to question 7 of the Questionnaire:

*As a main rule Chapters 7, 9 and 12 (previously Chapters 10 and 15) apply to drilling ships.*

*However, according to section 181, sub-section 2 (previously section 243, sub-section 2) special liability limits apply to such ships (and to movable sea plants) while the drilling ships are used for exploration and recovery of raw materials from the subsoil or seabed in Danish territorial waters or the Danish continental shelf area. According to the Act on Certain Sea Plants, the shipowner may limit his liability under the same conditions as provided for in Chapters 7 and 9 (previously Chapter*

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10). However, the amounts of limitation are considerably higher according to the Act on Certain Sea Plants: The shipowner may limit his liability to 20 million SDR to which amount another 12 million SDR will be added in case of personal injury.

**FINLAND**

Section 10 of chapter 9 of the Maritime Code so provides:

*The limits of liability for warships and other vessels which at the time of the event are owned or used by a State and are used exclusively for State purposes and not commercially may in no case be less than the limits applicable to a vessel having a tonnage of 5,000. Nevertheless, if a claim is for compensation for loss or damage caused by the special characteristics or employment of such a vessel, there shall be no right to limit liability. The provisions of this paragraph do not apply to vessels used primarily for ice breaking or salvage.*

*The limits of liability for a vessel built and adapted to drilling for natural resources of the sea bed shall be 12 million SDR for claims mentioned in section 5 item 2 and 20 million SDR for claims mentioned in section 5 item 3 if the claims concern damage caused while the vessel is used in drilling activities. For claims in respect of oil pollution liability there are special provisions.*

*Mobile platforms intended for exploration or exploitation of the natural resources of the sea bed shall be considered as vessels for purposes of the application of this chapter. The limits of liability for such platforms shall however always equal the amounts stated in the second paragraph.*

**FRANCE**

The Convention is deemed to apply without restrictions to ships constructed for or adapted to drilling.

**GERMANY**

The following response has been given by the German MLA to question 7 of the Questionnaire:

*The answer depends solely on the interpretation of the legal term "sea-going ship" in Article 1 (2) LLMCC. Taking into account Article 15 (2) lit. a) LLMCC we understand that "sea-going ship" is any ship intended for regular navigation on maritime waters whether registered as sea-going ship or not. Consequently, drilling units like other mobile craft would be treated as sea-going ships during their voyage.*

**GREECE**

This paragraph has become part of Greek law without any change. Greece has not availed itself of the right to establish higher limits of liability in respect of ships constructed for, or adopted to, and engaged in, drilling.

**HONG KONG, CHINA**

The Convention applies to all ships, whatever their purposes. Section 13 of the Ordinance so provides:

*For the purposes of this Ordinance:*

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(a) “ship” in the Convention includes:

(i) any air-cushion vehicle designed to operate in or over water while so operating; and

(ii) any structure (whether completed or in course of completion) launched and intended for use in navigation as a ship or part of a ship;

(b) references in the Convention to the court are references to the High Court.

**IRELAND**

The following comments have been made by the Irish Maritime Law Association:

7. Section 9 of the MSA 1996 states:

*“References in the 1976 Convention to a ship shall be construed as including references to any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or part of a ship”.*

*It would appear, therefore, that if a ship is constructed for or adapted to and engaged in drilling it would come within the ambit of the Act so long as it is a ship. If it was simply a drilling rig, the Convention would not appear to apply because of the provisions of Article 15.5 of the Convention.*

**JAPAN**

The Convention applies. However, as a consequence of the definition of ship in article 684 of the Commercial Law, which includes the requisite of navigability, the Convention does not apply to craft incapable of navigation.

**MEXICO**

The Convention applies.

**NETHERLANDS**

The Convention applies to ships constructed for, or adapted to, and engaged in, drilling.

**NEW ZEALAND**

The following response has been given by the MLA of Australia and New Zealand to question 7:

*Section 84 MTA defines “ship” as:*

*“...every description of vessel (including barges, lighters, and like vessels) used or intended to be used in navigation, however propelled; and includes any structure (whether completed or not) launched and intended for use as a ship or part of a ship; and also includes any ship used by or set aside for the New Zealand Defence Force.”*

*There is no authoritative consideration of this definition. If the adapted ship is intended for drilling as a stationary platform rather than navigation, the better view is probably that the limitation provisions would not apply. The precise answer is likely to depend upon the extent to which the adapted ship could be used in navigation, if at all.*



**NORWAY**

Section 181 of the Maritime Code so provides in its second paragraph:  
*With regard to vessels built or equipped to drill for natural resources under the sea bed, the limits of liability according to subsections 2 and 3 of Section 175 shall regardless of the size of the vessel be respectively 12 million SDR and 20 million SDR for claims arising from damage or loss caused while the vessel is used in drilling operations.*

Subsections 2 and 3 of section 175 set out the general limits for personal injury and property damage.

**POLAND**

The 1976 Convention applies to all sea-going vessels (merchant sea-going vessels, vessels employed exclusively for scientific research or for sports). According to Art. 3 § 3 of the Polish Maritime Code merchant sea-going vessels are sea-going vessels appropriated to or employed in the carriage of cargo or of passengers, for sea fisheries or for the exploitation of other wealth of the sea, for towage or salvage of sea-going vessels and of other floating structures, for recovering property sunk in the sea or for other activity of an economic nature.

**SPAIN**

The Convention applies, none of the situations mentioned under (a) and (b) having materialized.

**SWEDEN**

The position is the same as in Finland.

**UNITED KINGDOM**

The following response has been given to question 7 of the Questionnaire:

*Article 15(4) does not appear in Schedule 7, Part I, of the 1995 MSA and therefore does not have the force of law in the United Kingdom by virtue of Section 185 of this Act. The implication is that such vessels are subject in the United Kingdom to the limitation provisions of the 1976 Convention provided that they satisfy the definitions of "ship" contained in paragraph 12 of Schedule 7, Part II, to the MSA 1995 (see response to Question 4, above) and in s.313(2) of the MSA 1995.*

**5. This Convention shall not apply to:**

**(a) air-cushion vehicles;**

**(b) floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof.**

**AUSTRALIA**

Article 15(5) has been given the force of law.

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**BAHAMAS**

Article 15 has not been given the force of law. It is thought that in view of the definition of ship in section 12 of Part II of the Second Schedule to the Act as “any structure ... intended for use in navigation”, floating platforms are probably excluded from the scope of application of the Convention. Doubts may exist instead in respect of air-cushion vehicles.

**BARBADOS**

The same comments apply.

**BELGIUM**

This provision has been implemented without any change.

**CANADA**

Article 15(5) applies in its original text. It is also repeated in Section 576(3) of The Canada Shipping Act. Special provisions have been enacted in respect of the limitation of liability of dock, canal or port.

Carrying over from the 1957 Convention, Canada has extended by statute the right of limitation of liability to the owner of a dock, canal or port. Section 583 of The Canada Shipping Act describes the limitation rights as follows:

*(1) The maximum liability for an owner of a dock, canal or port for a claim arising on any distinct occasion for any loss or damage caused to a ship or ships, or to any goods, merchandise or other things whatsoever on board a ship or ships is the greater of*

*(a) \$2,000,000 and*

*(b) the amount calculated by multiplying \$1,000 by the number of tons of the tonnage of the largest ship that, at the time of the loss or damage is, or, within a period of five years before that time, had been, within the area of that dock, canal or port over which the owner had control or management.*

*(2) For the purposes of subsection (1), a ship's tonnage is the gross tonnage calculated in the manner set out in subsection 577(2).*

*(3) This section does not apply if it is proved that the loss or damage resulted from the personal act or omission of the owner committed with intent to cause the loss or damage or recklessly and with knowledge that the loss or damage would probably result.*

*(4) This section applies to any person for whose act or omission the owner is responsible.*

*(5) For the purposes of this section,*

*(a) 'dock' includes wet docks and basins, tidal-docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharfs, piers, stages, landing places, jetties and synchrolifts; and*

*(b) 'owner of a dock, canal or port' includes any person or authority having the control or management of any dock, canal or port, and any ship repairer using the dock, canal or port, as the case may be.*

**CROATIA**

Article 419(2) so provides:

*This part of the law shall not apply to a) hydrofoils and b) rigs/platforms employed for researches and the exploitation of natural resources of the sea bed and its subsoil.*

**DENMARK**

Although not expressly stated, in order not to prejudice the interpretation of other provisions of the Merchant Shipping Act, air-cushion vehicles are excluded from the scope of the rules implementing the LLMC Convention. As regards floating platforms see response to question 7 of the Questionnaire under Article 15(4).

**FINLAND**

The limits for drilling ships apply to floating platforms. See s. 10 of chapter 9, under article 15(4). Air-cushion vehicles are treated as ships and, therefore, they are not excluded from the scope of application of the limitation rules.

**FRANCE**

Article 15(5) has been given the force of law and, therefore, the Convention does not apply to air-cushion vehicles and floating platforms.

**GERMANY**

The position is the same.

**GREECE**

Also this paragraph has become part of Greek law without any change. Except for floating platforms falling under the description of sub-paragraph (b), floating rigs of more than 5,000 tons displacement, as well as floating refineries and oil storage tanks of more than 15,000 g.r.t. used in exploration, drilling of the sea-bed, pumping, refining and storage of oil or natural gas are considered as "ships" under Greek law and, therefore, the Convention applies to them.

As respects floating platforms excluded from the scope of application of the Convention limitation is available in accordance with the provisions of the Code of Private Maritime Law (Sections 85-86). See Annex VII.

**HONG KONG, CHINA**

The scope of application of the Convention has been extended to air-cushion vehicles by section 13(a)(i) of the Ordinance.

**IRELAND**

See the comments of the Irish Maritime Law Association under the preceding paragraph.

**JAPAN**

Since there is no provision in the Limitation of Liability of Shipowners Act expressly excluding air-cushion vehicles and floating platforms, its rules are applicable when air-cushion vehicles and floating platforms satisfy the

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definition of ship in the Commercial Code. But in general floating platforms are not deemed to be ships.

**MEXICO**

Article 15(5) is in force.

**NETHERLANDS**

Air-cushion vehicles are considered to be ships under the general definition of Book 8 of the Dutch Civil Code, but liability in their respect cannot be limited in the Netherlands.

Floating platforms are excluded from the scope of application of the rules enacted in the Dutch Civil Code only when they are fixed to the seabed, while they are subject thereto when they are floating (JAPIKSE, in *Limitation of Liability for Maritime Claims*, by Griggs and Williams, London 1998, p. 244).

**NEW ZEALAND**

In respect of floating platforms see response to question 7 of the Questionnaire under article 15(4). There is no specific provision in the MTA excluding air cushion vehicles. Given the wide definition of “ship” under the MTA, there does not appear to be any bar to applying the limitation provisions to air cushion vehicles which are intended for use in navigation.

**NORWAY**

Air-cushion vehicles are not considered as ships in the Norwegian Maritime Code.

**SPAIN**

Article 15(5) has been given the force of law and, therefore, the Convention does not apply to air-cushion vehicles and floating platforms.

**SWEDEN**

The limits for drilling ships apply to floating platforms. See s. 10 of chapter 9, under article 15(4).

**UNITED KINGDOM**

It is thought that floating platforms do not satisfy the definition of “ship” contained in paragraph 12 of Schedule 7, Part II, to the MSA 1995 and in s. 313(2) of the MSA 1995.

**ARTICLE 18***Reservations*

*1. Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right to exclude the application of Article 2 paragraph 1(d) and (e). No other reservations shall be admissible to the substantive provisions of this Convention.*

*2. Reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.*

*3. Any State which has made a reservation to this Convention may withdraw it at any time by means of a notification addressed to the Secretary-General. Such withdrawal shall take effect to the date the notification is received. If the notification states that the withdrawal of a reservation is to take effect on a date specified therein, and such date is later than the date the notification is received by the Secretary-General, the withdrawal shall take effect on such later date.*

#### **BELGIUM**

Belgium has reserved the right to exclude the application of Article 2(1)(d) and (e) and has given effect to such reservation with Article 47(1) of Book II, Title II of the Code of Commerce, as amended by Law 11 April 1989.

#### **GERMANY**

As stated under Article 2, Germany has excluded the application of Article 2(1)(d) and (e).

#### **HONG KONG, CHINA**

As stated under Article 2, Hong Kong has excluded the application of Article 2(1)(d).

#### **JAPAN**

Japan has reserved the right to exclude the application of Article 2(1)(d) and (e).

#### **NETHERLANDS**

The Netherlands has reserved the right to exclude the application of Article 2(1)(d) and (e).

#### **UNITED KINGDOM**

The United Kingdom has reserved the right to exclude the application of Article 2(1)(d) and to exclude the application of Article 2(1)(e) with regard to Gibraltar only.

**APPENDIX A****DECLARATIONS, RESERVATIONS AND STATEMENTS****BELGIUM**

The instrument of accession of the Kingdom of Belgium was accompanied by the following reservation (in the French language):

*[Translation]*

“In accordance with the provisions of article 18, paragraph 1, Belgium expresses a reservation on article 2, paragraph 1(d) and (e)”.

**CHINA**

By notification dated 5 June 1997 from the People's Republic of China:

*[Translation]*

“1. with respect to the Hong Kong Special Administrative Region, it reserves the right in accordance with Article 18(1), to exclude the application of the Article 2(1)(d)”.

**FRANCE**

The instrument of approval of the French Republic contained the following reservation (in the French language):

*[Translation]*

In accordance with article 18, paragraph 1, the Government of the French Republic reserves the right to exclude the application of article 2, paragraphs 1(d) and (e)”.

**GERMAN DEMOCRATIC REPUBLIC**

The instrument of accession of the German Democratic Republic was accompanied by the following reservation (in the German language):

*[Translation]*

*Article 2, paragraph 1(d) and (e)*

“The German Democratic Republic notes that for the purpose of this Convention there is no limitation of liability within its territorial sea and internal waters in respect of the removal of a wrecked ship, the raising, removal or destruction of a ship which is sunk, stranded or abandoned (including anything that is or has been on board such ship). Claims, including liability, derive from the laws and regulations of the German Democratic Republic”.

*Article 8, paragraph 1*

“The German Democratic Republic accepts the use of the Special Drawing Rights merely as a technical unit of account. This does not imply any change in its position toward the International Monetary Fund”.

**FEDERAL REPUBLIC OF GERMANY**

The instrument of ratification of the Federal Republic of Germany was accompanied by the following declaration (in the German language):

*[Translation]*

“... that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany”.  
“In accordance with art. 18, par. 1 of the Convention, the Federal Republic of Germany reserves the right to exclude the application of art. 2, par. 1 (d) and (e) of the Convention”.

**JAPAN**

The instrument of accession of Japan was accompanied by the following statement (in the English language):

“... The Government of Japan, in accordance with the provision of paragraph 1 of article 18 of the Convention, reserves the right to exclude the application of paragraph 1(d) and (e) of article 2 of the Convention”.

**NETHERLANDS**

The instrument of accession of the Kingdom of the Netherlands contained the following reservation:

“In accordance with article 18, paragraph 1 of the Convention on limitation of liability for maritime claims, 1976, done at London on 19 November 1976, the Kingdom of the Netherlands reserves the right to exclude the application of article 2, paragraph 1(d) and (e) of the Convention”.

**UNITED KINGDOM**

The instrument of accession of the United Kingdom of Great Britain and Northern Ireland contained reservation which states that the United Kingdom was “Reserving the right, in accordance with article 18, paragraph 1, of the Convention, on its own behalf and on behalf of the above mentioned territories, to exclude the application of article 2, paragraph 1(d); and to exclude the application of article 2, paragraph 1(e) with regard to Gibraltar only”.

**APPENDIX B****NOTIFICATIONS****ARTICLE 8(4)****GERMAN DEMOCRATIC REPUBLIC***[Translation]*

“The amounts expressed in Special Drawing Rights will be converted into marks of the German Democratic Republic at the exchange rate fixed by the Staatsbank of the German Democratic Republic on the basis of the current rate of the US dollar or of any other freely convertible currency”.

**CHINA***[Translation]*

“The manner of calculation employed with respect to article 8(1) of the Convention concerning the unit of account shall be the method of valuation applied by the International Monetary Fund”.

**POLAND**

“Poland will now calculate financial liabilities mentioned in the Convention in the terms of the Special Drawing Right, according to the following method. The Polish National bank will fix a rate of exchange of the SDR to the United States dollar according to the current rates of exchange quoted by Reuter. Next, the US dollar will be converted into Polish zloties at the rate of exchange quoted by the Polish National bank from their current table of rates of foreign currencies”.

**SWITZERLAND**

“The Federal Council declares, with reference to article 8, paragraphs 1 and 4 of the Convention that Switzerland calculates the value of its national currency in special drawing rights (SDR) in the following way:

The Swiss National Bank (SNB) notifies the International Monetary Fund (IMF) daily of the mean rate of the dollar of the United States of America on the Zurich currency market. The exchange value of one SDR in Swiss francs is determined from that dollar rate and the rate of the SDR in dollars calculated by IMF. On the basis of these values, SNB calculates a mean SDR rate which it will publish in its Monthly Gazette”.

**UNITED KINGDOM**

“... The manner of calculation employed by the United Kingdom pursuant to article 8(1) of the Convention shall be the method of valuation applied by the International Monetary Fund”.



**ARTICLE 15(2)****BELGIUM***[Translation]*

"In accordance with the provisions of article 15, paragraph 2, Belgium will apply the provisions of the Convention to inland navigation".

**FRANCE***[Translation]*

"... - that no limit of liability is provided for vessels navigating on French internal waterways;

- that, as far as ships with a tonnage of less than 300 tons are concerned, the general limits of liability are equal to half those established in article 6 of the Convention...for ships with a tonnage not exceeding 500 tons".

**FEDERAL REPUBLIC OF GERMANY***[Translation]*

"In accordance with art. 15, par. 2, first sentence, sub-par. (a) of the Convention, the system of limitation of liability to be applied to vessels which are, according to the law of the Federal Republic of Germany, ships intended for navigation on inland waterways, is regulated by the provisions relating to the private law aspects of inland navigation.

In accordance with art. 15, par. 2, first sentence, sub-par. (b) of the Convention, the system of limitation of liability to be applied to ships up to a tonnage of 250 tons is regulated by specific provisions of the law of the Federal Republic of Germany to the effect that, with respect to such a ship, the limit of liability to be calculated in accordance with art. 6, par. 1 (b) of the Convention is half of the limitation amount to be applied with respect to a ship with a tonnage of 500 tons".

**NETHERLANDS***Paragraph 2(a)*

"The Act of June 14th 1989 (Staatsblad 239) relating to the limitation of liability of owner of inland navigation vessels provides that the limits of liability shall be calculated in accordance with an Order in Council.

The Order in Council of February 19th 1990 (Staatsblad 96) adopts the following limits of liability in respect of ships intended for navigation on inland waterways.

**I. LIMITS OF LIABILITY FOR CLAIMS IN RESPECT OF LOSS OF LIFE OR PERSONAL INJURY OTHER THAN THOSE IN RESPECT OF PASSENGERS OF A SHIP, ARISING ON ANY DISTINCT OCCASION:**

1. for a ship not intended for the carriage of cargo, in particular a passenger ship, 200 Units of Account per cubic metre of displacement at maximum permitted draught, plus, for ships equipped with mechanical means of propulsion, 700 Units of Account for each kW of the motorpower of the means of propulsion;
2. for a ship intended for the carriage of cargo, 200 Units of Account per ton of the ship's maximum deadweight, plus, for ships equipped with

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*Annex VI - Implementation by States Parties*

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mechanical means of propulsion, 700 Units of Account for each kW of the motorpower of the means of propulsion;

3. for a tug or a pusher, 700 Units of Account for each kW of the motorpower of the means of propulsion;

4. for a pusher which at the time the damage was caused was coupled to barges in a pushed convoy, the amount calculated in accordance with 3 shall be increased by 100 Units of Account per ton of the maximum deadweight of the pushed barges; such increase shall not apply if it is proved that the pusher has rendered salvage services to one or more of such barges;

5. for a ship equipped with mechanical means of propulsion which at the time the damage was caused was moving other ships coupled to this ship, the amount calculated in accordance with 1, 2 or 3 shall be increased by 100 Units of Account per ton of the maximum deadweight or per cubic metre of displacement of the other ships; such increase shall not apply if it is proved that this ship has rendered salvage services to one or more of the coupled ships;

6. for hydrofoils, dredgers, floating cranes, elevators and all other floating appliances, pontoons or plant of a similar nature, treated as inland navigation ships in accordance with Article 951a, paragraph 4 of the Commercial Code, their value at the time of the incident;

7. where in cases mentioned under 4 and 5 the limitation fund of the pusher of the mechanically propelled ship is increased by 100 Units of Account per ton of the maximum deadweight of the pushed barges or by 100 Units of Account per ton of the maximum deadweight or per cubic metre of displacement of the other coupled ships, the limitation fund of each barge or of each of the other coupled ships, the limitation fund of each barge or of each of the other coupled ships shall be reduced by 100 Units of Account per ton of the maximum deadweight of the barge or by 100 Units of Account per ton of the maximum deadweight or per cubic metre of displacement of the other vessel with respect to claims arising out of the same incident; however, in no case shall the limitation amount be less than 200,000 Units of Account.

II. The limits of liability for claims in respect of any damage caused by water pollution, other than claims for loss of life or personal injury, are equal to the limits mentioned under I.

III. The limits of liability for all other claims are equal to half the amount of the limits mentioned under I.

IV. In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of an inland navigation ship, the limit of liability of the owner thereof shall be an amount equal to 60,000 Units of Account multiplied by the number of passengers the ship is authorized to carry according to its legally established capacity or, in the event that the maximum number of passengers the ship is authorized to carry has not been established by law, an amount equal to 60,000 Units of Account multiplied by the number of passengers actually carried on board at the time of the incident. However, the limitation of liability shall in no case be less than 720,000 Units of Account and shall not exceed the following amounts:

- (i) 3 million Units of Account for a vessel with an authorized maximum capacity of 100 passengers;
  - (ii) 6 million Units of Account for a vessel with an authorized maximum capacity of 180 passengers;
  - (iii) 12 million Units of Account for a vessel with an authorized maximum capacity of more than 180 passengers;
- Claims for loss of life or personal injury to passengers" have been defined in the same way as in Article 7, paragraph 2 of the Convention on Limitation of Liability for Maritime Claims, 1976.

The Unit of Account mentioned under I-IV is the Special Drawing Right as defined in Article 8 of the Convention on Limitation of Liability for Maritime Claims, 1976."

*Paragraph 2(b)*

"The Act of June 14th 1989 (Staatsblad 241) relating to the limitation of liability for maritime claims provides that with respect to ships which are according to their construction intended exclusively or mainly for the carriage of persons and have a tonnage of less than 300, the limit of liability for claims other than for loss of life or personal injury may be established by Order in Council at a lower level than under the Convention.

The Order in Council of February 19th 1990 (Staatsblad 97) provides that the limit shall be 100,000 Units of Account.

The Unit of Account is the Special Drawing Right as defined in Article 8 of the Convention on Limitation of Liability for Maritime Claims, 1976."

## **SWITZERLAND**

*[Translation]*

"In accordance with article 15, paragraph 2, of the Convention on Limitation of Liability for Maritime Claims, 1976, we have the honour to inform you that Switzerland has availed itself of the option provided in paragraph 2(a) of the above mentioned article.

Since the entry into force of article 44a of the Maritime Navigation Order of 20 November 1956, the limitation of the liability of the owner of an inland waterways ship has been determined in Switzerland in accordance with the provisions of that article, a copy of which is [reproduced below]:

### **II. Limitation of liability of the owner of an inland waterways vessel** **Article 44a**

1. In compliance with article 5, subparagraph 3c, of the law on maritime navigation, the liability of the owner of an inland waterways vessel, provided in article 126, subparagraph 2c, of the law, shall be limited as follows:

- a. in respect of claims for loss of life or personal injury, to an amount of 200 units of account per deadweight tonne of a vessel used for the carriage of goods and per cubic metre of water displaced for any other vessel, increased by 700 units of account per kilowatt of power in the case of mechanical means of propulsion, and to an amount of 700 units of account per kilowatt of power for uncoupled tugs and pusher craft; for all such vessels, however, the limit of liability is fixed at a minimum of 200,000 units of account;
- b. in respect of claims for passengers, to the amounts provided by the

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*Annex VI - Implementation by States Parties*

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Convention on Limitation of Liability for Maritime Claims, 1976, to which article 49, subparagraph 1, of the federal law on maritime navigation refers;

c. in respect of any other claims, half of the amounts provided under subparagraph a.

2. The unit of account shall be the special drawing right defined by the International Monetary Fund.

3. Where, at the time when damage was caused, a pusher craft was securely coupled to a pushed barge train, or where a vessel with mechanical means of propulsion was providing propulsion for other vessels coupled to it, the maximum amount of the liability, for the entire coupled train, shall be determined on the basis of the amount of the liability of the pusher craft or of the vessel with mechanical means of propulsion and also on the basis of the amount calculated for the deadweight tonnage or the water displacement of the vessels to which such pusher craft or vessel is coupled, in so far as it is not proved that such pusher craft or such vessel has rendered salvage services to the coupled vessels.”

**UNITED KINGDOM**

“... With regard to article 15, paragraph 2(b), the limits of liability which the United Kingdom intend to apply to ships of under 300 tons are 166,677 units of account in respect of claims for loss of life or personal injury, and 83,333 units of account in respect of any other claims.”

**ARTICLE 15(4)****NORWAY**

“Because a higher liability is established for Norwegian drilling vessels according to the Act of 27 May 1983 (No. 30) on changes in the Maritime Act of 20 July 1893, paragraph 324, such drilling vessels are exempted from the regulations of this Convention as specified in article 15 No. 4.”

**SWEDEN**

“... In accordance with paragraph 4 of article 15 of the Convention, Sweden has established under its national legislation a higher limit of liability for ships constructed for or adapted to and engaged in drilling than that otherwise provided for in article 6 of the Convention.”

## ANNEX VII

## NATIONAL RULES OF PROCEDURE

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**BELGIUM**

## Code of Commerce

*Book II, Title II as amended by Law 11 April 1989**Chapter 1**Section III**De la constitution du fonds de limitation et de la compétence**Art. 48*

§1er. Le propriétaire du navire ou l'assistant, demande la constitution du fonds, réglée par la Convention LLMC en présentant une requête au président du tribunal de commerce compétent en vertu de l'article 627, 10°, du Code judiciaire. La requête doit répondre aux conditions prescrites par l'article 1026 du Code judiciaire.

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*Annex VII - National rules of procedure: Belgium*

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Elle doit, en outre, énoncer la nationalité et le nom du navire, l'événement au cours duquel les dommages sont survenus, avec indication de la date et du lieu, le montant légal de la limitation de responsabilité évalué par le requérant et la manière dont il entend constituer le fonds de limitation: versement en espèces ou garantie.

A la requête sont annexées:

1° La liste, certifiée conforme par le requérant, des créanciers connus de lui à l'égard desquels il estime pouvoir opposer la limitation de sa responsabilité, avec l'indication si possible du domicile de chacun d'eux ainsi que du montant, à titre définitif ou provisoire, de chaque créance et de la nature de celle-ci;

2° toutes pièces justificatives du calcul du montant légal de la limitation de responsabilité.

§2. La présentation de la requête n'emporte pas reconnaissance de responsabilité.

§3. Le président du tribunal de commerce vérifie au provisoire si le montant indiqué par le requérant correspond à celui auquel il peut légalement limiter sa responsabilité. Dès qu'il a constaté la concordance entre ces deux montants, le président ordonne l'ouverture de la procédure de constitution du fonds.

Si le requérant n'a pas offert de verser en espèces le montant auquel sa responsabilité peut être limitée, majoré des intérêts légaux depuis le jour de l'événement dommageable jusqu'à celui de la constitution du fonds, le président n'ordonne l'ouverture de la procédure que si le requérant offre de fournir une garantie qui est acceptable et adéquate.

La garantie offerte n'est acceptable que si, de l'avis du président, il est certain que le fonds sera effectivement disponible et librement transférable dès que la garantie sera fournie.

La garantie est adéquate, si son montant correspond à celui auquel la responsabilité peut être limitée, augmenté d'une provision destinée à couvrir les intérêts légaux pour la durée que le président estimera être convenable.

Les dispositions des articles 2040 à 2043 du Code civil sont applicables à la garantie à fournir par le requérant.

L'ordonnance indique le délai dans lequel le versement doit être effectué ou dans lequel la garantie doit être fournie, ce délai ne pouvant excéder un mois à compter de la date de l'ordonnance; celle-ci fixe en outre le montant de la provision à verser par le requérant, dans le même délai, pour couvrir les frais de la procédure de constitution, de liquidation et de répartition du fonds de limitation.

Le président nomme un juge-commissaire et un liquidateur.

Le salaire du liquidateur est réglé par le président suivant la nature et l'importance de la procédure de constitution, de liquidation et de répartition du fonds.

Les dispositions des articles 460, 462 et 463 du Livre III du présent Code sont applicables aux activités du juge-commissaire et du liquidateur.

§4. En cas de versement en espèces, le liquidateur désigne l'organisme auprès duquel celles-ci seront déposées. Ce dépôt se fait au nom du

liquidateur ès qualité. Aucun retrait ne peut être opéré sans l'autorisation du juge-commissaire.

Les intérêts des sommes déposées accroissent celles-ci.

Dans le cas où une garantie est fournie, elle est constituée en faveur du liquidateur ès qualité.

Sans autorisation du juge-commissaire, il ne peut être apporté aucune modification à la garantie ainsi constituée.

La provision destinée à couvrir les frais de la procédure est remise au liquidateur, qui en dispose sous le contrôle du juge-commissaire.

§5. Sur rapport du liquidateur établissant le dépôt des sommes ou la constitution de la garantie, le président constate dans une ordonnance que le fonds est constitué. A partir de cette ordonnance, l'article 13 de la convention LLMC et les articles 496 à 500, 502 à 504 et 508 du Livre III du présent Code sont applicables au litige.

Pour l'application du premier alinéa l'ordonnance du président est assimilés au jugement déclaratif de faillite visé aux articles 496, 504 et 508.

Les publications visées à l'article 496 précité seront faites, s'il y a lieu, dans un ou plusieurs journaux maritimes étrangers.

L'opposition à l'ordonnance visée à l'alinéa 1er est portée devant le tribunal de commerce. Elle doit se faire dans les trois mois de la publication visée à l'article 496 précité. Ce délai est augmenté des délais prévus à l'article 55 du Code judiciaire.

§6. Les montants de la responsabilité limitée sont convertis en monnaie nationale au moment de la vérification prévue au §3, alinéa 1er.

Si, avant le constat de constitution du fonds de limitation, il y a lieu à rectification, dans l'un ou l'autre sens, de la conversion en francs belges du montant de la responsabilité limitée, cette rectification est prononcée par ordonnance du président qui fixe le délai d'exécution des mesures qu'il prescrit.

§7. L'article 1039 du Code judiciaire est applicable pour toutes les ordonnances rendues par le président dans la procédure visée par la présente section.

#### *Art. 49*

§1er. Le jugement qui postérieurement à la constitution du fonds, déclare la faillite du requérant, accorde le sursis de paiement ou homologue le concordat judiciaire, est sans effets sur ledit fonds.

§2. Le requérant et éventuellement le curateur de sa faillite doivent être appelés pour toutes les opérations de la procédure de liquidation et de répartition du fonds de limitation.

#### *Section IV*

#### *Procédure de liquidation et de répartition du fonds*

#### *Art. 50*

§1er. Lorsque la responsabilité du propriétaire du navire ou de l'assistant est établie et que ceux-ci sont en droit de limiter leur responsabilité, la procédure de liquidation et de répartition se poursuit.

§2. Les articles 496 à 500, 502 à 504 et 508 du Livre III du présent Code

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*Annex VII - National rules of procedure: Belgium*

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sont applicables à la déclaration, la vérification et la contestation des créances déposées à charge du fonds.

§3. Les publications visées à l'article 496 du Livre III du présent Code seront faites, s'il y a lieu, dans un ou plusieurs journaux maritimes étrangers.

*Art. 51*

§1er. Aucun droit de priorité ne peut être exercé sur la partie du fonds de limitation destinée à l'indemnisation des dommages matériels.

§2. Le liquidateur fait un projet de répartition qu'il communique aux créanciers.

En cas de contestation du projet de répartition, le tribunal de commerce dont le président a connu de la procédure, se prononcera sur le rapport du liquidateur.

*Art. 52*

§1er. Le fonds sera réparti entre les créanciers, au marc le franc de leurs créances affirmées et vérifiées.

§2. Le paiement à chaque créancier de la partie du fonds qui lui revient, éteint sa créance vis-à-vis du requérant.

§3. Après le paiement de toutes les créances, le surplus éventuel du fonds revient à celui qui l'a constitué ou, si celui-ci est déclaré en faillite, à la masse.

Sur rapport du liquidateur, contresigné par le juge-commissaire, la procédure est alors déclarée close par le président du tribunal de commerce compétent en vertu de l'article 627, 10° du Code judiciaire.

*Section V*

*Conversion en monnaie nationale*

*Art. 53*

Si le propriétaire du navire ou l'assistant ne constitue pas un fonds de limitation, les montants de la limitation de la responsabilité sont convertis en monnaie nationale aux dates respectives des paiements.

*Book III, Title I*

*Chapter IV*

*De la déclaration et de la vérification des créances*

496. Les créanciers du failli sont tenus de déposer au greffe du tribunal de commerce la déclaration de leurs créances avec leurs titres dans le délai fixé au jugement déclaratif de faillite. Le greffier en tiendra état et en donnera récépissé.

Les créanciers sont avertis à cet effet par les publications prescrites par l'article 472. Ils le seront en outre par une circulaire recommandée, que les curateurs leur adresseront aussitôt qu'ils seront connus.

Cette circulaire indiquera les jours et heures fixés pour la clôture du procès-verbal de vérification des créances et les débats des contestations à naître de cette vérification.



Les récépissés seront et demeureront annexés à la minute de la circulaire, qui sera visée par le juge-commissaire.

497. S'il existe des créanciers, résidant ou domiciliés hors du royaume, à l'égard desquels le délai fixé par le jugement déclaratif de la faillite serait trop court, le juge-commissaire le prolongera à leur égard selon les circonstances; il sera fait mention de cette prolongation dans les circulaires adressées à ces créanciers, conformément à l'art. 496.

498. La déclaration de chaque créancier énoncera ses nom, prénoms, profession et domicile, le montant et les causes de sa créance, les privilèges, hypothèques ou gages qui y sont affectés et le titre d'où elle résulte.

Elle sera signée par le créancier, ou en son nom par son fondé de pouvoir; dans ce cas, la procuration sera annexée à la déclaration, et elle devra énoncer le montant de la créance et contenir l'affirmation prescrite par le présent article.

499. La déclaration contiendra, de la part du créancier non domicilié dans la commune où siège le tribunal, élection de domicile dans cette commune.

A défaut d'avoir élu domicile, toutes significations et toutes informations pourront leur être faites ou données au greffe du tribunal.

500. La vérification des créances aura lieu, de la part des curateurs, à mesure que la déclaration en sera faite au greffe; elle sera opérée en présence du juge-commissaire et à l'intervention du failli, ou lui dûment appelé. Les titres en seront rapprochés des livres et écritures du failli.

Les créances des curateurs seront vérifiées par le juge-commissaire.

Un procès-verbal des opérations sera dressé par les curateurs et signé à chaque séance par eux et le juge-commissaire. Il indiquera le domicile des créanciers et de leurs fondés de pouvoirs. Il contiendra la description sommaire des titres produits, mentionnera les surcharges, natures et interlignes, et exprimera si la créance est admise ou contestée.

En cas de contestation ou si la créance ne paraît pas pleinement justifiée, les curateurs ajourneront leur décision jusqu'à la clôture du procès-verbal de vérification, et si, au moment de cet ajournement le créancier n'est pas présent en personne ou par fondé de pouvoir, ils lui en donneront immédiatement avis par lettre chargée à la poste.

502. [Dans la séance fixée pour la clôture du procès-verbal de vérification, toute créance déclarée qui sera contestée ou qui n'aura pas encore été admise sera examinée contradictoirement. Les curateurs signeront sur le titre de chacune des créances admises et non contestées la déclaration suivante: "Admis au passif de la faillite de ... pour la somme de ..., le ...".

Le juge-commissaire visera la déclaration; il renverra au tribunal toutes les contestations relatives aux créances non admises.]

503. Le failli et les créanciers vérifiés ou portés au bilan pourront assister à la vérification des créances et fournir des contredits aux vérifications faites et à faire. Après la clôture du procès-verbal de vérification, les contredits aux vérifications faites et comprises dans ce procès-verbal ne pourront, à peine de nullité, être formés que par actes signifiés aux créanciers déclarants, et déposés au greffe avec les pièces justificatives deux jours avant l'audience fixée pour les débats sur les contestations.

*Annex VII - National rules of procedure: Canada*

Les contredits aux vérifications qui seraient faites après la clôture du procès-verbal de vérifications devront, sous la même peine, être signifiés dans les dix jours qui suivront l'admission de la créance contestée. Toutefois, ce délai ne courra, à l'égard des créanciers admis postérieurement à cette dernière époque, qu'à compter de la vérification de leurs créances.

504. [Au jour fixé par le jugement déclaratif pour les débats sur les contestations, le juge-commissaire fera son rapport, et le tribunal ainsi saisi, sans attendre l'expiration des délais qui auront été prolongés en vertu de l'article 497, procédera, sans citation préalable, par urgence, toutes affaires cessantes, et, s'il est possible, par un seul jugement, à la décision de toutes les contestations relatives à la vérification des créances. Ce jugement sera rendu après avoir entendu contradictoirement, s'ils se présentent, les curateurs, le failli et les créanciers opposants et déclarants.]

Les contestations qui ne pourront recevoir une décision immédiate seront disjointes. Le tribunal pourra toutefois décider par provision que les créanciers contestés seront admis dans les délibérations pour la formation du concordat, pour une somme qui sera déterminée par le même jugement. S'il ne statue pas à cet égard, les créanciers contestés ne pourront prendre part aux opérations de la faillite tant qu'il ne sera intervenu de décision sur le fond de la contestation.

Aucune opposition ne sera reçue contre le jugement porté en exécution du présent article, ni contre ceux qui statueront ultérieurement sur les contestations disjointes. Le jugement qui prononcera une admission provisionnelle de créanciers contestés ne sera, en outre, susceptible ni d'appel ni de recours en cassation.]

508. A défaut de déclaration et d'affirmation de leurs créances dans le délai fixé par le jugement déclaratif de la faillite, et prolongé en vertu de l'art. 497, les défaillants connus ou inconnus ne seront pas compris dans les répartitions; toutefois, ils pourront déclarer et affirmer leurs créances jusqu'à la dernière distribution des deniers inclusivement. Leur déclarations ne suspendront pas les répartitions ordonnées; mais si de nouvelles répartitions sont ordonnées après ces déclarations, ils y seront compris pour la somme qui sera provisoirement déterminée par le juge-commissaire, et qui sera tenue en réserve jusqu'à ce que leurs créances auront donné lieu, resteront à leur charge, et ils ne pourront rien réclamer sur les répartitions ordonnées avant leurs déclarations, mais ils auront droit à prélever sur l'actif non encore réparti les dividendes afférents à leur créances dans les premières répartitions, s'ils justifient avoir été dans l'impossibilité de faire leur déclaration et affirmation dans le délai prescrit.

**CANADA**

By Sections 580 through 582 of The Canada Shipping Act, the Admiralty Court has exclusive jurisdiction with respect to any matter in relation to the constitution and distribution of the limitation fund pursuant to Articles 11 through 13 of the Convention.

The power of the Admiralty Court to regulate limitation of liability proceedings is described in Sections 580 through 582 of The Canada Shipping Act which are set out as follows.

580. (1) The Admiralty Court has exclusive jurisdiction with respect to any matter in relation to the constitution and distribution of a limitation fund pursuant to Articles 11 to 13 of the Convention.

(2) Any person against whom any liability that is limited by section 577, 578 or 583 or paragraph 1 of Article 6 or 7 of the Convention is alleged or apprehended may assert their right to limitation of liability in a defence filed, or by way of action or counterclaim for declaratory relief, in any court of competent jurisdiction in Canada.

581. (1) Where a claim is made or apprehended against a person in respect of a liability that is limited by section 577 or 578 or paragraph 1 of Article 6 or 7 of the Convention, the Admiralty Court, on application by that person or any other interested person, including a subject matter in any other court, tribunal or other authority, may take any steps it considers appropriate, including, without limiting the generality of the foregoing:

- (a) determining the amount of the liability and providing for the constitution and distribution of a fund pursuant to Articles 11 and 12, respectively, of the Convention, in relation to the liability;
- (b) proceeding in such a manner as to make interested persons parties to the proceedings, excluding any claimants who do not make a claim within a certain time and requiring security from the person claiming limitation of liability or other interested person and the payment of any costs, as the court considers appropriate; and
- (c) enjoining any person from commencing or continuing proceedings before any court, tribunal or other authority other than the Admiralty Court in relation to the same subject matter.

(2) In providing for the distribution of a fund under paragraph (1)(a) in relation to a liability, the Admiralty Court, having regard to any claim that may subsequently be established before a court, tribunal or other authority outside Canada in respect of that liability, may postpone the distribution of any part of the fund that it considers appropriate.

(3) No lien or other right in respect of a ship or other property affects the proportions in which a fund is distributed by the Admiralty Court.

(4) The Admiralty Court may

- (a) make any rule of procedure it considers appropriate with respect to proceedings before it under this section; and
- (b) determine what form of guarantee it considers to be adequate for the purposes of paragraph 2 of Article 11 of the Convention.

(5) For the purposes of Article 11 of the Convention, interest is payable at the rate prescribed under the Income Tax for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act in effect from time to time.

582. (1) Where a ship or other property is released pursuant to paragraph 2 of Article 13 of the Convention, the person who applies for the release is deemed, in any case other than a case in which a fund has been constituted in a place described in paragraphs 2(a) to (d) of that Article, to have submitted to the jurisdiction of the court that ordered the release for the purpose of determining the claim.

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*Annex VII - National rules of procedure: Croatia*

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(2) In considering whether to release a ship or other property referred to in subsection (1), the court shall not have regard to a limitation fund that is constituted in a country other than Canada unless the court is satisfied that the country is a state that is a party to the Convention.

**CROATIA**

## Maritime Code

*Part VII - The Ship Operator**2. Proceedings for the Limitation of the Ship Operator's Liability**Article 421*

Non-litigious proceedings for the limitation of the ship operator's liability shall be conducted by a sole judge of the court having territorial jurisdiction.

Unless otherwise specified by this Law, the provisions of the Civil Procedure Act shall correspondingly apply to the proceedings referred to in Paragraph 1 of this Article.

If the ship or boat involved in the occurrence, for which proceedings for the limitation of the ship operator's liability are conducted, is registered in the Croatian Register of ships or in a record of boats, the court in whose area the ship is registered or the boat recorded, shall have territorial jurisdiction.

If the ship or boat involved in the occurrence for which proceedings for the limitation of liability of a ship operator of foreign nationality are conducted, the court in whose area the ship was arrested, and if it was not arrested, the court in whose area assets for the constitution of the limitation fund have been deposited, shall have territorial jurisdiction.

No agreement between the parties on territorial jurisdiction shall be allowed in proceedings for the limitation of the ship operator's liability.

*Article 422*

Proceedings for the limitation of the ship operator's liability shall be instituted on the proposal of the person who is according to the provisions of this Law entitled to limit his liability.

A proposal for instituting proceedings for the limitation of the ship operator's liability shall, in addition to general data which must be stated in every application, also contain:

- 1) a description of the occurrence giving rise to the claim for which the limitation of liability is being proposed;
- 2) the ground for and the amount of limited liability;
- 3) the way the proposer is ready to constitute the limitation fund (by depositing cash or by giving another adequate security) and in particular to ensure the real value of the fund (by time deposit of resources in a reliable bank etc.)
- 4) a list of known creditors with the designation of their place of business or residence;
- 5) information on the kind and the likely amount of the claims of known creditors.

A proposal for instituting proceedings for the limitation of the ship operator's liability must be accompanied by documents proving the tonnage of the ship according to the provisions of Article 411, Paragraph 4 of this Law.

*Article 423*

If the court finds that the requirements prescribed by this Law which entitle the proposer to limit his liability have not been met, it shall render a ruling rejecting the request submitted.

If the court finds that the resources of the limitation fund will not be actually available for the benefit of the claimants, it shall reject the request for the constitution of the fund; however, the proceedings pertaining to the limitation of liability shall persist, as though the proposer invoked the limitation of liability without intention of constituting a fund, provided the requirements prescribed by this Law which entitle the proposer to limit his liability have been met.

*Article 424*

If the court is satisfied that the request made in the proposal for instituting proceedings for the limitation of the ship operator's liability complies with the provisions of this Law pertaining to the requirements for the limitation of liability, it shall render a ruling approving the limitation of liability.

If the court finds that the assets of the proposed limitation fund will be actually available for the benefit of the creditor, it shall render a ruling approving the constitution of the limitation fund.

In the ruling referred to in Paragraph 2 of this Article the court shall summon the proposer within 15 days to submit to the court proof that he has made available to the court the assets approved for the constitution of the limitation fund, and that he has deposited in advance a specific sum necessary to cover the costs that will be incurred in the course of or in connection with the proceedings.

If the proposer fails to proceed in conformity with the provision of Paragraph 3 of this Article, the court shall render a ruling setting aside the ruling on the constitution of the limitation fund.

In the ruling the court shall warn the proposer of the consequences of his failure to proceed according to the provision of Paragraph 4 of this Article.

*Article 425*

The ruling pertaining to the limitation of the proposer's liability shall be rendered by the court without deferment.

The limitation fund shall be considered to have been constituted on the date when the proposer submits to the court proof that he has proceeded in accordance with the provision of Article 424, Paragraph 3 of this Law.

A ruling ascertaining that the limitation fund has been constituted shall be rendered by the court within 24 hours from receipt of proof as referred to in Paragraph 3 of this Article.

The ruling pertaining to the limitation of liability and the constitution of the limitation fund shall be published in the Official Gazette (Narodne novine, Republika Hrvatska), on the court's notice board and, if necessary, also in some other adequate manner.

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*Annex VII - National rules of procedure: Croatia*

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The ruling shall be delivered to the proposer and to all creditors to whose claims the limitation of liability relates, and whose place of business or residence is known to the court.

*Article 426*

The ruling pertaining to the limitation of the ship operator's liability or the constitution of the limitation fund shall contain:

- 1) the name of the ship operator, port of registration and nationality, or the mark and place of registration of the boat;
- 2) the firm or the name and place of business or the personal name and residence and nationality of the proposer;
- 3) the occurrence to which the ship operator's limited liability relates;
- 4) the amount of liability limitation and the ruling pertaining to the constitution of the limitation fund and date of its constitution;
- 5) a summon to the creditors to report to the court the claims which are, according to the provisions of this Law, to be paid from the limitation fund, within a period of 30 days from the date of the publication of the ruling in the Official Gazette, whether or not a final decision on their existence has already been rendered, accompanied by a warning of the consequences of the omission mentioned in Article 436 of this Law;
- 6) the place and the time of the hearing for the examination of claims.

*Article 427*

If against a person who on the basis of the provisions of this Law is entitled to limit his liability (Articles 406, 407), and to whom the constituted limitation fund relates at the time of the fund's constitution, enforcement proceedings are conducted or proceedings for securing the claims which, according to the provisions of this Law, are to be settled from the constituted limitation fund, the enforcement court shall, at the request of such a person, stay by a ruling the enforcement proceedings or the security proceedings and set aside all acts committed in these proceedings.

The party at whose request the court has stayed the enforcement proceedings or the security proceedings shall bear his costs of the proceedings stayed, and shall be obliged, at the request of the opposite party, to pay the latter's expenses.

After the constitution of the limitation fund it shall no longer be possible to seek the institution of regular enforcement proceedings or security proceedings for securing claims which, according to the provisions of the Law, are to be settled from the constituted limitation fund.

If the ruling for the limitation of liability has been rendered, but the limitation fund has not been constituted, the court shall entitle by enforcement proceedings or security proceedings the enforcement or security solely to the amount of limitation of liability, provided the person who invokes the limitation of liability submits to the court the ruling for the limitation of liability and the proof of its compliance with this Law.

*Article 428*

Creditors making claims in a foreign currency shall report their claims in

the equivalent amount of local currency - Kunas at the rate of exchange of the National Bank of Croatia on the date of constitution of the limitation fund.

For claims reported in due time (Article 426, Point 5) a statutory overdue interest shall run from the date of constitution of the limitation fund and for other claims from the date of their reporting.

Examination of reported claims shall be carried out at the hearing for the examination of claims.

The proposer and all creditors who have reported their claims before the closure of the hearing for the examination of claims shall be entitled to take part in the hearing as parties.

Failure of the parties to appear at the hearing shall not prevent the court from holding the hearing.

At the hearing the court shall invite all present parties to declare themselves concerning the claims reported and concerning the ground for the limitation of the proposer's liability.

#### *Article 429*

It shall not be considered that by reporting his claim the creditor has recognised the right of the proposer to pay the reported claim from the constituted limitation fund.

A creditor may not contest the claim of another creditor by maintaining that it cannot be paid from the constituted limitation fund, as the occurrence giving rise to the claim, was caused by the ship operator with the intent to cause damage or by gross negligence with the knowledge that damages would probably arise (Article 410).

It shall be considered that the proposer of the constitution of the limitation fund and the creditors recognise that the claim reported exists and that it is recoverable from the constituted limitation fund, unless this is contested in writing and orally at the hearing before the closure of the hearing for the examination of claims.

#### *Article 430*

If the creditor contests that his claim is subject to the limitation of the proposer's liability, and the proposer disagrees with such contestation, the court shall by a ruling instruct the creditor within 30 days from the date of service of the ruling to institute a law-suit against the proposer to determine that the creditor's claim is not recoverable from the limitation fund.

If the creditor fails within the time-limit specified in Paragraph 1 of this Article to comply with the court ruling, or if he withdraws the law-suit instituted, it shall be considered that he has renounced his contestation that his claim is subject to the limitation of the proposer's liability.

#### *Article 431*

If a creditor contests to another creditor the existence or amount of the latter's claim or the right for his claim to be recovered from the limitation fund, the court shall by a ruling instruct the creditor whose claim has been contested within 30 days from the date of service of the ruling to institute against the proposer and all creditors who have contested his claim or the amount of this

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*Annex VII - National rules of procedure: Croatia*

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claim a law-suit for determining the existence and the amount of his claim or the right for it to be recovered from the limitation fund.

If the creditors contest another creditor's claim determined by a final judgement passed in the law-suit or other authority against the proposer, the court shall by a ruling instruct the creditor or creditors who contest such claim within 30 day to institute a law-suit to determine that the claim does not exist.

If the creditors instructed by the court to institute the law-suit within the term referred to in Paragraph 1 and 2 of this Article fail to proceed in accordance with the court ruling, or if they withdraw the law-suit instituted, it shall be deemed that in the case referred to in Paragraph 1 of this Article the claim has not been reported, and in the case referred to in Paragraph 2 of this Article that the claim has not been contested.

*Article 432*

If the proposer contests the existence or the amount of the creditor's claim, the court shall by a ruling instruct the creditor within 30 days from the date of service of the ruling to institute a law-suit against the proposer to ascertain the existence and the amount of his claim.

The proposer may not contest the creditor's claim if the existence and the amount of this claim has been ascertained by a final decision in a law-suit between the proposer and the creditor or in a law-suit conducted in accordance with the provision of Article 431, Paragraph 1, of this Law.

If the creditor instructed by the court to institute a law-suit fails to proceed according to the court's ruling within the term referred to in Paragraph 1 of this Article, or if he withdraws the law-suit instituted, it shall be considered that he has not reported his claim.

*Article 433*

An appeal against the rulings to institute a law-suit referred to in Articles 429, 431 and 432 of this Law shall not stay the enforcement of the rulings.

The law-suits referred to in Articles 429, 431 and 432 of this Law may be instituted only for the claims which were the subject-matter at the hearing for the examination of claims.

The person instructed to institute a law-suit shall inform the court of the law-suit referred to in Paragraph 2 of this Article within three days from the date of its institution.

Final judgements passed in the law-suits referred to in Articles 430, 431 and 432 of this Law shall be legally binding on all parties to the proceedings for the limitation of the ship operator's liability.

*Article 434*

The disputes referred to in Articles 430, 431 and 432 of this Law shall fall exclusively within the territorial jurisdiction of the court in whose area the court which conducts proceedings for the limitation of the ship operator's liability is located.

*Article 435*

If the proposer makes it credible that some claims should be settled from



the limitation fund abroad, the court may, at his proposal, order that the sum which would be necessary for the settlement of his claim be set aside from the fund in proportion to other reported claims and to the limitation fund.

A proposal as referred to in Paragraph 1 of this Article may be submitted until the holding of the first hearing for the distribution of the constituted limitation fund.

The sum set aside according to the provision of Paragraph 1 of this Article shall be kept in a separate deposit for ten years from the date the ruling on the final distribution of the constituted limitation fund became final.

The court may even before the expiration of the term referred to in Paragraph 3 of this Article order that the sum set aside be in whole or in part returned to the general deposit of the limitation fund, if according to the circumstances it can be concluded that other requirements for setting aside the sum have ceased exist (Paragraph 1).

After the expiration of the term referred to in Paragraph 3 of this Article the court shall return the sum set aside to the general deposit of the limitation fund.

#### *Article 436*

In order to examine claims reported after the closure of the hearing for the examination of claims, the court shall order a new hearing for the examination of claims.

Creditors whose claims are examined at the new hearings according to the provision of Paragraph 1 of this Article may not contest the earlier recognised claims.

Creditors may report their claims until the closure of the first hearing for the distribution of the limitation fund.

Claims reported after the closure of the first hearing for the distribution of the limitation fund shall not be examined.

Creditors who report their claims after the expiration of the term referred to in Article 426, Point 5, of this Law shall be obliged to pay to the proposer and other parties to the proceedings, at their request, the costs of the proceedings caused by the subsequent report. The court may summon creditors to deposit within a specific term a sum that will be necessary to cover these costs.

#### *Article 437*

After the proceedings for the examination of the claims reported have been terminated, the court shall determine by a ruling which claims will be recognised and to what amount, taking account of the written statements of the parties also.

#### *Article 438*

The distribution of the limitation fund shall be carried out after the ruling rendered in accordance with Article 437 of this Law has become final.

The court may, on the proposal of a creditor, also carry out a provisional partial distribution of the limitation fund for the purpose of the preliminary payment of the claims ascertained if the creditor proposing it makes it credible

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*Annex VII - National rules of procedure: Croatia*

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that the law-suit referred to in Articles 430, 431 and 432 of this Law will not be terminated within six months.

The distribution of the fund referred to in Paragraph 2 of this Article shall include the balance of limitation fund left after from the entire fund assets have been set aside for the possible payment of claims which are still controversial in the amount in which these claims should be paid should their existence be ascertained in the amount in which they were reported.

The distribution of the assets of the limitation fund set aside according to the provisions of Article 435, Paragraphs 1, 2 and 3, of this Law shall be carried out after the proceedings for the examination of controversial claims to which the sums set aside relate have been terminated by final decision, account being taken of the distribution already carried out according to the provisions of Paragraphs 1, 2 and 3 of this Article.

*Article 439*

In order to carry out the distribution of the limitation fund, the court shall draw up a distribution draft.

After having drawn up the draft for the distribution of the limitation fund, the court shall fix a hearing for discussing the draft, to which it shall summon the proposer and creditors whose claims have been determined and for which it has been established that they are to be paid from the limitation fund, and also creditors whose claims are controversial.

Together with the summons to appear at the hearing a copy of the distribution draft shall be sent to the parties.

*Article 440*

If in order to draw up the draft for the distribution of the constituted limitation fund it is necessary to have an expert, and the court does not have such an expert, it may entrust preparations for drawing up the distribution draft to a special expert outside the court.

The provisions of the Civil Procedure Act pertaining to expert witnesses shall also apply to experts referred to in Paragraph 1 of this Article.

*Article 441*

The proposer and creditors referred to in Article 439 of this Law shall be entitled to take part in hearings as parties.

Absence of the parties from the hearing shall not prevent the court from holding the hearing.

At the hearing the court shall invite the parties to declare themselves concerning the draft for the distribution of the limitation fund and to make their objections to the draft.

The court shall render a decision on the distribution of the constituted limitation fund on the basis of the results of the proceedings also taking into account the written statements of the parties.

*Article 442*

The court shall be obliged within three days from the date when the ruling on the distribution of the limitation fund against which no legal remedy had

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*Implementation and interpretation of the 1976 LLMC Convention*

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been employed became final, or from the date when the appellate court delivered to the court of the first instance a final ruling, to issue an order for the payment of the claims of the creditors to which the ruling on the distribution relates.

*Article 443*

The reporting of claims in proceedings for the limitation of the ship operator's liability shall with respect to the interruption of the limitation period have the same effect as the institution of a law-suit in litigious proceedings.

As regards claims that were contested in the proceedings for the examination of claims, it shall be considered that the limitation period was interrupted from the date of the reporting of the claims until the expiration of the time-limit for instituting a law-suit according to the provisions of Articles 431 and 432 of this Law, or from the date when the judgement in which it was determined that the creditors' claims were not to be paid from the limitation fund, became final.

The limitation period for claims which on the basis of a ruling on the distribution of the limitation fund are to be paid from the fund begins to run again when the ruling on the distribution becomes final.

*Article 444*

For creditors whose claims it has not been able to pay even within one month from the date of the issue of the order for payment (Article 442), the court shall establish a separate deposit from the assets of the limitation fund, according to the rules on the establishment of court deposits.

The assets of the court deposit shall be placed on time deposit at a bank with an adequate interest rate to a time-limit which should correspond to a period of time before the expiration of which, according to the judgement of the court, the conditions for the payment of the creditors' claims cannot be fulfilled.

*Article 445*

In the procedure for the limitation of the ship operator's liability each party shall bear his costs, unless otherwise specified by this Law.

*Article 446*

An appeal against rulings rendered in the procedure for the limitation of the ship operator's liability must be lodged within eight days from the service of the rulings.

*Article 447*

In a proceeding for the limitation of the ship operator's liability the parties and the public prosecutor may, against a court ruling by which the court proceedings have been finally terminated, employ all legal remedies that may be used against judgements rendered in litigious proceedings.

*Annex VII - National rules of procedure: Denmark***DENMARK****Merchant Shipping Act***Part XV - Limitation Funds*

350.-(1) The provisions of this Part of the Act shall apply to limitation funds set up according to sections 240 and 271 hereof.

(2) A limitation fund shall be established with the Maritime and Commercial Court of Copenhagen.

351.-(1) A limitation fund according to section 240 shall correspond to the full limitation amount according to section 238 for such claims with regard to which the limitation of liability is invoked and which arise out of the same occurrence. The fund shall moreover comprise interest on the limitation amount from the time of the liability incurring occurrence and until the establishment of the fund by an amount which is equal to the official discount rate from time to time with addition of 2 per cent per annum.

(2) A limitation fund according to section 271 shall be equal to the limitation amount according to section 270.

352.-(1) The party making the request for the establishment of a limitation fund shall deposit the fund amount, cf. section 351, in cash with the Court or provide other adequate security therefore.

(2) The party concerned shall moreover notify the Court of all persons who may be assumed to make claims against the fund, and provide a report about the background for the establishment of the Fund.

353.-(1) The Court shall by an Order decide the size of the fund amount and whether any security offered can be approved.

(2) In the Order shall be laid down that moreover security shall be provided for an additional amount to cover costs in connection with the administration of the Fund, hereunder costs of any action, and to cover any claims for interest. In connection with a limitation fund according to section 240 hereof security for interest may only be claimed after the set up of the fund.

(3) If it appears from the Order that the amounts according to sections 251 and 352(2) have been deposited in cash or that other adequate security has been provided therefore, the fund will be deemed to have been established when the Order is made. Besides the fund is considered to be established when the Court by endorsement on the Order confirms that payment has been made or security provided.

(4) The Court may by a later Order increase the security for the additional amount according to subsection (2) above.

354.-(1) The Court shall forthwith insert a notice about the establishment of the fund in the Danish Official Gazette (Statstidende) whereby any claimants are called upon to notify their claims for a share in the fund, before a date fixed in the notice which must not be shorter than 2 months. The notice shall point out the contents of sections 240(3), 357 and 364.

(2) The notice may moreover be published in Denmark in some other manner fixed by the Court and should, where circumstances speak in favour thereof, be published in States where damage or loss may have occurred. Separate notice should by registered mail be sent to all known claimants.

355. The Court may appoint a Director of the fund.

356. The party notifying a claim shall give the Court the necessary information about the claim, hereunder the basis of the claim and amount and if it is or has been subject to separate legal proceedings.

357. For claims which are not notified the distribution of the fund is set down for judgment in the first instance, section 364 shall apply.

358. The Court may by Order release the fund if the time limit for notification of claims has expired and consent is given by the party who has established the fund and the claimants with respect to the claims notified.

359. After the expiry of the time limit for notification, the Court shall, upon request of the party who established the fund, the party who insures against the liability, or the party who is entitled to cover from the fund, summon the interested parties to a court meeting (fund meeting) for a treatment of the questions concerning the basis of liability, the right to limitation of liability and the size of the amounts mentioned in section 351, and the claims which have been notified.

360. The decision as to the size of the fund amount may by the Maritime and Commercial Court be altered according to section 353(1).

361. Any objections to the right to limitation of liability, the size of the fund, or a notified claim, shall be decided by judgement given by the Maritime and Commercial Court according to the rules of the Administration of Justice Act on civil cases.

362. After the expiry of the notification time limit the Court may decide that a provisional distribution shall be made.

363.-(1) When all disputes have been settled the Court shall by judgment distribute the fund according to section 239 or section 271 hereof.

(2) The fund and the additional amount shall be distributed even if there is no right to limitation of liability. The Court may upon request deliver an enforceable judgement for the part of the claim which is not covered by the fund.

364. When the Court has set down for judgement the question of the distribution of the fund, the decisions made by the Court with respect to a limitation right, the size of the fund, claims notified and the distribution of the fund, will get binding effect on all parties who can invoke claims against the fund, irrespective of whether they have notified claims against the fund.

365. Any appeal and interlocutory appeal against the decisions of the Maritime and Commercial Court shall be made to the Supreme Court according to the rules of the Danish Administration of Justice Act to this effect.

#### *Part XVI*

##### *Special Drawing Rights*

366. By SDR shall be understood the Special Drawing Rights (SDR) used by the International Monetary Fund. The conversion of SDR to Danish currency is made according to the rate of exchange on the date when security is placed for the liability or if security is not placed on the date of payment. If a limitation fund is established according to Part 10 or 12 hereof, the conversion is, however, made according to the rate of exchange on the date

*Annex VII - National rules of procedure: Finland*

where the limitation fund is deemed to have been established according to section 353(3), unless before the establishment of the fund security is provided for the liability.

*Part XVII**Prosecution and penalties*

367. If the master fails to carry a copy of this Act on board and of any regulation issued in pursuance hereof he shall be liable to a fine. The same shall apply if the master fails to carry a copy of the prescribed rules and regulations according to the second sentence of section 60(2).

368. Where the master, a mate, the chief engineer, an engineer or the radio officer fail to fulfil their obligations with regard to the ship's log, the engine-room log, or the radio log they shall be liable to a fine or mitigated imprisonment (hæfte).

369. Where the master in accordance with section 70 refuses to carry seamen, their ashes, or their property on board the ship he shall be liable to a fine.

370. Where the master or the shipowner fails to give notification of the hearing of any maritime declaration, cf. section 306, he shall be liable to a fine.

**FINLAND****Maritime Code***Chapter 12 - On Limitation Fund and Limitation Proceedings*

*Section 1* The provisions in this chapter shall apply to any limitation fund constituted in accordance with chapter 9 section 7 (global fund) and in certain parts to limitation funds constituted according to Chapter 10, § 6.

*Section 2* A global fund shall be equal to

1. the aggregate amounts which according to chapter 9 section 5 constitute the limit of liability for claims for which limitation is invoked and which have arisen out of one distinct occasion, and
2. interest on amounts referred to under item 1, calculated according to section 3 of the Interest on Debts Act from the day of the occurrence until the day of the constitution of the fund.

*Section 3* The person applying for constitution of a limitation fund shall pay the amount of the fund into court or produce satisfactory security for it. In the application, which shall be in writing, the applicant shall account for the circumstances and state the names and addresses of likely claimants against the fund.

*Section 4* The Court shall fix the amount of the fund and decide whether the proposed security is acceptable.

Unless there are particular contrary reasons, the Court shall also require the applicant to pay into court or lodge adequate security for an additional amount intended to cover remuneration to the administrator of the fund, costs of the procedure and other expenses for the constitution and distribution of the fund as well as interest for the period after the constitution of the fund.

If it appears from the decision that the requisite payment has been made or adequate security has been lodged, the fund shall be deemed to have been constituted on the day of issue of the decision. Otherwise the fund shall be considered as constituted on the day when payment was made or security lodged.

Decisions referred to in the first and second paragraphs are effective until otherwise prescribed. If such a decision involves the payment of a higher amount or the lodging of additional security, the Court shall order the person constituting the fund to pay the balance or provide the additional security within a stated time. If the order is not followed, the court shall declare that the fund no longer has the effect stated in chapter 9 section 8.

Appeals against decisions according to the first and second paragraphs and against orders according to the fourth paragraph shall be lodged separately.

*Section 5* When a limitation fund has been constituted, the Court shall announce this directly. In the announcement, all creditors shall be advised to submit their claims to the Court within a certain period which shall not be less than two months. Notice of the provisions of chapter 9 section 7 third paragraph and of sections 8 and 15 of this chapter shall be included in the announcement.

The announcement shall be published in the Official Gazette and in a local newspaper. If there are special reasons, the announcement shall also be published abroad.

The person constituting the fund and all known creditors shall be informed of the announcement by special message.

*Section 6* If called for by the nature of the matter or other circumstances, the Court shall, when a limitation fund has been constituted, appoint an administrator of the fund. The administrator shall have the duty, in addition to the tasks referred to in section 11 second paragraph, of assisting in the handling of the fund and limitation procedures and in negotiations between the parties. The administrator shall have the special knowledge and experience that his mandate requires.

The administrator's remuneration is determined by the Court.

*Section 7* A claimant submitting his claim shall state its amount and basis. If judgement has been given regarding the claim or legal proceedings about it are pending, this shall be stated.

*Section 8* For a claim which has not been notified to the Court before the handling of the fund distribution has been terminated in the Court of First Instance payment may be made only according to section 14.

*Section 9* The fund may not be dissolved until the submission period has elapsed and both the person constituting the fund and the claimants who have submitted claims against it have agreed thereto.

*Section 10* A limitation proceeding means a proceeding in which questions of liability and its limitation and of submitted claims are decided and the fund is distributed. A limitation proceeding is brought into court by application at the Court where the fund is constituted.

*Section 11* In a limitation proceeding, the Court shall hold a fund meeting. To the meeting, the Court shall call the administrator, the person having

*Annex VII - National rules of procedure: France*

constituted the fund, the person having brought the limitation proceeding into court and the claimants. If the right of any other person is affected, such person shall also be called. At the fund meeting shall be taken up matters concerning liability and its limitation, the amount of the limit of liability and the claims that have been submitted.

Prior to the fund meeting the administrator shall examine the submitted claims and, as far as possible, draw up a proposal for the distribution of the fund. The proposal shall be sent to those who have been called to the meeting. If an administrator has not been appointed, the Court shall take these measures.

If no objection to the proposal, duly amended at the fund meeting, remains after the end of the meeting, the proposal shall form the basis for the distribution of the fund.

If any objection remains at the end of the fund meeting, the Court shall set a certain period within which the objecting person shall state whether he maintains his objection and requests the Court's hearing of the dispute. If such request has not been made in time, the objection shall be considered to have lapsed. If it is maintained, the Court shall try the dispute as soon as possible.

*Section 12 .....*

*Section 13* After the expiry of the submission period, the Court may order that a certain part of the proven claims shall be paid immediately.

*Section 14* When all disputes are settled, the Court shall decide on the distribution of the fund.

The Court may reserve a certain amount for covering claims which have not been submitted before the end of the distribution of the fund at the Court of First Instance. Such amount shall be distributed when all claims submitted have been considered and it can be assumed that no further claims will be submitted.

Distribution of the fund shall take place even if the person constituting the fund has no right to limitation of liability. In such case the Court, upon motion, may give judgment concerning the part of a claim that is not paid out of the fund.

*Section 15* An unappealable decision in the limitation case concerning liability, the right to limitation of liability, the amount of liability, claims submitted and the distribution of the fund shall be binding upon every one who can maintain claims against the fund, regardless whether they have submitted their claims or not.

**FRANCE**

Décret No. 67-967 of 27 October 1967

*Chapitre VII - Fonds de limitation**Section I - Constitution du fonds et dispositions générales*

59. Tout propriétaire de navire ou toute autre personne mentionnée à l'article 69 de la loi n° 67-5 du 3 janvier 1967 portant statut des navires et autres bâtiments de mer, qui entend bénéficier de la limitation de responsabilité prévue au chapitre VII de la loi précitée, présente requête, aux



fins d'ouverture d'une procédure de liquidation, au président du tribunal de commerce:

- a) S'il s'agit d'un navire français, du port d'attache du navire;
- b) S'il s'agit d'un navire étranger, du port français où l'accident s'est produit ou du premier port français atteint après l'accident ou, à défaut de l'un de ces ports, du lieu de la première saisie ou du lieu où la première sûreté a été fournie.

60. La requête doit énoncer:

L'événement au cours duquel les dommages sont survenus;

Le montant maximum du fonds de limitation, calculé conformément aux dispositions du chapitre VII de la loi n° 67-5 du 3 janvier 1967 portant statut des navires et autres bâtiments de mer;

Les modalités de constitution de ce fonds.

A la requête sont annexés:

1° L'état certifié par le requérant des créanciers connus de lui, avec, pour chacun, les indications de son domicile, de la nature et du montant définitif ou provisoire de sa créance;

2° Toutes pièces justifiant le calcul du montant du fonds de limitation.

61. Le président du tribunal de commerce, après avoir vérifié que le montant du fonds de limitation indiqué par le requérant a été calculé conformément aux dispositions du chapitre VII de la loi n° 67-5 du 3 janvier 1967 portant statut des navires et autres bâtiments de mer, ouvre la procédure de constitution du fonds.

Il se prononce sur les modalités de constitution du fonds.

Il fixe en outre la provision à verser par le requérant pour couvrir les frais de la procédure.

Il nomme un juge-commissaire et un liquidateur. Le président du tribunal de commerce statue par ordonnance au pied de la requête.

62. En cas de versement en espèces, le juge-commissaire désigne l'organisme qui recevra les fonds en dépôt. Ce dépôt est fait au nom du requérant; aucun retrait ne peut intervenir sans autorisation du juge-commissaire.

Les intérêts des sommes déposées grossissent le fonds.

63. Dans le cas où le fonds est représenté par une caution solidaire ou une autre garantie, cette sûreté est constitué au nom du liquidateur. Aucune modification ne peut être apportée à la sûreté ainsi constituée sans autorisation du juge-commissaire.

Les produits de la sûreté ainsi fournie grossissent le fonds.

64. Une ordonnance du président du tribunal constate la constitution du fonds, à la demande du requérant et sur le rapport du juge-commissaire.

65. A partir de l'ordonnance prévue à l'article 64, aucune mesure d'exécution n'est possible contre le requérant pour des créances auxquelles la limitation est opposable.

66. Nonobstant la désignation du juge-commissaire et du liquidateur, le requérant est appelé et peut intervenir à tous les actes de la procédure.

67. Si le requérant est autorisé à faire valoir à l'égard d'un créancier une créance pour un dommage résultant du même événement, les créances

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*Annex VII - National rules of procedure: France*

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respectives sont compensées et les dispositions du présent chapitre ne s'appliquent qu'au solde éventuel.

Hors ce cas, les créances ne peuvent bénéficier de la compensation.

68. Les créances cessent de produire intérêt à compter de l'ordonnance prévue par l'article 64.

69. Lorsque le requérant établit qu'il pourrait être ultérieurement contraint de payer en tout ou en partie une des créances visées à l'article 65 de la loi n° 67-5 du 3 janvier 1967 portant statut des navires et autres bâtiments de mer, le juge-commissaire peut ordonner qu'une somme suffisante soit provisoirement réservée pour permettre au requérant de faire ultérieurement valoir ses droits sur le fonds, aux conditions indiquées audit article 65 de la loi précitée.

70. La faillite, le règlement judiciaire ou la liquidation des biens [*redressement ou liquidation judiciaires*] du requérant prononcée postérieurement à l'ordonnance prévue à l'article 64 est sans effet sur la constitution du fonds, sous réserve des articles 29 et 30 de la loi n° 67-563 du 13 juillet 1967 [*abrogés; Comp. L. n° 85-98 du 25 janv. 1985, art. 9 et 107*] sur le règlement judiciaire, la liquidation des biens, la faillite personnelle et les banqueroutes.

*Section II - Production, vérification des créances, état des créances*

71. Postérieurement à l'ordonnance prévue à l'article 64, le liquidateur informe de la constitution du fonds tous les créanciers dont le nom et le domicile sont indiqués par le requérant.

Cette communication est faite par lettre recommandée avec demande d'avis de réception. Elle porte copie de l'ordonnance susvisée et indique:

1° Le nom et le domicile du propriétaire du navire ou de tout autre requérant avec mention de sa qualité;

2° L'événement au cours duquel les dommages sont survenus;

4° Le montant de la créance du destinataire de la lettre d'après le requérant.

72. La communication indique en outre:

Que dans le délai de trente jours de l'envoi de la lettre, le créancier destinataire doit produire ses titres de créances; ce délai est augmenté de dix jours pour les créanciers domiciliés hors de la France métropolitaine et en Europe et de vingt jours pour ceux domiciliés dans toute autre partie du monde;

Que, dans le même délai, ce créancier peut contester le chiffre attribué à sa créance par le requérant;

Que, passé ce délai, ce chiffre est réputé accepté par le créancier.

73. La même communication est publiée dans un journal d'annonces légales et, éventuellement, dans une ou plusieurs publications étrangères. Le choix en est fait par le juge commissaire.

Les créanciers dont le nom et le domicile n'ont pas été indiqués par le requérant disposent d'un délai de trente jours pour produire leurs créances, à dater de la publication faite dans le pays de leur domicile.

La publication précise que, passé ce délai:

1° Les créanciers connus du requérant, mais dont il ignore le domicile, sont réputés accepter les chiffres attribués à leurs créances;

2° Les créanciers inconnus du requérant conservent le droit de produire jusqu'à l'ordonnance du président du tribunal déclarant la procédure close, mais ils ne pourront rien réclamer sur les répartitions ordonnées par le juge-commissaire antérieurement à leur production et leur créance sera éteinte s'ils n'ont pas produit avant l'ordonnance de clôture, à moins qu'ils ne prouvent que le requérant connaissait leur existence, auquel cas celui-ci sera tenu envers eux sur ses autres biens.

74. Le liquidateur procède à la vérification des créances en présence du requérant. Si le liquidateur ou le requérant conteste l'existence ou le montant d'une créance, le liquidateur en avise aussitôt le créancier intéressé par lettre recommandée avec demande d'avis de réception; ce créancier a un délai de trente jours pour formuler ses observations, écrites ou verbales. Ce délai est augmenté de dix jours pour les créanciers domiciliés hors de la France métropolitaine et en Europe et de vingt jours pour ceux domiciliés dans toute autre partie du monde.

Le liquidateur présente au juge-commissaire ses propositions d'admission ou de rejet des créances.

75. L'état des créances est arrêté par le juge-commissaire.

76. Dans les huit jours, le greffier adresse à chaque créancier copie de cet état par lettre recommandée avec demande d'avis de réception.

77. Tout créancier porté sur l'état est admis, pendant un délai de trente jours à compter de la date d'envoi de la lettre visée à l'article 76, à formuler au greffe, par voie de mention sur l'état, des contredits sur toute créance autre que la sienne. Ce délai est augmenté de dix jours pour les créanciers domiciliés hors de la France métropolitaine et en Europe et de vingt jours pour ceux domiciliés dans toute autre partie du monde.

Le requérant a le droit de formuler des contredits dans les mêmes formes et délais.

78. Les contredits visés à l'article 77 sont renvoyés par les soins du greffier, après avis donné aux parties trois jours au moins à l'avance par lettre recommandée avec demande d'avis de réception, à la première audience, pour être jugés sur le rapport du juge-commissaire si la matière est de la compétence du tribunal de commerce.

79. Tout créancier peut, jusqu'à l'expiration des délais fixés à l'article 77, contester le montant du fonds de limitation par réclamations déposées au greffe. Ces réclamations sont renvoyées par les soins du greffier au tribunal de commerce pour être jugées dans le délai prévu à l'article 77.

80. Les créances qui échappent à la compétence du tribunal de commerce du lieu de constitution du fonds ne peuvent être inscrites pour leur montant définitif que lorsque la décision de la juridiction compétente est devenue définitive, mais elles doivent être mentionnées à titre provisoire.

81. Tout jugement rendu par le tribunal de commerce sur les créances contestées ou sur le montant de la responsabilité du requérant est opposable à celui-ci ainsi qu'à tous les créanciers parties à la procédure.

*Annex VII - National rules of procedure: Greece**Section III - Répartition*

82. Lorsque le montant du fonds de limitation est définitivement fixé et que l'état des créances admises est devenu définitif, le liquidateur présente le tableau de distribution au juge-commissaire.

Chaque créancier en est informé par le liquidateur, avec indication du montant du dividende qui lui reviendra. Il reçoit en même temps un titre de perception signé du liquidateur et du juge-commissaire et revêtu de la formule exécutoire.

Sur présentation de ce titre, le créancier est réglé par le dépositaire des fonds ou par le requérant s'il n'y a pas eu versement en espèces; à défaut, il est réglé au moyen de la garantie ou pour la caution fournie.

83. Avant que le tableau de répartition soit définitif, des répartitions provisoires peuvent être faites au profit des créanciers sur ordonnance du juge-commissaire.

84. Le paiement à chaque créancier du dividende qui lui revient éteint sa créance à l'égard du requérant. Quand tous les paiements ont eu lieu, la procédure est déclarée close par le président du tribunal sur le rapport du liquidateur, visé par le juge-commissaire.

*Section IV - Voies de recours*

85. Le délai d'appel est de quinze jours à compter de la signification des jugements statuant sur le montant des créances, les contredits ou le montant du fonds de limitation. L'appel est jugé sommairement par la cour dans les trois mois. L'arrêt est exécutoire sur minute.

86. Les ordonnances du juge-commissaire prises en application des articles 75 et 83 peuvent être frappées d'opposition dans le délai prévu à l'article 77. L'opposition est formée par simple déclaration au greffe. Le tribunal statue à la première audience.

87. Ne sont susceptibles d'aucune voie de recours les ordonnances du président du tribunal de commerce relatives à la nomination ou au remplacement du juge-commissaire ou du liquidateur.

**GREECE****Code of Private Maritime Law**

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*Section 85*

The shipowner is discharged from the liabilities provided for in the preceding section by abandoning the ship and the gross freight. Where the shipowner himself committed the wrongful act by negligence in his capacity as Master of the ship, he is also entitled to abandonment. The abandonment does not comprise the insurance indemnity. This shall not apply in claims of accidents to persons.

The shipowner must make good any sum, which by reason of lien or hypothecation would be deducted beforehand from the value of the ship or freight by creditors who have a claim against the shipowner and for which claim he cannot be discharged by abandonment.

*Section 86*

The shipowner instead of the abandonment, may offer for every voyage a sum equivalent to three tenths of the ship's value at the commencement of the voyage, as well as an additional sum equivalent to another three tenths to satisfy claims arising from accidents to persons. Where the additional sum is not adequate to satisfy such claims, these claims concur for their not satisfied part on the first sum and the freight.

The privilege provided for in the present section shall also apply in the case where the ship is abandoned to the underwriters.

The provisions of the present section shall not apply on claims arising from salvage.

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*Section 90*

The abandonment is effected by a declaration in writing containing the reason thereof, the amount of freight, the names of creditors known at the time the declaration for the abandonment is made, their place of domicile, their respective claims as well as the appointment of a person with authority to accept service. The competent Court is either the Court of First Instance of the district of the port where the ship is registered or the Court of First Instance of Piraeus.

The declaration is made before the Clerk of the Court by attaching to it the certificate of the public deposit of the freight and in the case of freight to be collected, the vouching documents.

A copy of the declaration is served to those who have served an action or a writ for payment, to the creditors who have an hypothecation on the ship as well as to the Registrar who is bound to enter the said declaration in the ship's Registry.

*Section 91*

When, instead of the ship, the sum provided for in section 86 is abandoned, the person effecting the abandonment is bound to deposit the said sum to a Public Deposit and to attach to the respective report the relative vouchers.

The sum is provisionally determined by the President of the Court according to the proceedings in section 634 of Civil Procedure Act.

*Section 92*

Within a month commencing ten days after the above declaration, the President of the Court appoints a Junior Judge and a liquidator and fixes the sum to be paid in advance by the persons effecting the abandonment for the proceedings costs and the Court order is immediately served in the care of the Clerk to the Junior Judge and the liquidator.

*Section 93*

The liquidator serves the President's order to the creditors mentioned in the declaration, as well as to the Chamber of Shipping and publishes it in summary in two Athens daily papers of wide circulation, inviting the creditors

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*Annex VII - National rules of procedure: Greece*

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to submit to him within three months a declaration about their claims, containing also an appointment of a person with authority to accept service of documents.

The declaration of the creditors interrupts the limitation of their claims.

*Section 94*

The liquidator has the custody and maintenance of the abandoned ship and takes care to insure her with the consent of the Junior Judge.

The liquidator deposits in a Public Deposit any sum collected in the meantime and in order to withdraw any such sum the consent of the Junior Judge is required.

*Section 95*

In the case of a freight to be collected, the respective claims are ipso jure abandoned to the creditors and the person effecting the abandonment is bound to attach to the declaration the vouching documents.

*Section 96*

Where the period of time provided for in section 93 has expired, the liquidator invites immediately the person effecting the abandonment and the creditors who have announced themselves to a meeting, by serving to them at least ten days earlier the list of the declared claims he has drawn up.

*Section 97*

Where on the fixed day, creditors representing three fourths of the claims do not attend, the person effecting the abandonment and the creditors, assemble again at a new meeting fixed within the next twenty days and after an invitation is served to them at least three days earlier.

*Section 98*

During the assembly, claims are verified first and then the liquidator suggests the solutions imposed by the circumstances and the equity.

*Section 99*

Where disputes have arisen, they are tried in the care of the liquidator according to the proceedings in Summary Jurisdiction and all are tried during the same hearing.

*Section 100*

Where an agreement is reached during the verification of claims and after the orders of the Court referred to in the preceding section become final, the Junior Judge draws up the list of final distribution which is carried out immediately by the liquidator, who pays over to the person effecting the abandonment the balance, if any.

*Section 101*

The liquidator, with the consent of the Junior Judge proceeds to the temporary distribution of the fund or of a part of it to the persons entitled to non-disputed claims, preserving intact the sums corresponding to disputed claims.

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*Implementation and interpretation of the 1976 LLMC Convention*

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*Section 102*

After the submission of the declaration referred to in section 90, the creditors are not entitled to take any legal steps against the shipowner in personam neither to take any conservative measure or proceedings of forced sale and if any are taken, are ipso jure dismissed.

*Section 103*

At any stage of the proceedings, it is allowed upon the application of the liquidator or of any person having a lawful interest, to sell the ship. The sale is performed in the way fixed by the President of the Court sitting in Summary Jurisdiction and after summoning always the shipowner and if possible the creditors who have an hypothecation on the ship.

The sale can be performed at the President's discretion, even without a Public Auction.

*Section 104*

Upon the termination of the liquidation, the liquidator deposits together with the respective report, all the documents, with the Clerk of the Court.

**HONG KONG, CHINA**

Merchant Shipping (Limitation of Shipowners Liability) Ordinance, 1993

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*Part III**Limitation of Liability for Maritime Claims*

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*19. Constitution of fund*

(1) The Monetary Authority may from time to time by order prescribe the rate of interest to be applied for the purposes of paragraph 1 of Article 11 of the Convention.

(2) Where a fund is constituted with the court in accordance with Article 11 of the Convention for the payment of claims arising out of any occurrence, the court may stay any proceedings relating to any claim arising out of that occurrence which are pending against the person by whom the fund has been constituted.

*20. Distribution of fund*

No lien or other right in respect of any ship or property shall affect the proportions in which under Article 12 of the Convention the fund is distributed among several claimants.

*21. Bar to other actions*

Where the release of a ship or other property is ordered under paragraph 2 of Article 13 of the Convention, the person on whose application it is ordered to be released is deemed to have submitted to the jurisdiction of the court to adjudicate on the claim for which the ship or property was arrested or attached.

*Annex VII - National rules of procedure: Ireland***IRELAND**

Section 8 of the Act provides that the Minister may, by Order, declare that any State specified in the Order is a Contracting State and the Order shall be evidence that that State is a Contracting State.

Section 9 provides that references in the Convention to a ship shall be construed as including references to any structure (whether completed or in the course of completion) launched and intended for use in navigation as a ship or a part of a ship.

Section 10 provides that the right to limit liability extends to non-seagoing ships.

Section 11 provides a restriction on the right to limit liability. It shall not apply to claims in respect of the raising, removal, destruction or rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such a ship and Article 3 shall be construed accordingly.

Section 12 provides that the reference in Article 3 of the Convention to a nuclear ship includes a reference to a ship carrying nuclear material (whether or not the ship is powered by such material).

Section 13 provides for conversion of the amounts in units of account into currency of the State for the purpose of the Convention.

Section 14 states the rate of interest to be applied for the purposes of Article 11 of the Convention. The Section permits the Minister for the Marine, with the consent of the Minister for Finance, to prescribe by Order the rate of interest to be applied under the terms of the Convention.

Section 15 gives the Court power to stay proceedings where a fund is constituted.

Section 16 provides that no lien or other right in respect of any ship or property shall affect the proportions in which under Article 12 of the Convention the fund is distributed among the several claimants concerned.

Section 17 provides that where the release of a ship or property is ordered under paragraph 2 of Article 13 of the Convention the person on whose application it is ordered to be released shall be deemed to have submitted to the jurisdiction of the court to adjudicate on the claim for which the ship or property was arrested or attached.

Section 38 provides for exclusion of liability in certain cases. A copy of Section 28 is appended hereto.

**JAPAN**

Rules of procedure are set out in the Limitation of Liability of Shipowners Act and in the Supreme Court Rules for the Procedure of the Limitation of Liability of Shipowners & others Cases (Supr. Court Rules No. 2, 1976).

I. Summary of the limitation proceedings.

The limitation proceedings are performed with the following steps.

- 1) The filing for the limitation proceeding by the shipowners or others (art. 17), with the presentation of prima facie proof to the effect that total amount of claims exceeds the limitation amount (art. 18). The order by



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*Implementation and interpretation of the 1976 LLMC Convention*


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the court for the deposit of money equivalent to the limitation amount plus interest of 6% for the period from the date of accident to the date of deposit (art. 19). The decision by the court to commence the limitation proceedings (art. 26). The public notice by the court (art. 28).

- 2) The filing of the claims by the claimants (art. 17(5), art. 50). The investigation of the claims by the court (art. 57). The confirmation of the claims (art. 60).
- 3) The distribution of limitation fund (art. 69). The decision by the court to terminate the limitation proceedings (art. 80). The public notice by the court (art. 80).

II. Some comments on the characteristic points of the limitation proceedings.

- 1) The shipowners and others who wish to limit their liabilities should necessarily file for the limitation proceedings.
- 2) The claimants who wish to deny the adjudication of limitation proceedings may assert the payment of full amount of their claims in each judicial proceedings outside of the limitation proceedings.
- 3) The limitation proceedings are presided by the judicial court.
- 4) The constitution of limitation fund is necessary for the commencement of the limitation proceedings.

## NETHERLANDS

Articles 642a-642z of the Dutch Code of Civil Procedure  
Translation by Sandra Dixon/Taco van der Valk-Nauta Dutilh

*642a Procedure with respect to the limitation of liability. Application.*

*(Compare Articles 1(7), 11, and 14, 1976 Convention.)*

*(This Article supersedes Article 320a of the Dutch Code of Civil Procedure.)*

1. A person who wishes to avail himself of the provisions of Article 750, 751, 1060 or 1061 of Book 8 of the Civil Code to limit his liability shall apply to the district court of the place where the ship is registered in the register referred to in Article 193 or 783 of Book 8 of the Civil Code, or, if the ship is not registered in any of these registers, to the District Court of Rotterdam, requesting that the court determine the amount or amounts to which his liability will be limited (the amount of the limitation fund or funds) and order the institution of proceedings for the purpose of distributing the fund to be constituted.

2. The application shall state:
  - a. the name of the ship;
  - b. in the case of a sea-going ship, its nationality and, in the case of a sea-going fishing ship or an inland navigation ship, the location of the register in which it is registered, if possible;
  - c. the applicant's name and place of residence;
  - d. the amount(s) which, in the applicant's opinion, the fund or funds are to contain, and the information necessary to calculate these amounts;
  - e. the day and place of the occurrence that gave rise to the claims in

*Annex VII - National rules of procedure: Netherlands*

respect of which the applicant believes that he is entitled to limit his liability, as well as a description of that occurrence;

- f. the name and place of residence of the persons known to the applicant with respect to whom he believes that he is entitled to limit his liability, together with an estimate of the maximum amount of each such person's claim.

The applicant shall state in the application the manner in which he proposes to constitute the fund.

3. The filing of an application as referred to in this Article shall not constitute an admission of liability.

4. The proceedings shall be held on the day and at the time communicated by the clerk of court to the persons referred to in paragraph 2(f) of this Article. Furthermore, the clerk of court shall announce the petition in one or more newspapers which the district court may designate.

*642b Consolidation of multiple applications.*

*(Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320b of the Dutch Code of Civil Procedure.)*

If more than one application as referred to in Article 642a relating to one and the same ship and arising from the same occurrence has been filed, the court shall, before ruling on these applications, order that the cases relating to a single fund be consolidated in a one action, unless an applicant objects and his objections are held to be well-founded.

*642c Determining the Amount of the Fund and the Manner of Constitution.*

*Appointment of Supervisory Judge and Liquidator: Declaration of Court.*

*(Compare Articles 4 and 14, 1976 Convention.) (This Article supersedes Article 320c of the Dutch Code of Civil Procedure.)*

1. The provisions of Articles 754 and 1064 of Book 8 of the Civil Code may not be invoked in proceedings commenced by an application as referred to in Article 642a.

2. Upon granting the application, the court shall determine the amount of the limitation fund or funds, expressed in units of account, with due observance of Articles 755 and 756 of Book 8 of the Civil Code or the general administrative order referred to in Article 1065 of Book 8 of the Civil Code. The court shall order the applicant to constitute the fund on a day which it shall determine, but in any event no later than one month following the day of the order, by:

- a. depositing into court the amount of the funds, as calculated in accordance with Articles 755, 756 and 759 of Book 8 of the Civil Code or the general administrative order referred to in Article 1065 of that Book, increased by statutory interest pursuant to Article 757 or that general administrative order and by an amount covering the costs of the proceedings; or
- b. providing security for the amount referred to under (a) in some other way, as the court shall determine, increased by statutory interest due from the day on which this security is provided until the day on which the clerk of court issues the summons referred to in Article 642v.

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*Implementation and interpretation of the 1976 LLMC Convention*

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3. The court shall designate a supervisory judge to determine how the fund or funds will be distributed and shall also appoint a liquidator. It is entitled to appoint more than one liquidator for each fund if it believes that this is justified.

4. The fund shall be constituted in the name of the supervisory judge and the liquidator, who shall control its disposition, acting jointly, to the exclusion of the applicant.

5. The court's decision shall be [provisionally] enforceable without delay. The effect of the decision may not be suspended by a higher court.

6. An applicant who has complied with the court's order shall request forthwith that the court issue a declaration to that effect. If the court refuses this declaration, it is entitled to issue a new order to the applicant to constitute the fund on a day which it shall determine but which may not be later than one month following the day of the decision. An applicant who has complied with the court's new order shall apply to the court forthwith for a declaration to that effect. In that event, the second sentence of this paragraph shall not apply.

7. An applicant with respect to whom the court has not issued a declaration as referred to in paragraph 6 shall no longer be entitled to limit his liability pursuant to Article 750, 751, 1060 or 1061 of Book 8 of the Civil Code.

8. Articles 45 to 48 inclusive of Book 3 of the Civil Code and Articles 42 to 49 inclusive of the Bankruptcy Act do not apply to compliance with an order to deposit a sum of money or provide security as referred to in this Article.

*642d Fund constituted applies to all liable persons of one category.*

*(Compare Article 11(3), 1976 Convention.)*

*(This Article supersedes Article 320d of the Dutch Code of Civil Procedure.)*

1. If, with respect to one and the same occurrence, a fund is constituted by one of the persons referred to in

- a. Article 758(1)(a) or 1066(1)(a) of Book 8 of the Civil Code
- b. Article 758(1)(b) or 1066(1)(b) of Book 8 of the Civil Code
- c. Article 758(1)(c) or 1066(1)(c) of Book 8 of the Civil Code, or
- d. Article 758(2) or 1066(2) of Book 8 of the Civil Code,

or by that person's insurer, such fund shall be deemed to have been constituted by all the persons referred to under the same letter and with respect to the claims in respect of which the fund was constituted.

*642e Prerequisites for release of attachments, return of security.*

*(Compare Articles 13 and 14, 1976 Convention.)*

*(This Article supersedes Article 320e of the Dutch Code of Civil Procedure.)*

1. If, after the granting of an application under Article 750 or 751 of Book 8 of the Civil Code, no claimants have objected to limitation of liability by the person liable within the period of time referred to in Article 642g, or if an irrevocable decision has been made rejecting a [particular] claimant's objection, and a fund has been constituted with respect to which the court has issued a declaration as referred to in Article 642c(6) and the fund is actually available to the claimant and the claimant can enforce his claim against the

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fund, the court may, at the request of the persons for whose benefit the fund was constituted, order the release of arrests or attachments, which may have been levied in respect of the claims for which the fund was constituted, or order that any security which was provided be returned.

2. If the requirements set forth in paragraph 1 are met, the court shall, upon the submission of an application as referred to in paragraph 1, issue an order as referred to in that paragraph if the fund has been constituted

- a. at the port where the accident from which liability arose took place, or, if the accident took place out of port, at the ship's first port of call thereafter, or
- b. at the port of disembarkation of the persons involved, if the damage arose from loss of life or personal injury, or
- c. at the port of discharge in respect of damage to cargo, or
- d. in the State where the arrest was made.

3. Paragraphs 1 and 2 of this Article shall only apply if the fund can be freely transferred to the claimant in respect of his claim.

4. If the requirements set forth in paragraph 1 are met with respect to a petition based upon Article 1060 or 1061 of Book 8 of the Civil Code, the court shall, upon the submission of an application as referred to in paragraph 1, issue an order as referred to in that paragraph.

*642f Suspension of Legal Proceedings at the Initiative of the Person Liable. Sanction. (Compare Articles 13 and 14, 1976 Convention.) (This Article supersedes Article 320f of the Dutch Code of Civil Procedure).*

1. If the requirements set forth in Article 642e are met, legal proceedings in respect of claims for which the fund was constituted shall be suspended upon the effecting of service in accordance with Article 256, even if they have already reached the stage where judgment is to be rendered.

2. Except in the cases referred to in paragraph 3, after pending legal proceedings have been suspended, these proceedings shall be removed from the cause list at the request of any interested person, if

- a. the application of the claimant for verification as referred to in Article 642l is denied, or
- b. the plan of distribution as referred to in Article 642v is adopted in the manner set out in that Article, or
- c. the claim of the claimant lapses pursuant to Article 642w.

3. Legal proceedings which have been suspended shall be resumed, if

- a. it is subsequently decided that the person liable may not limit his liability after all and this decision becomes irrevocable, or
- b. the person liable seeks to have the costs of the proceedings assessed against the claimant under any of the circumstances referred to in paragraph 2.

4. If the person liable fails to avail himself of a suspension as referred to in paragraph 1 of this Article, he shall no longer be entitled to invoke the limitation of his liability against the claimant involved.

5. Articles 255 to 262 inclusive shall apply to the suspension and resumption of legal proceedings.

*Implementation and interpretation of the 1976 LLMC Convention**642g Fixing Day for Lodging Claims, Defences, Meeting.  
(Compare Article 14, 1976 Convention.)**(This Article supersedes Article 320g of the Dutch Code of Civil Procedure.)*

1. After the declaration referred to in Article 642c(6) has been issued, the supervisory judge shall, as soon as possible after having heard the liquidator, determine the final day on which claims against the person liable, as well as objections to the latter's invocation of limitation of liability with respect to all or one or more claimant, may be submitted to the liquidator.

2. After having heard the liquidator, the Official Receiver shall also fix the day(s), time and place at which he shall proceed to verify the claims submitted and to rule upon the objections to the invocation of limitation of liability. These days, times and places may vary for each fund or for one of the funds.

3. At least eight weeks must elapse between the deadline for submitting claims and raising objections as referred to in paragraph 1 and the day set for verifying these claims and ruling on these objections.

*642h Setting Aside Sum for Benefit of the Person Liable.  
(Compare Article 12(4), 1976 Convention.)**(This Article supersedes Article 320h of the Dutch Code of Civil Procedure.)*

Where a person liable establishes that, notwithstanding Article 642f(1), he may be compelled to pay, at a later date, in whole or in part any such amount of compensation with regard to which he would have enjoyed a right of subrogation pursuant to Article 642j had the compensation been paid before the fund was distributed, the supervisory judge may order that a sufficient sum shall be provisionally set aside to enable the person liable at such later date to enforce his claims pursuant to Article 642j.

*642i Notice to Claimants and Publication.  
(Compare Article 14, 1976 Convention.)**(This Article supersedes Article 320i of the Dutch Code of Civil Procedure.)*

The liquidator shall, without delay, give notice of the decisions referred to in Article 642g by registered letter to the person or persons liable and the claimants who have been named by him/them. He shall also, if so ordered by the supervisory judge, announce these decisions in one or more newspapers which the supervisory judge may designate.

*642j Subrogation of the Person Liable Based Upon Prior Payments.  
(Compare Article 12, 1976 Convention.)**(This Article supersedes Article 320j of the Dutch Code of Civil Procedure.)*

A person liable may not reclaim in whole or in part an amount which he or his insurer paid prior to the distribution of a fund. He shall be subrogated, by operation of law, in the rights of the claimant for the amount paid.

*642k Filing of Claim By Claimant who Submits Defence  
or in the case of Uncertainty.**(This Article supersedes Article 320k of the Dutch Code of Civil Procedure.)*

A claimant who submits a defence against the application of the person

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liable must nevertheless file a proof of claim. The same applies to a claimant who is not sure whether, given the nature of the claim, the person liable is entitled to invoke the limitation of his liability with respect to such claim.

*642l Manner of Filing. List of provisionally admitted, contested claims.*

*Lodging with clerk of court. (Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320l of the Dutch Code of Civil Procedure.)*

1. Claims shall be filed with the liquidator by submitting a statement of account or other written declaration indicating the nature and amount of the claim accompanied by vouchers by which the claim can be substantiated (in original or copy form). A claimant as referred to in the second sentence of Article 642k shall also submit a written declaration setting forth the grounds for his uncertainty as referred to therein.

2. The filing of a claim shall, for purposes of its becoming prescribed or lapsing, be regarded as the institution of legal proceedings on the claim.

3. The claimants shall be entitled to demand that the liquidator provide them with a formal receipt.

4. The liquidator shall check the statements of account which have been submitted against the books and records of the person liable and other information which he has furnished, shall consult with the claimant and the person or persons liable if he has an objection to the admission of a claim, and may demand the production of missing documents by such persons and to inspect their books and records and the original documents.

5. With respect to each fund, the liquidator shall place the claims which he approves on a list of provisionally admitted claims and the claims which he contests on a separate list stating the grounds on which they are contested.

6. The lists drawn up by the liquidator shall be available without charge for public inspection at the clerk of court's office for at least 21 days prior to the day set for verification. No charge shall be imposed for lodging these documents.

7. The liquidator shall indicate the written defences which have been submitted against the application of the person liable, stating the grounds on which they are based.

*642m Notice by Liquidator to Claimants.*

*(Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320m of the Dutch Code of Civil Procedure.)*

The liquidator shall give notice in writing of the lodging of the lists pursuant to Article 642l to all known claimants and the person or persons liable to which notice he shall add a further summons to attend the verification meeting.

*642n Verification Meeting Before Supervisory Judge*

*(Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320n of the Dutch Code of Civil Procedure.)*

On the day or days designated in accordance with Article 642g, the supervisory judge shall conduct one or more sittings in the presence of the liquidator.

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*Implementation and interpretation of the 1976 LLMC Convention*

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*642o Claims Filed After Expiry of Term. Admission to proof.*

*(Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320o of the Dutch Code of Civil Procedure.)*

1. The supervisory judge may, at the request of the claimant, permit claims which are filed after the expiry of the period referred to in Article 642g(1) to be eligible for verification.
2. Such a request must be granted if the claimant resides outside the Netherlands and was for this reason prevented from filing on an earlier date.
3. In the event of a dispute over whether the claimant was indeed prevented from filing as referred to in paragraph 2, the supervisory judge shall decide the matter after having consulted the meeting.

*642p Determining the Amount of the Claims.*

*(Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320p of the Dutch Code of Civil Procedure.)*

1. All claimants and persons liable shall be entitled to contest a claim.
2. Claims which are not contested shall be assessed by the supervisory judge at the amount alleged.
3. The decision of the supervisory judge shall be noted in the formal record of the sitting and on the list drawn up by the liquidator.

*642q Reference to District Court, including in the case of Uncertainty.*

*(Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320q of the Dutch Code of Civil Procedure.)*

1. In the event that a claim or the invocation of limitation of liability is contested at a sitting [before the supervisory judge], the supervisory judge shall, if he is unable to bring about an agreement between the parties and the person liable, refer them to the [full] district court for the resolution of their dispute at one or more sittings of that court which he shall designate. The supervisory judge shall also refer to the district court a claimant as referred to in the second sentence of Article 642k, notwithstanding that his claim is not contested, for the purpose of deciding whether it was indeed proper that his claim be filed for verification.
2. If a claimant whose claim is contested or a person liable is not present at a sitting [before the supervisory judge] the liquidator shall notify him without delay by registered letter of each reference [as referred to in paragraph 1].

*642r Renvooi procedure. (Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320r of the Dutch Code of Civil Procedure.)*

1. If a claimant who requests that his debt be verified does not appear at the sitting of the district court, he shall be deemed to have withdrawn his claim, insofar as it was contested.
2. If a person who has contested any allegation of a person liable or claimant does not appear, he shall be deemed to have abandoned his objection.
3. The persons referred to in Article 642q(2) shall not be entitled to assert in the proceedings that they did not receive the notice referred to in that Article.
4. Claimants who fail to contest [any allegation] either upon filing their

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claim or at the meeting, are not entitled to join or intervene in the proceedings; in the event of bankruptcy of a person liable the trustee in that bankruptcy can intervene.

5. An irrevocable decision to the effect that a person liable is not entitled to limit his liability in respect of one or more claims, is binding on a person liable as well as, in the event of his bankruptcy, on his creditors.

*642s Plan of Distribution. Refusal to Permit Limitation of Liability.*

*(Compare Articles 4, 12 and 14, 1976 Convention.)*

*(This Article supersedes Article 320s of the Dutch Code of Civil Procedure.)*

1. After completion of the sittings [before the supervisory judge] referred to in Article 642n, or, if these have given rise to disputes, after such disputes have been resolved by a decision which has become irrevocable, the liquidator shall draw up a plan of distribution for the relevant fund and submit the plan to the supervisory judge for his approval.

2. If it is irrevocably decided that the person liable is not entitled to limit his liability, the security which has been provided shall terminate and a sum which has been deposited shall be distributed to the person who deposited it, but not earlier than one month after the decision has become irrevocable and the liquidator has given notice in the manner prescribed in Article 642i of the day on which the distribution shall occur.

*642t Claims in Foreign Currency. Specific allocation of each fund.*

*(Compare Articles 2, 11, 12 and 14, 1976 Convention.)*

*(This Article supersedes Article 320t of the Dutch Code of Civil Procedure.)*

1. Claims which are not expressed in Dutch currency shall be admitted at their estimated value in Dutch currency.

2. If a person liable exercises the authority granted to him in either Article 750 or 751, or Article 1060 or 1061 of Book 8 of the Civil Code, the following rules shall apply:

- a. the life fund shall be applied to satisfy claims for damage to persons;
- b. the passenger fund shall be applied to satisfy claims for damage to persons incurred by passengers;
- c. the property fund shall be applied to satisfy claims for property damage and claims for damage to persons insofar as these remain unsatisfied after applying the rule set forth in (a) above;
- d. the wreck fund shall be applied to satisfy claims as referred to in Article 752(1)(d) or (e) of Book 8 of the Civil Code;
- e. the waterpollution fund shall be applied to satisfy claims in respect of costs and damages due for waterpollution as referred to in the general administrative order pursuant to Article 1065 of Book 8 of the Civil Code;
- f. if an amount which is to be distributed in accordance with the rules set forth in (a)-(e) above is insufficient to satisfy the claims to which it is to be applied under these rules, these claims shall be reduced pro rata.

3. For the purpose of applying paragraph 2, damage to persons shall be understood as comprising all damage arising from death or personal injury and property damage as all damage which is not damage to persons.



4. Without prejudice to the provisions of paragraph 2(c) above, each fund shall be applied to satisfy only the claims in respect of which it was constituted.

*642u Lodging of Plan of Distribution with Clerk of Court. Lodging of Objections. (Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320u of the Dutch Code of Civil Procedure.)*

1. A plan of distribution with respect to a fund which is available for disposition, which plan has been approved by the supervisory judge, shall be lodged for 14 days at the clerk of court's office for inspection, without charge, by claimants whose claims have been admitted and by persons liable. No charge shall be made for lodging these documents.

2. The liquidator shall announce the lodging in the manner prescribed in Article 642i, and shall also give notice thereof by registered letter to the persons liable and to all claimants whose claims were admitted, stating the amount allotted to them; each of them is entitled to oppose the plan of distribution by submitting a statement of objections to the clerk of the district court within the period specified, setting forth the grounds on which the objections are based.

3. After expiry of the period, the district court shall render its decision, after having heard the claimants and persons liable or caused them to be properly summoned, by means of a registered letter from the liquidator.

*642v After Adoption of Plan of Distribution. Summoning Claimants. (Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320v of the Dutch Code of Civil Procedure.)*

1. After a plan of distribution has been adopted by the supervisory judge or, if a timely objection was made, by the district court, the clerk of court shall summon the claimants by registered letter to take receipt of the sum to which they are entitled.

2. After adoption, the plan shall be available for inspection without charge at the clerk of court's office for all persons with an interest.

3. Any remaining credit balance and any allotted distributions which have not been collected within one year shall be paid out to the person who made the deposit. Article 642s(2) shall apply *mutatis mutandis*.

*642w Claims not Filed Lapse. (Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320w of the Dutch Code of Civil Procedure.)*

Except as provided in Article 642f(4), the claims of claimants who, despite having been properly summoned, have not filed these claims for the purpose of verification shall lapse upon the plan of distribution becoming irrevocable.

*642x Provisional Plan of Distribution. Providing Security. (Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320x of the Dutch Code of Civil Procedure.)*

1. The supervisory judge is authorised to adopt a provisional plan of distribution at any time. In that event, Articles 642s to 642v inclusive shall apply *mutatis mutandis*.

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2. The supervisory judge is entitled to order that claimants to whom a distribution is made on the basis of a provisional plan of distribution provide security to him in a manner which he shall designate.

*642y Right of Appeal. (Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320y of the Dutch Code of Civil Procedure.)*

1. The decisions of the supervisory judge and those of the district court pursuant to Article 642u(3) shall not be subject to appeal [either to the Court of Appeal or, in cassation, to the Netherlands Supreme Court].

2. With respect to all other decisions to which Articles 642a to 642z give rise, the person liable and the appearing claimants are entitled to file an appeal [to the Court of Appeal] within four weeks from the day of pronouncement, unless pursuant to any general rule a shorter period applies. The same period is applicable for appeals, in cassation, to the Netherlands Supreme Court.

3. If an appeal is filed, notice must be given to the clerk of court by means of a writ.

4. The judgment in respect of the appeal shall be communicated without delay by the clerk of the relevant appellate body to the clerk of the district court, who shall give notice thereof by registered letter to claimants and persons liable.

*642z Costs. (Compare Article 14, 1976 Convention.)*

*(This Article supersedes Article 320z of the Dutch Code of Civil Procedure.)*

Except as provided in Articles 56, 57 and 58, the costs arising from the application of Articles 642a to 642y inclusive shall be borne by the person liable.

## NORWAY

### Maritime Code

#### *Chapter 12 - Limitation Funds and Limitation Proceedings*

##### *Section 231 Scope*

The provisions of the present Chapter apply to limitation funds constituted according to Section 177 (global funds), Section 195 (oil damage funds according to the 1992 Liability Convention) or Section 214 (oil damage funds according to the 1969 Liability Convention), and subsequent actions for limitation. Funds constituted according to Sections 207 and 226 shall also be regarded as global funds.

The provisions of the Dispute Act apply correspondingly unless the contrary follows from the present Chapter.

##### *Section 232 Amounts of Funds*

The global fund shall correspond to

- a) the total of the amounts which according to Section 175 are the limits of the liability for the claims for which limitation of liability is being invoked and which arose from one and the same event, and
- b) interest on the amounts mentioned under letter a) for the time from the

event to the constitution of the fund, calculated at the rate laid down according to Section 3 of Act of December 17, 1976, No. 100 Relating to Interest on Overdue Payments.

A fund constituted according to Section 207 shall equal the full amount of the liability according to the second or third paragraph of Section 207. A fund constituted according to Section 226 shall equal the full amount of the liability according to the second or third paragraph of Section 226.

An oil damage fund according to the 1992 Liability Convention shall equal the amount of the liability according to Section 194, with deductions as mentioned in letter b) of the first paragraph of Section 229. An oil damage fund according to the 1969 Liability Convention shall equal the amount of the liability according to Section 213.

#### *Section 233 Application to constitute a Fund*

The person applying for the constitution of a limitation fund shall pay the amount of the fund to the Court or give such security for the amount as the Court finds satisfactory.

The application shall explain the reasons for constituting the fund, the information on the ship which is necessary to calculate the amount of the fund, and as far as possible information on all those believed likely to present claims against the fund.

#### *Section 234 Constitution of a Fund*

A decision to constitute a fund is made in the form of a ruling<sup>1</sup> which provisionally fixes the amount of the fund and decides whether the proposed security is acceptable.

Unless there are special reasons for the contrary, the Court shall in its ruling also require payment of or the giving of security for an additional amount fixed at the discretion of the Court to meet the costs of constituting the fund and of an action for limitation, and the liability for interest payments. When a global fund is constituted, this only applies to interest for the period after the constitution of the fund.

If it appears from the ruling that the necessary payment has been made or security given, the fund shall be regarded as constituted on the day when the ruling was handed down. Otherwise the fund shall be regarded as constituted on the day when payment was made or security given.

The ruling can be appealed.

#### *Section 235 Announcement*

The Court shall immediately announce that a limitation fund has been constituted. In the announcement, all creditors intending to claim recovery from the fund shall be advised to submit their claims to the Court within a certain time limit of at least two months. Attention shall at the same time be drawn to the provisions of the second period of the third paragraph of Section 177 and Sections 238 and 245.

The announcement shall be published in Norsk lysningsblad<sup>2</sup> and, at the discretion of the Court, also in other ways. According to the circumstances, the announcement shall also be published in other States.

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The person constituting the fund and all known creditors shall be notified by registered mail.

*Section 236 Fund Administrator*

If practical reasons so indicate, the Court may appoint an advocate or other expert to administer the fund. The Court determines the remuneration of the administrator.

*Section 237 Submission of Claims*

A person submitting a claim shall give the Court the necessary information concerning the claim, including the basis for and the amount of the claim, and whether it is or has been subject to separate legal action.

*Section 238 Lapse of Claims*

Satisfaction of a claim of which the Court has not been notified before the distribution of the fund is adjudicated by the Court of first instance can only be demanded according to the provisions of the second paragraph of Section 244.

*Section 239 Payment and Release of the Fund*

The fund can not be released unless the time limit for the submission of claims has expired and consent has been given by the person constituting the fund and by all creditors who have submitted claims against the fund.

*Section 240 Limitation Proceedings*

Limitation proceedings are instituted by a writ of summons to the Court at which the fund is constituted. Proceedings can be instituted by a person as mentioned in the first period of the third paragraph of Section 177, the second period of the first paragraph of Section 177, the second period of the first paragraph of Section 195, or the second period of the first paragraph of Section 214. All those with claims against the fund shall be served with a joint writ of summons. All on whose behalf the fund was constituted can be made parties to the procedure.

*Section 241 Fund Meeting*

The Court shall summon the person who constituted the fund, the person who instituted the limitation proceedings, and the creditors who have submitted claims (the parties) to a fund meeting. The fund meeting shall deal with the questions of the right to limitation of liability, the amount of the liability, and the claims submitted.

Before the meeting the administrator or, if no administrator has been appointed, the Court shall prepare and distribute to the parties recommendations concerning the questions to be dealt with.

If at the end of the fund meeting no objections have been made to the recommendations with such changes as may have been made at the fund meeting, the Court shall base the distribution of the fund on the recommendation. If it finds it necessary, the Court can postpone the treatment of the recommendation to a later fund meeting.

If an objection remains at the end of the fund meeting, the Court shall set a time limit within which the person maintaining the objection shall request

that the question be decided by the Court. If the time limit is overrun, the objection shall be regarded as withdrawn.

#### *Section 242 Settlement of Disputes*

If a request has been presented for a question to be decided by the Court, the Court decides whom to regard as plaintiff and defendant. The dispute shall be settled after such further preparation as the Court finds necessary. The Court may decide that the dispute shall be heard according to the rules on ordinary civil trials.

Disputes concerning the right of limitation of liability, the amount of the liability or individual claims can be subject to separate proceedings and adjudication. Each part judgment is in that case subject to separate appeal.

The Court shall give the person who constituted the fund and anyone having submitted a claim notice of disputes that are initiated and judgments given.

#### *Section 243 Provisional Payment*

After the expiry of the time limit for submitting claims, the Court may decide to make provisional payments in partial settlement of the claims which have been proved.

#### *Section 244 Distribution of the Fund*

When all disputes have been settled, the Court shall by judgment distribute the fund according to the provisions of Section 176, 195 or 214.

The Court may retain an amount of money to cover claims that have not been submitted before the distribution of the fund was adjudicated by the Court of first instance. That amount of money shall be distributed when all claims submitted are decided on and the Court believes that no further claims will be submitted.

The fund shall be distributed even if the person who constituted it is not entitled to limitation of liability. The Court can on request give judgment ordering enforcement in respect of such part of a claim as is not covered by the fund.

#### *Section 245 Effect of Final Judgments*

A final judgment on the right of limitation of liability, the amount of the liability, the claims submitted and the distribution of the fund is binding on all those entitled to claim recovery from the fund, regardless of whether they have submitted claims in the case. The case can only be re-opened in respect of the right to limitation of liability.

### **SPAIN**

#### **Disposiciones Basicas del Enjuiciamiento Civil**

#### **TITULO III**

#### ***De los incidentes***

741. Las cuestiones incidentales de previo o especial pronunciamiento que se promuevan en toda clase de juicios, con exclusión de los verbales, y no

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tengan señalada en esta Ley tramitación especial, se ventilarán por los trámites que se establecen en el presente título.

742. Dichas cuestiones, para que puedan ser calificadas de incidentes, deberán tener relación inmediata con el asunto principal que sea objeto del pleito en que se promuevan. Será inadmisibile el incidente de nulidad de resoluciones judiciales. Los vicios que puedan producir tal efecto serán hechos valer a través de los correspondientes recursos.

743. Los Jueces repelerán de oficio los incidentes que no se hallen en ninguno de los casos del artículo que precede, sin perjuicio del derecho de las partes que los hayan promovido para deducir la misma pretensión en la forma correspondiente. Contra dicha providencia procederá el recurso de reposición, y si no se estimare, el de apelación en un solo efecto.

744. Los incidentes que por exigir un pronunciamiento previo sirvan de obstáculo a la continuación del juicio, se sustanciarán en la misma pieza de autos, quedando mientras tanto en suspenso el curso de la demanda principal.

745. Además de los determinados expresamente en la Ley, se considerarán en el caso del artículo anterior, los incidentes que se refieran:

1º A la personalidad de cualquiera de los litigantes o de su Procurador, por hechos ocurridos después de contestada la demanda.

2º A cualquier otro incidente que ocurra durante el juicio y sin cuya resolución fuera absolutamente imposible, de hecho o de derecho, la continuación de la demanda principal.

746. Los incidentes que no opongan obstáculo al seguimiento de la demanda principal se sustanciarán en pieza separada, sin suspender el curso de aquélla.

747. La pieza separada se formará a costa de la parte que haya promovido el incidente, y contendrá:

1º El escrito original en que se promueva el incidente, o testimonio del mismo y de la providencia en la parte necesaria, si aquél contiene otras pretensiones.

2º Los documentos originales relativos al incidente que se hayan presentado con dicho escrito.

3º Testimonio de los particulares que con referencia a los autos principales designe la parte que promueva el incidente, incluyendo también en él los que la contraria solicite que se adicionen, si el Juez los estima pertinentes.

748. Esta designación deberá hacerse por el que promueva el incidente dentro de los tres días siguientes al de la notificación de la providencia mandando formar la pieza separada, y por la otra parte dentro de los tres días posteriores, a cuyo fin se les pondrán los autos de manifiesto en la Escribanía.

Transcurridos dichos plazos sin haber hecho la designación, el actuario llevará a efecto desde luego la formación de la pieza separada con el escrito y documentos expresados en los números 1º y 2º del artículo anterior.

En todo caso se hará constar por nota en los autos principales la formación de la pieza separada, y en ésta que los Procuradores de las partes tienen acreditada su representación en aquéllos.

749. Promovido el incidente, y formada en su caso la pieza separada, se

dará traslado a la parte contraria por término de seis días, para que conteste concretamente sobre la cuestión incidental.

Si fuesen varias las partes litigantes, se concederá dicho término a cada una de ellas por su orden.

Se observará lo dispuesto en los artículos 515 y siguientes respecto a la presentación y entrega de copias.

750. En el escrito promoviendo el incidente, y en el de contestación, deberán las partes solicitar que se reciba a prueba, si la estiman necesaria.

751. Si ninguna de las partes hubiere pedido el recibimiento a prueba, el Juez, sin más trámites, mandará traer a la vista los autos para sentencia, con citación de aquéllas.

752. Se recibirá a prueba el incidente:

1º Cuando lo hubieren solicitado todos los litigantes.

2º cuando habiéndolo pedido una sola parte, el Juez lo estime procedente.

753. El término de prueba en los incidentes no podrá bajar de diez días ni exceder de veinte.

Este término será comun para proponer y ejecutar la prueba, observándose en lo demás las disposiciones del juicio ordinario que a ella se refieren.

754. Sólo podrá otorgarse el término extraordinario de prueba en los incidentes que se sustancien en pieza separada, y en los del número 1º del artículo 745.

755. Transcurrido el término de prueba, sin necesidad de que lo soliciten los interesados, mandará el Juez que se unan a los autos las pruebas practicadas y se traigan a la vista para sentencia, con citación de las partes.

756. Tanto en el caso del artículo anterior como en el del 751, si cualquiera de las partes lo pidiere dentro de los dos siguientes al de la citación, el Juez señalará, a la posible brevedad, día para la vista.

En este acto oír a los defensores de las partes si se presentaren.

757. En el caso del artículo anterior, se pondrán las pruebas de manifiesto a las partes en la Escribanía para instrucción, por el término que medie desde el señalamiento hasta el día de la vista.

758. Celebrada la vista o transcurridos los dos días siguientes al de la citación sin haberla solicitado, el Juez dictará sentencia dentro del quinto día. Esta sentencia será apelable en un solo efecto.

759. Las disposiciones que preceden serán aplicables a los incidentes que se promuevan durante la segunda instancia y en los recursos de casación.

La sentencia que en ellos recaiga será suplicable para ante la misma Sala.

760. Dentro de los tres días siguientes al de la entrega de la copia del escrito de súplica a los otros colitigantes, podrán éstos contestar lo que estimen conveniente.

Transcurrido dicho término, la Sala dictará la resolución que estime justa, previo informe del Magistrado ponente, y sin ningún otro trámite.

761. Contra las sentencias que dicten las Audiencias en dicho recurso de súplica, sólo se dará el de casación en los casos expresamente determinados por esta Ley.

Contra las que dicte el Tribunal Supremo no se dará recurso alguno.

**UNITED KINGDOM****Practice Directions - Part 49f***Limitation Claims*

9.1(1) Limitation may be relied upon by way of defence to any claim.

9.1(2) A limitation claim may be brought by counterclaim with the permission of the Admiralty Court.

9.1(3) A limitation claim is begun by the issue of a claim form in Admiralty Form No. ADM15 ("a limitation claim form"). The limitation claim form must be accompanied by a declaration:

- a. proving the facts upon which the Claimant relies
- b. stating the names and addresses (if known) of all persons who to the knowledge of the Claimant have claims against him in respect of the occurrence to which the claim relates, other than named defendants and sworn as an affidavit.

9.1(4) The Claimant and at least one of the Defendants must be named in the limitation claim form, but all other Defendants may be described.

9.1(5) The limitation claim form must be served on all named Defendants.

9.1(6) The limitation claim form may not be served out of the jurisdiction unless:

- a. the case falls within section 22(2)(a) to (e) of the Supreme Court Act 1981;
- b. the Defendant has submitted to or agreed to submit to the jurisdiction of the court; or
- c. the Admiralty Court has jurisdiction over the claim under any applicable Convention.

9.1(7) Every Defendant upon whom a limitation claim form is served must either:

- a. within 28 days of service file a defence to the limitation claim in Admiralty Form No. ADM16A or file a notice in Admiralty Form No. ADM16 that he admits the right of the claimant to limit liability; or
- b. if he wishes to dispute the jurisdiction of the court or to argue that the court should not exercise its jurisdiction file within 14 days of service or, if the limitation claim form is served out of the jurisdiction, within the time specified in RSC Order 11 rule 1A (Schedule 1 to the CPR), an acknowledgment of service in Admiralty Form No. ADM16B.

9.1(8) In the event that the Defendant files an acknowledgment of service pursuant to paragraph 9.1(7)(b) he will be treated as having accepted that the court has jurisdiction to hear the limitation claim unless he makes an application under CPR Part 11 within 14 days of filing his acknowledgment of service.

9.2(1) Where one or more named Defendants admits the right to limit, the Claimant may file in the registry an application for a restricted limitation decree in Admiralty Form No. ADM17 and the Court will issue a decree in Admiralty Form No. ADM18 limiting liability only against such named Defendants as have admitted the Claimant's right to limit liability.



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*Implementation and interpretation of the 1976 LLMC Convention*

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9.2(2) A restricted limitation decree may be obtained against any named Defendant failing to file a defence within the time specified for doing so.

9.2(3) A restricted decree need not be advertised, but a copy must be served on the Defendants to whom it applies.

9.2(4) Where the right to limit is not admitted or the Claimant seeks a general limitation decree in Admiralty Form No. ADM19, he must within 7 days of the date of the filing of the defence of the named Defendant last served or the expiry of the time for doing so, apply for an appointment before the Admiralty Registrar for a case management conference at which directions will be given for the further conduct of the proceedings.

9.3(1) When a limitation decree is granted the Admiralty Court:

- a. may order that any proceedings relating to any claim arising out of the occurrence be stayed;
- b. may order the Claimant to establish a limitation fund if one has not been established or make such other arrangements for payment of claims against which liability is limited as the Court considers appropriate;
- c. may, if the decree is a restricted limitation decree, distribute the limitation fund;
- d. shall, if the decree is a general limitation decree, give directions as to advertisement of the decree and fix a time within which notice of claims against the fund must be filed or an application made to set aside the decree.

9.3(2) When the Admiralty Court grants a general limitation decree the Claimant must:

- a. advertise it in such manner and within such time as the Court shall direct;
- b. file in the registry a declaration that the decree has been advertised in accordance with (a) and copies of the advertisements.

9.4 Any person other than a named Defendant may apply to the Admiralty Registrar within the time fixed in the decree to have a general limitation decree set aside. Any such application must be supported by a declaration proving that the person has a good faith claim against the Claimant arising out of the occurrence and sufficient grounds for contending that the Claimant is not entitled to the decree obtained, either in the amount of limitation or at all.

9.5(1) A limitation fund may be established before or after a limitation claim has been commenced.

9.5(2) If a limitation claim is not commenced within 75 days of the date the fund was established, the fund will lapse and all monies in court, including any interest accrued therein, will be repaid to the person making the payment into court. The lapsing of a limitation fund shall not prevent the establishment of a new fund.

9.6(1) The Claimant may constitute a limitation fund by paying into court the sterling equivalent of the number of special drawing rights to which he claims to be entitled to limit his liability under the Merchant Shipping Act 1995 together with interest thereon from the date of the occurrence giving rise to his liability to the date of payment into court.

*Annex VII - National rules of procedure: United Kingdom*

9.6(2) Where the Claimant does not know the sterling equivalent of the said number of special drawing rights on the date of payment into court he may calculate the same on the basis of the latest available published sterling equivalent of a special drawing right as fixed by the international Monetary Fund, and in the event of the sterling equivalent of a special drawing right on the date of payment into court under paragraph (1) being different from that used for calculating the amount of that payment into court the Claimant may:

1. make up any deficiency by making a further payment into court which, if made within 14 days after the payment into court under paragraph (1), shall be treated, except for the purposes of the rules relating to the accrual of interest on money paid into court, as if it has been made on the date of that payment into court, or
2. apply to the Admiralty Court for payment out of any excess amount (together with any interest accrued thereon) paid into court under paragraph (1).

9.6(3) An application under paragraph 9.6(2) (b) may be made without notice to any party and must be supported by evidence to the satisfaction of the Court proving the sterling equivalent of the appropriate number of special drawing rights on the date of payment into court.

9.6(4) On making any payment into court under this rule, the Claimant shall give notice thereof in writing to every named Defendant, specifying the date of payment in, the amount paid in, the amount of interest included therein, the rate of such interest, and the period to which it relates. The Claimant shall also give notice in writing to every Defendant of any excess amount (and any interest thereon) paid out to him under paragraph 9.6(2)(b).

9.6(5) Money paid into court under this paragraph shall not be paid out except under an order of the court.

9.7(1) A claim against the fund must be in Admiralty Form No. ADM20.

9.7(2) No later than the time fixed in the decree for filing claims, each of the Defendants must file and serve his statement of case on the limiting party and on all other Defendants. The statement of case must contain the particulars of the Defendant's claim. Any Defendant unable to do so must file a declaration in Admiralty Form No. ADM21 stating the reason for his inability. The declaration must be sworn as an affidavit.

9.7(3) Within 7 days of the time for filing claims or declarations, the Admiralty Registrar will fix a date for a case management conference at which directions will be given for the further conduct of the proceedings.

*References to the Admiralty Registrar*

10.(1) The Admiralty Court may at any stage in the claim refer any question or issue for determination by the Admiralty Registrar (a "reference").

10.(2) Unless otherwise ordered, where a reference has been ordered:

- a. The Claimant must file and serve particulars of claim on all other parties within 14 days of the date of the order.
- b. Any party opposing the claim must file a defence to the claim within 14 days of service of the particulars of claim upon him.

10.(3) Within 7 days of the filing of the defence, the Claimant must apply

for an appointment before the Admiralty Registrar for a case management conference at which directions will be given for the further conduct of the proceedings.

- 10.(4) Any decision of the Admiralty Registrar on the hearing of the reference may be appealed to the Admiralty Judge, by Notice in Admiralty Form No. ADM25 filed within 75 days of the decision on the reference appealed against.

## **PASSENGERS CARRIED BY SEA**

*During the Singapore Conference a Seminar session will be held, at which Mr. Bernd Kroger (ICS) and Mr. Charles Haddon-Cave Q.C. will consider the different systems of liability existing in the carriage of passengers by sea and by air.*

*Prof. Dr. Walter Müller, who was President of the Diplomatic Conference which adopted in 1974 the Athens Convention, has written on this subject the paper published below. It is hoped that this paper will contribute to the debate in Singapore.*

### **PASSENGERS CARRIED BY SEA. SHOULD THE ATHENS CONVENTION 1974 BE MODIFIED AND ADAPTED TO THE LIABILITY REGIME IN AIR-LAW?**

WALTER MÜLLER\*

1. The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL 1974) entered into force on 28 April 1987. On 25 May 1990, a Protocol was adopted increasing the liability limit per passenger from 46,666 SDR to 175,000 SDR. Article 7(2) of the Convention already provided, that a State Party could fix, as far as carriers who are nationals of such State are concerned, a higher per capita limit of liability. On 2 May 1996, a Protocol was adopted to amend the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 76). This included a change to Art 7(1), increasing the global limit for passenger claims to 175,000 SDR multiplied by the number of authorized passengers. This Protocol added a new para 3<sup>bis</sup> to Article 15, providing that a State Party could regulate the system of liability in their national law, provided that the limit of liability is no lower than that prescribed by the Convention. Neither the 1990 Protocol to the Athens Convention nor the 1996 Protocol to the LLMC 76 have entered into force. One reason for this is that some Governments which were preparing to submit the Protocol to their Parliaments for ratification decided, after the submission to the IMO Legal Committee in 1996 of new proposals to amend the Athens Convention, to wait

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\* Prof. Dr. Walter Müller (Switzerland) has been the president of the preparatory committees of CMI and IMO and of the Diplomatic Conference 1974).

for the result of these proposed changes. No Government may be prepared to engage at short intervals in parliamentary procedures. This indicates, once more, that international maritime lawyers' somewhat restless desire for change and in particular their desire to change, previously adopted rules, actually impedes efforts to implement adopted Conventions world-wide, an aim also discussed at CMI.

2. The Athens Convention had much greater acceptance than is represented by the 25 formal ratifications. It is interesting to have a look at the laws of Germany, the four Scandinavian countries, France, the Netherlands, the People's Republic of China and Vietnam, countries which have incorporated the Convention's liability system into their national law, so that the rules also apply to national carriage; and not only to international carriage, as provided in the Convention.

Some of the above mentioned countries abstained from formal ratification, because they considered the limit of 46,666 SDR as too low. They have stipulated higher limits in their national laws, amounts, which would largely be covered by the increase in the Protocol of 1990. Since the adoption of the Convention in 1974, public opinion has changed during the following years as illustrated by the increase to 175,000 SDR in the 1990 Protocol.

3. In 1974, a Diplomatic Conference considered new developments in international air-law and decided to provide an identical limit, namely 58,000 USD (at that time equal to 46,666 SDR) provided for in the so-called "Montreal-Agreement" of the main air-lines for carriage on from the United-States. This was done in order to convince the American Government to withdraw its denunciation of the 1929/1955 Warsaw-Convention at the last possible moment.

The new Convention for the Unification of certain rules for International Carriage by Air of 28 May 1999, which is not yet in force, fixed the limitation amount per passenger for the first indemnity, on the basis of strict liability, to 100,000 SDR, an amount that is lower than the 175,000 SDR provided in the 1990 Protocol for sea carriage.

4. At present, two main proposals are under discussion in relation to the Athens Convention, one providing for compulsory insurance to be provided by the shipowner with a direct right to claim against the insurer, and the other to change the liability system based on fault into a system of strict liability as provided in the new 1999 Air-Carriage Convention for an initial damage amount of up to 100,000 SDR. The first proposal has already been incorporated in a draft for a Protocol in the IMO Legal Committee. Apart from the fact, as mentioned below, that this proposal affects the readiness to ratify the 1990 and 1996 Protocols, the proposal seems to be supported by the opinion of European carriers who are already covering their liability with a P&I Insurance for reasons of commercial prudence and want to avoid unfair competition by foreign carriers who have not covered their liability with voluntary insurance and may calculate their running costs without factoring in insurance costs. Is this argument really convincing on a world-wide basis in the light of the boom in cruise operations round the globe? A look at offers from travel agencies shows that they are providing embarkation and disembarkation in countries

where there are no insurance obligations. A new unified rule of maritime law should not only be considered from a purely legal point of view if success is also expected with regard to the political and economic aspects which mostly prevail when a State is called to ratify a new instrument. Does it make sense only to unify and provide new rules for some advanced European countries which should be at least 10, the minimum number normally needed for a convention to enter into force?

5. Critics of the Athens Convention should not forget that the liability system adopted at that time represented a milestone in the progressive development of maritime law. Prior to this, in virtually all countries, the contract of carriage of passengers was governed by the principle of freedom of contract, and the carrier used or abused this freedom to exclude liability. In purely domestic carriage, which is not covered by the Convention, transport-conditions endorsed in the tickets still contain the disclaimer "The carrier is not liable for any accident, injury or death for whatever cause".

It was not easy to convince the delegations in 1974 to accept the compulsory liability as provided in the Convention and to abandon the unlimited freedom of contract as a first step in the right direction. The low acceptance rate of the previous 1961 Convention with the same principle demonstrates this fact; this although the 1961 Convention entered formally into force with two ratifications only.

6. The liability system of the Athens Convention is based on facts, reality and experience. A passenger on board a ship is not an "inert thing" entrusted to the custody of the carrier, but a human being with his own agenda not to be controlled by the carrier and its staff like a passenger in an air plane or hovercraft. During the critical phase of takeoff and landing, the air passenger must sit and keep his/her seatbelt fastened, the crew, for safety reasons recommends keeping the belt fastened during the whole flight. On the other hand a passenger on board a ship can freely circulate and use the ship's facilities, such as swimming pool, fitness centre, shooting ranges, etc. in particular on board a cruise vessel. He can dance, indulge in alcoholic excesses, quarrel with other passengers in the bar or on deck during the night, with the inherent risk of falling overboard. As to his cabin-luggage, the passenger can freely use and handle this without supervision. There are often many kinds of shop on board - including beauty salons, hairdresser and massage parlors. There is therefore a common perception, that a passenger ship is a "floating hotel" or at least a "floating restaurant". It may, therefore, not be an appropriate or a fair solution to provide strict liability in general for the carrier, as proposed by lawyers arguing that the carrier can, according the general rule, avoid liability by proving fault or concurrent fault on the part of the passenger. If a hairdresser burns a client's skin, or, worse, if a doctor on board gives a wrong prescription or injection or makes a wrong diagnosis, or if a nurse gives wrong medication, one may not identify or prove fault of the passenger. It was therefore appropriate for the Athens Convention to provide for liability without proof of fault of the carrier and his staff only if a shipwreck, collision, stranding, explosion or fire or a defect of the ship were the cause of an accident or incident causing harm to a passenger. For other causes of harm or loss, the burden of proof of fault should

lie with the passenger claiming damages. The new Dutch Civil Code of 1991 introduced not only the liability system of the Athens Convention with the exception of carriage by hovercrafts, but added, in Article 8.514, a very intelligent rule, as follows:

“If persons whose assistance the carrier uses in the performance of his obligations render services upon the request of the passenger, to whom the carrier is not obliged, they are considered as acting upon the orders of the passenger to whom they render these services.”

7. When proposing new legal rules in an International Convention or Protocol lawyers should, as we have learned from experience, also consider the economic and political chances of such rules being accepted by a significant number of states, not only by a few advanced and developed so-called “rich states”, but also by a large number of less advanced or developing states. Otherwise, a new instrument will remain in the records of IMO only, and the efforts and cost involved in a Diplomatic Conference will be in vain. If one considers the major deplorable incidents of the past years, sometimes involving hundreds of victims, one will see that these incidents happened mainly in ferry-boat enterprises operating between the mainland and islands or between islands in the so-called third-world countries, particularly in archipelagic areas, where the carriage of passengers is as important as carriage by train, coach or tramway in other parts of the world. These enterprises are usually run by the government or are governmental companies and they vary fares for political reasons; fares not even covering the running costs and the costs of providing safety devices and rescue services. Very often, the boats are double or even triple-booked. There are therefore serious doubts, as to whether countries which for the same reasons have not yet accepted the Athens Convention will be prepared to ratify new rules with higher limits of liability. One should always be aware that these countries represent the majority in a Conference. In addition, if new stronger liability rules are only applied in cases of international, transboundary carriage, as provided in the scope of application rule, the international legislator will provide no protection for the majority of passengers obliged to use a ship. A moderation is therefore also indicated for the CMI when dealing with a possible adaptation of liability at sea to liability in the air. It would possibly be wiser to promote further implementation of the existing liability systems than to invent or copy a new one at the risk of further disunifying maritime law.

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