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*Table of contents***TABLE OF CONTENTS****PART I - Organization of the CMI**

	PAGE No.
Constitution	10
Rules of Procedure	28
Guidelines for proposing the election of Titulary and Provisional Members	31
Headquarters of the CMI	32
Members of the Executive Council	32
President ad Honorem and Honorary Vice Presidents	34
Management Functions	35
Member Associations	39
Temporary Members	82
Members Honoris Causa	83
Titulary Members	83
Consultative Members	111

PART II - The Work of the CMI

**CMI 37th Conference
Singapore
11-17 February 2001**

Officers of the Conference	119
List of Attendance	120
Opening Session	
- Opening speech of the President of the CMI	171
- Address by Prof. David J. Attard, Director, IMLI	175
- Opening address by Prof. S. Jayakumar, Minister for Law and Minister for Foreign Affairs	177
Agenda of the Conference	181
Issues of Transport Law	
- Report of Committee A	182
- Resolution of the Conference	188

Table of contents

Marine Insurance

- Discussion Paper	189
- Report to the Plenary Session	203
- Resolution of the Conference	211

General Average

- Report to the Plenary Session by the International Working Group	212
- Resolution of the Conference	213

Model National Law on Acts of Piracy and Maritime Violence

- Report on the Conference Session	214
- Resolution of the Conference	223

Implementation and Interpretation of the 1976 LLMC Convention

- Report of the Working Group	224
- Resolution of the Conference	230
- Report to IMO	231

Passengers Carried by Sea

- Limitation against passenger claims: medieval, unbreakable and unconscionable, Paper by Charles Haddon-Cave QC	234
- Passengers Carried by Sea - should they be granted the same rights as airline passengers? Paper by Bernd Kröger	244
- Resolution of the Conference	253

Salvage

- First report on UNESCO Draft Convention on the Protection of Underwater Cultural Heritage	254
---	-----

Work programme

- Resolution of the Conference	259
--------------------------------	-----

The Work of the CMI after the Singapore Conference**Issues of Transport Law**

	263
- Report of the Fifth Meeting	265
- Report of the Sixth Meeting	305
- Draft Outline Instrument of 31 May 2001	357
- Consultation Paper of 31 May 2001	379
- Synopsis of the Responses to the Consultation Paper and other comments on the Draft Outline Instrument	383
- CMI Draft Instrument on Transport Law	532

Model National Law on Acts of Piracy and Maritime Violence

- Final Report of the Joint International Working Group	598
- Annex A	599
- Annex B	606

*Table of contents***General Average**

- Report of the Chairman of the Joint International Working Group 608

Salvage - UNESCO Draft Convention on the Protection of Underwater Cultural Heritage

- Report by John D. Kimball 615
- Letter of the President of the CMI to the Director General of UNESCO 620

PART III - Status of ratifications**Status of the ratifications of and accessions to the Brussels International Maritime Law Conventions:**

- Editor's notes 625
- Collision between vessels, 23rd September 1910 626
- Assistance and salvage at sea, 23rd September 1910 628
- Assistance and salvage at sea, Protocol of 27th May 1967 631
- Limitation of the liability of owners of sea-going vessels, 25th August 1924 632
- Bills of lading, 25th August 1924 (Hague Rules) 633
- Bills of lading, Protocol of 23rd February 1968 (Visby Rules) 639
- Bills of lading, Protocol of 21st December 1979 (SDR Protocol) 641
- Maritime liens and mortgages, 10th April 1926 642
- Immunity of State-owned ships, 10th April 1926 and additional Protocol 24th May 1934 643
- Civil jurisdiction in matters of collision, 10th May 1952 645
- Penal jurisdiction in matters of collision and other incidents of navigation, 10th May 1952 647
- Arrest of sea-going ships, 10th May 1952 654
- Limitation of the liability of owners of sea-going ships, 10th October 1957 659
- Limitation of the liability of owners of sea-going ships, Protocol of 21st December 1979 664
- Stowaways, 10th October 1957 665
- Carriage of passengers by sea, 29th April 1961 665
- Nuclear ships, 25th May 1962 666
- Carriage of passengers' luggage by sea, 27th May 1967 667
- Vessels under construction, 27th May 1967 667
- Maritime liens and mortgages, 27th May 1967 668

Table of contents

**Status of the ratifications of and accessions to the IMO conventions,
in the field of private maritime law:**

- International convention on civil liability for oil pollution damage (CLC 1969)	670
- Protocol of 1976 to the International convention on civil liability for oil pollution damage (CLC Prot 1976)	680
- Protocol of 1992 to amend the International convention on civil liability for oil pollution damage, 1969 (CLC Prot 1992)	684
- International convention on the establishment of an international fund for compensation for oil pollution damage (Fund 1971)	686
- Protocol of 1976 to the International convention on the establishment of an international fund for compensation for oil pollution damage, 1971 (Fund Prot 1976)	692
- Protocol of 1992 to amend the International convention on the establishment of an international fund for compensation for oil pollution damage, 1971 (Fund Prot 1992)	694
- Convention relating to civil liability in the field of maritime carriage of nuclear material (Nuclear 1971)	696
- Athens convention relating to the carriage of passengers and their luggage by sea (PAL 1974)	698
- Protocol of 1976 to amend the 1974 Athens convention relating to the carriage of passengers and their luggage by sea (PAL Prot 1976)	700
- Protocol of 1990 to amend the 1974 Athens convention relating to the carriage of passengers and their luggage by sea (PAL Prot 1990)	702
- Convention on limitation of liability for maritime claims (LLMC 1976)	702
- Protocol of 1996 to amend the Convention on limitation of liability for maritime claims, 1976 (LLMC Prot 1996)	709
- International convention on salvage (Salvage 1989)	709
- International convention on oil pollution preparedness, response and co-operation, 1990	713
- International convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, 1996 (HNS 1996)	715

Constitution

Status of the ratifications of and accessions to United Nations and United Nations/IMO conventions in the field of maritime law:

- The United Nations Convention on a code of conduct for liner conferences, 6 April, 1974 (Liner Confer 1974) 718
- The United Nations Convention on the carriage of goods by sea, 31 March 1978 (The Hamburg Rules 1978) 720
- The United Nations Convention on international multimodal transport of goods, 24 May 1980 (Multimodal 1980) 721
- The United Nations Convention on the law of the sea, 10 December 1982 721
- The United Nations Convention on conditions of registration of ships, 7 February 1986 (Registration ships 1986) 724
- The United Nations Convention on the liability of operators of transport terminals in the international trade, 1991 725
- International Convention on maritime liens and mortgages, 1993 725
- International Convention on Arrest of Ships, 1999 725

Status of the ratifications of and accessions to UNIDROIT conventions in the field of private maritime law:

- UNIDROIT Convention on international financial leasing, 1988 727

APPENDIX

- Conferences of the Comité Maritime International 728

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

* The Constitution has been amended by the Assembly of the CMI held in Singapore on 16th February 2001. The new Constitution will enter into force, pursuant to its Article 24, on the tenth day following its publication in the *Moniteur belge*.

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

* Le 16 février 2001, l'Assemblée du CMI, réunie à Singapour, a modifié les statuts. Les nouveaux statuts entreront en vigueur le dixième jour après leur publication au Moniteur belge.

Part I - Organization of the CMI

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 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.

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

Constitution

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 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.

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

Part I - Organization of the CMI

- 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.

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;

Constitution

- 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.

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;

Part I - Organization of the CMI

- 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;
- 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.

Constitution

- 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;
- 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.

Part I - Organization of the CMI

Article 11**Secretary-General**

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

Constitution

Article 11**Le Secrétaire Général**

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

Part I - Organization of the CMI

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.

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.

Constitution

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 Associations membres appartiennent.

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 présentés.

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.

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.

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.

Constitution

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.

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.

Part I - Organization of the CMI

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.

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.

Constitution

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 VicePrésident 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.

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

Part I - Organization of the CMI

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.

Constitution

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*

1996¹

Rule 1

Right of Presence

In the Assembly, only Members of the CMI as defined in Article 3 (I) 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 (I) 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 (I) of the Constitution and members of the Executive Council may 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.

1. Adopted in Brussels, 13th April 1996.

Rules of Procedure

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

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

Part I - Organization of the CMI

Assembly shall be published in the two official languages of the CMI, English and French, either in the *CMI Newsletter* or otherwise distributed in writing to the Member Associations.

Rule 7

Amendment of these Rules

Amendments 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 ELECTION OF TITULARY AND PROVISIONAL MEMBERS

1999¹

Titulary Members

No person shall be proposed for election 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 (I)(c) of the Constitution. The Administrator shall receive any proposals for Titulary Membership, with 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.

Periodic Review

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

1. Adopted in New York, 8th May 1999, pursuant to Article 3 (I)(c) and (d) of the Constitution.

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Management Functions

MANAGEMENT FUNCTIONS

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 Benoit GOEMANS
 Allan PHILIP
 Alexander VON ZIEGLER

Classification Societies

Frank L. WISWALL, Jr., *Chairman*
 Karl-Johan GOMBRII, *Deputy Chairman*

Constitution Committee

Frank L. WISWALL, Jr., *Chairman*
 Benoit GOEMANS
 Allan PHILIP
 Patrice REMBAUVILLE-NICOLLE
 Alexander VON ZIEGLER

Members

Executive Council and Assembly meetings

Benoit GOEMANS
 Patrick GRIGGS
 John E. HARE
 Pascale STERCKX
 Alexander VON ZIEGLER

Implementation of Conventions

Francesco BERLINGIERI, *Chairman*
 Gregory TIMAGENIS, *Deputy Chairman*
 Richard SHAW, *Rapporteur*

Liaison with International Bodies

Patrick GRIGGS
 Alexander VON ZIEGLER

Mobile Equipment

Thomas REME', *Chairman*
 Patrick GRIGGS, *Deputy Chairman*

Charitable Trust

Francesco BERLINGIERI
 Thomas BIRCH REYNARDSON
 Charles GOLDIE
 Patrick GRIGGS
 Allan PHILIP
 Alexander VON ZIEGLER
Trustees

Conferences, Seminars, etc.

Johanne GAUTHIER
 Patrick GRIGGS
 John E. HARE
 Stuart HETHERINGTON
 Pascale STERCKX
 Alexander VON ZIEGLER
 Frank L. WISWALL, Jr.

E-Commerce

Johanne GAUTHIER, *Chairman*
 Luis COVA ARRIA, *Deputy Chairman*

General Average

International Working Group

Bent NIELSEN, *Chairman*
 Richard SHAW, *Rapporteur*

Joint Working Group

Frank L. WISWALL, Jr., *Chairman*

Issues of Transport Law

Stuart BEARE, *Chairman*
 Karl-Johan GOMBRII, *Deputy Chairman*
 Michael STURLEY, *Rapporteur*

Marine Insurance

John E. HARE, *Chairman*
 Thomas REME
 Jean-Serge ROHART
Joint Deputy Chairmen
 Trine Lise WILHELMSEN, *Rapporteur*

National Associations:

Luis Cova ARRIA, *South America & Caribbean*
 Stuart HETHERINGTON, *Australasia & Far East*
 John E. HARE, *Africa Middle East & Indian Subcontinent*
 Jean-Serge ROHART, *Europe*
 Gregory TIMAGENIS, *Europe*
 Frank L. WISWALL, Jr., *North America*

Management Functions

Nominating Committee

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 Francesco BERLINGIERI
 Patrick GRIGGS
 Allan PHILIP
 Jan RAMBERG
 Zengjie ZHU
Members

Planning Committee

Patrick GRIGGS
 Alexander VON ZIEGLER

Publications and Funding

Francesco BERLINGIERI
 Benoit GOEMANS
 John E. HARE
 Stuart HETHERINGTON
 Frank L. WISWALL, Jr.

Piracy

Frank L. WISWALL, Jr., *Chairman*
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Individual members: 135.

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The Work of the CMI

**CMI 37TH CONFERENCE
SINGAPORE
11-17 FEBRUARY 2001**

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OPENING SESSION

12th February 2001

OPENING SPEECH OF THE PRESIDENT OF THE CMI

Minister, delegates from National Maritime Law Associations, distinguished guests, consultative members and observers, my lord, ladies and gentlemen. Welcome to this the 37th International Conference of the Comité Maritime International. I particularly welcome representatives of our Consultative members, notably BIMCO, ICC, IBA, ICS, FIATA, Int. Group of P&I and IUMI. I also welcome representatives from AIDE and Intergovernmental Organisations, IMO, IOPC Funds, UNCITRAL, OECD, UNCTAD. We have here delegates from 46 nations.

I hope that you are here to join in and advance our work – if you disagree with what we're doing or the way we're doing it I am sure you will feel free to say so. That is the CMI's way.

It is instructive to look back over the previous 36 Conferences to see if there is any pattern in our selection of venues for our Conferences. Between 1897 and 1955 (that is conferences from 1-25) all Conferences were held in Europe. This had much to do with the fact that with Antwerp as its birth place and home the CMI has traditionally been an organisation conscious of its European roots. This is despite the fact that its mission has always been the harmonisation of international maritime law. 1965 took us to New York and then in 1969 we really branched out and held our Conference in Tokyo. After a return to Europe for two Conferences; 1977 saw us in Rio de Janeiro and 1981 in Montreal. Since then we have held our Conferences in Lisbon, Paris and Sydney and finally returned to our home base for the Centenary Conference in Antwerp in 1997.

If you have been following me you will be able to work out that of the 36 Conferences so far held only 5 have been held outside Europe.

When I became President in 1997, and knew that the responsibility for the next major Conference would be mine, I tried to think of a member country with a substantial shipping business and the ability to organise a Conference of the quality which the CMI has come to expect. I don't need to tell this audience that over the last 30 years or so the centre of gravity for the shipping industry has shifted to the Far East. It seemed to me to be appropriate to hold this 37th Conference in one of the Far Eastern centres of the shipping trade. I first visited Singapore on business on 1965 and have been here many times since. I have a great affection for the place. When Chandran Arul indicated that the Maritime Law Association of Singapore would be willing to host the Conference jointly with the Singapore Shipping Association I

jumped at the offer. Ladies and Gentleman it will be for you to judge whether I and my Executive Council made the right choice. I already have the feeling that the organisers of this event (both the professionals and the amateurs) have matters well under control and that we will have a productive Conference in a work sense as well as a great deal of interest and fun on the social side.

Whilst talking about the history of our Conferences I should mention that shortly before coming out to Singapore I received a fax message from Nick Healy, a very old friend of many of us here today. I was a student in his New York law office in 1961. He was due to come to Singapore, with his wife Margaret for this Conference but unfortunately Margaret fell, broke her hip and had to undergo surgery. She is on the mend but, they are unable to be with us at this Conference. I know for a fact that Nick and Margaret first attended a CMI Conference in Athens in 1962. They have been to all 12 Conferences since that date – a period spanning close to 40 years. It is difficult to believe that anyone will ever beat that record of attendance. I am sure that sometime during this week an opportunity will arise to drink a toast to Nick and Margaret and other absent friends.

Many of the locals here will remember the infamous case of the *Showa Maru*. I cannot put a precise date to this but it must have been in the early 1980's that the *Showa Maru* struck a rock off Singapore and caused serious pollution on both sides of the Singapore Straits. It was my uncomfortable duty to act for the owners and liability insurers of the *Showa Maru* and to deal with the PSA (as it then was) and other organisations in Singapore responsible for dealing with claims. My clients, in that case, were responsible for bringing, pollution to Singapore. On this occasion I bring no pollution with me to Singapore; I bring nothing worse than a broad cross section of the shipping industry, shipowners, insurers, averages adjusters, insurance brokers and so on and just a few maritime lawyers. I know that we will all be more welcome to Singapore than the oil which was brought here by the *Showa Maru*.

I have mentioned that this is a broadly based group drawn from the maritime trades. This reflects the mission statement of the founders of the CMI. The CMI was set up for the sole purpose of achieving the ultimate goal of uniformity in relation to all aspects of international maritime law. The mission statement, drafted over 100 years ago, stated that no maritime law should be promulgated that did not have input from shipowners, merchants, underwriters, average adjusters, bankers and other persons interested in the maritime trades. You will observe that, this list does not include maritime lawyers. However the mission statement goes on to say that once there has been input from those involved in the day to day business of shipping then and only then is it the duty of the lawyers "to discern what, among diverse solutions, is the best". In other words those involved in the maritime trades are to have a primary say in determine the rules which would govern their activities. We should bear that in mind this week.

Against this background let me turn to the programme for this Conference. One of the early achievements of the CMI was to produce the final draft of the Hague Rules in 1924. The CMI was subsequently responsible for the Hague/Visby Rules of 1968. It is widely recognised that

those rules (now in form and substance nearly 80 years old) no longer serve their intended purpose. Efforts have been made to devise a new set of International Rules (I refer to the Hamburg Rules) but these have not been widely adopted. As the years have gone by more and more countries and groups of countries have devised their own national or regional codes to replace the Hague Visby Rules.

In conjunction with UNCITRAL the CMI has, for the last three years, been exploring the possibility of creating a new Convention, Code or set of Rules which would cover numerous aspects of the law relating to the carriage of goods by sea to which could be added a new liability regime. An International Working Group and an International Sub Committee (both under the chairmanship of Stuart Beare) have worked with huge energy over those three years and they now want to debate with you the issues which, during the long build up to this Conference, they have identified as being vital to this new instrument. I hope that all delegations have done their home work and will be ready to contribute to this debate. I am clear in my own mind that this is the best and probably the last chance of restoring some degree of international uniformity in this important and difficult area. This subject will require the attention of delegates throughout the week of the Conference.

Professor John Hare (S. Africa) will Chair two sessions on Issues of Marine Insurance. You may puzzle over the title given to this subject but should understand that the CMI felt, following a Symposium held in Oslo in the Spring of 1998, that there was no demand for a complete new Marine Insurance Code or similar. However we did feel that there were a number of aspects of the law of Marine Insurance which create problems in whichever jurisdiction they are encountered. From that starting point we have identified four areas of the law of marine insurance where we hope, with the assistance of delegates to this Conference, to be able to suggest ways in which the law might be harmonised on an international basis. The exact method by which this harmonisation might be achieved will be discussed here in Singapore.

It may not be entirely inappropriate that we should also be here in the Far East discussing a model law on Piracy and Acts of Maritime Violence. Statistics published by United Nations reveal that this is a geographical area in which acts of piracy and maritime violence are not uncommon. Shortly before coming out here I was approached by one of the co-chairmen of the United Nations Law of the Sea Committee set up by the UN General Assembly. One of the two current topics on their Agenda is "co-ordination and co-operation in combating piracy and armed robbery at sea". If, by the end of this Conference, we can produce a model law on piracy and acts of maritime violence there is a prospect that this model law might be endorsed and promoted by the UN itself.

The International Union of Marine Insurers approached the CMI two years ago with a request that we should again examine the York-Antwerp Rules on General Average of 1994. IUMI would like to see many of the expenses currently allowed in General Average, after the arrival of the vessel at port of refuge, excluded from General Average in future. The CMI has, for many decades, been the custodian of the York-Antwerp Rules and it is

therefore up to us, at this Conference, to consider whether, relatively soon after the last revision in 1994, we should be looking at a fundamental review of the Rules.

As if these four topics were not enough to keep us fully extended for the week of the Conference we will have two Seminar Sessions. One of these will consider why it is that so many International Maritime Law Conventions in the past 30 years have failed to achieve the level of ratification originally anticipated. The Chairman of that Seminar and discussion session will be one of my predecessors as President of the CMI, Professor Francesco Berlingieri. The second Seminar Session will deal with a topic of tremendous current interest. Should passengers who travel by sea have the same rights as airline passengers now have under the 1999 Montreal Convention? We will have the benefit of presentations by two distinguished speakers. One will try to persuade us that ships and aircraft are essentially the same from the point of view of injured passengers and the other will seek to persuade us that ships are very different.

If you have had an opportunity of looking at the report of the Planning Committee you will have noticed that in our future proposed work programme there is a reference to the UNESCO Draft Convention on Underwater Cultural Heritage. An international working group was set up under the Chairmanship of Professor Eric Japikse and I am pleased to say that this IWG has now produced a preliminary report. That report is included in the Conference documents file. The exhibits have not been copied but may be obtained from the Secretariat. Please take the opportunity of considering the report during the week. I have asked the Rapporteur of the IWG (John Kimball from New York) to report briefly at the Plenary Session. The Assembly will then be asked to consider whether the project, as outlined in the report, should proceed further.

One Housekeeping matter;

May I remind you that the working sessions of this Conference will operate in accordance with the Rules of Procedure which appear on pages 26-28 of Yearbook 2000 – Singapore I. Rule 2 requires that Member Associations must address sessions of the Conference through a spokesman. The spokesman may yield the floor to another member of his delegation “for the purpose of addressing a particular and specified matter”. Observers may also address sessions of the Conference though only with the consent of the Chairman of that Session. Please co-operate with the Chairmen of the Sessions in which you are involved. On most topics we have a lot of ground to cover and it is only by being disciplined that we can hope to complete our tasks.

May I also remind you that at the Assembly meeting on the afternoon of Friday 16th February each member Association is required to nominate up to three delegates to represent them at the Assembly. Would you please, during the course of the week, notify our Assistant Administrator, Pascale Sterckx, who will represent your Association at the Assembly. The same goes for Consultative Members. Titulary Members may also attend the Assembly but are not entitled to vote on motions put to the Assembly. Those attending

should pick up a set of Accounts from the Secretariat and also a copy of the proposed changes to the CMI Constitution – associated with the incorporation of CMI.

I have said quite enough and it remains for me to thank our hosts for organising this Conference and to encourage you, ladies and gentlemen, to contribute with enthusiasm to the tasks which we have set for ourselves this week. The CMI is a unique privately funded organisation dedicated to the harmonisation of international maritime law and you, ladies and gentlemen are part of that unique group. With your help we can achieve a great deal and we must never forget that we can only justify our existence if we do, indeed, achieve what we set out to do.

ADDRESS BY PROFESSOR DAVID J. ATTARD, DIRECTOR, IMLI

Honourable Minister,
Representative of the Secretary-General,
President Griggs,
Chairman Arul,
Distinguished Guests,

I wish first of all to thank Professor Frank Wiswall for his kind introduction. I am particularly grateful to the CMI for allowing me to address such an important gathering as it provides me with a unique opportunity to address distinguished members of the maritime community.

Our Institute, which is widely known as IMLI [the first one of its type anywhere in the world] offers a unique course designed to cover the whole spectrum of international maritime law on a comparative basis. Its programme consists of numerous modules, which include international law, law of the sea, shipping law, marine environmental law, and legislative drafting. Training at the Institute also fosters excellence in three important areas:

1. the development of expertise to advise on and develop national maritime legislation;
2. the development of legislative drafting skills to ensure that States have the necessary expertise to develop national maritime legislation; and
3. the preparation of lawyers to participate in, and contribute to, the deliberations of the international maritime fora.

The duration of the course is one academic year and successful students are awarded a Masters Degree in International Maritime Law.

In order to qualify, students - who primarily should come from developing countries - are required to have a first law degree. A major and innovative feature of the Institute is that 50 per cent of the places on the course each year are reserved for women candidates.

Due to the intensive nature of the training, the Institute, admits only a limited number of students annually. Over the past few years, the demand for

places at IMLI has increased. This has led the Board of Governors to increase the number of places from 20, to 25 and now to 30.

IMLI's small permanent, teaching staff is complemented annually by a number of practitioners and academics from the field of maritime law. In this respect, CMI's assistance has been invaluable for it has ensured that we attract eminent and authoritative speakers who hail from different legal systems. We feel this is a very important aspect of our teaching for it offers our students the opportunity to learn maritime law on a comparative basis and to be exposed to the wealth of experience which practitioners have.

Distinguished Guests,

It is well known that the success of international maritime conventions and similar legal instruments is - to a large extent - dependent on the will of States. The viability of these texts depends generally on whether States are able, through national laws, to enforce the rules therein. In view of the global nature of such a task, it is important to bear in mind that not all States have the legal expertise of the traditional maritime States. [Indeed, it has also been noted that although many developing States have reasonable numbers of legal trained persons, they generally do not have a sufficient number of persons trained in international maritime law.] It is this void which IMLI attempts to deal with.

The large majority of IMLI graduates are now actively engaged in the service of their country. It gives us great satisfaction to note that our graduates are often asked to take on senior responsibilities in their countries. Indeed, one is able to find IMLI graduates occupying important posts, which range from a Chief Justice in the Court of Appeal, Attorney Generals, Judge Advocate Generals to Legal Advisors in National Maritime Authorities.

In the international fora, IMLI graduates have demonstrated a similar aptitude for success. It is often possible to find them leading national delegations to IMO meetings and Diplomatic Conferences. [IMLI's contribution to the international maritime community is vividly reflected in a declaration issued at the Geneva Diplomatic Conference on Arrest of Ships. In this statement, eight IMLI graduates who were representing their respective countries expressed appreciation and gratitude for their studies at IMLI, which enabled them to contribute effectively towards the codification and progressive development of international maritime law.]

It is with great satisfaction that I am able to report that over the past twelve years 233 lawyers from 89 countries have studied at IMLI. Today, there is hardly a major port in the developing world, wherein the maritime community will not find the expertise of an IMLI graduate, who is able to understand and speak the language of international maritime law. It seems to me no exaggeration to state that IMLI is generating a unique and formidable global network of lawyers, which has already started to influence the development of international maritime law.

In conclusion, I wish to once again express my appreciation to the CMI Executive Council for allowing me to introduce IMLI to the 37th International Conference. It has been a particular pleasure as the object of IMLI and the CMI is fundamentally the same - in the words of Article 1 of the

CMI Constitution, to strive for “the unification of maritime law in all its aspects”. Essentially, IMLI’s mission is that of attaining this goal by educating annually a select group of lawyers in - amongst other things - the fruitful work which has emanated from the past 36 International Conferences of the CMI.

Thank you very much.

**OPENING ADDRESS BY PROF. S. JAYAKUMAR, MINISTER FOR
LAW AND MINISTER FOR FOREIGN AFFAIRS**

Mr Patrick Griggs, President of the Comité Maritime International (CMI)
Mr Chandran Arul, Chairman of the CMI 2001 Organising Committee
Ladies and Gentlemen

1 I am pleased to be invited to address this Conference and warmly welcome all of you to Singapore.

2 Established in 1897, Comité Maritime International (CMI) is, I believe, the oldest international organisation in the maritime field. It was the first international organisation concerned exclusively with maritime law and related commercial practices. It is thus fitting that the first Conference of the CMI in Asia is being held in Singapore – a country with a long maritime tradition and an aim to become a major International Maritime Centre.

Singapore - Maritime Tradition and International Maritime Centre

3 Singapore’s long maritime tradition and its importance as a maritime nation did not come about by chance. Our geo-strategic location and our openness to the rest of the world have contributed tremendously to our success as a maritime nation. Lying astride the Indian and Pacific Oceans, most of the major maritime trading routes pass through Singapore. More importantly, our approach of maintaining free and open economic links with the outside world has contributed to our current relative prosperity.

4 As early as the 5th Century, Singapore was the site of a town known as Temasek which by the second half of the 13th Century was a city-port familiar to Arab seafarers who were making use of the Singapore Straits in their voyages between the Malacca Straits and the South China Sea. During the 14th Century, Chinese seafarers discovered the passageway now well known as the Keppel Harbour Channel. The waterway emerged as a well-defined route in the 16th Century when Portuguese mariners travelled frequently through the Malacca Straits and the South China Sea on voyages between Cochin in India and Macau. When Sir Stamford Raffles came to Singapore in 1819, a trading station for the East India Company was established and Singapore gained increasing importance as the main shipping channel between the Indian Ocean and the South China Sea which continues to this day.

5 Following from its long maritime tradition, Singapore is well on its way to becoming a major international maritime centre. The Business Times of 2 Feb 2001 reported, *inter alia*, that:

“Singapore looks set to retain its title as the world’s busiest port in terms of shipping tonnage – which it has held for 15 consecutive year – after a record handling of over 900 millions gross tons (gt) in 2000.”

At any one time there are more than 800 ships in Singapore’s port. It is the focal point for some 400 shipping lines with links to 740 ports in 130 countries worldwide. It is a major transshipment hub for Asia and a leading bunkering port in the world.

6 Apart from the port, other activities which have contributed to our role an international maritime centre include a good legal infrastructure, shipbuilding and repair, shipping agencies, shipping lines, cruise and freight forwarding. To complement these sectors, there is available in Singapore a wide range of services which include ship management, ship broking, ship financing and marine insurance.

7 Let me elaborate on the legal infrastructure. The number of lawyers doing shipping law in Singapore is growing to cope with increasing volume of maritime work. In a recent Euromoney Legal Media Group survey, Singapore was listed as having 3 shipping lawyers who featured in a list of the world’s top 20 shipping and maritime lawyers, reflecting the growing prominence of the jurisdiction. Their clients include international and local banks, shipbuilders and operators. In addition to local law firms, 5 major international law firms with good shipping expertise have established offices in Singapore.

8 A local law firm with a large shipping and admiralty practice recently became the first Asian law firm to set up an office in Greece (Piraeus). It also has offices in Dubai, Bangkok and Hamburg. This firm and other major local shipping law firms offer a full range of shipping legal services, e.g. dispute resolution, ship registration, ship financing, ship construction, ship repair contracts, ship arrest, collision, salvage, charterparty disputes, bills of lading, towage disputes, shipbuilding and ship purchase disputes, general average, oil pollution, bunker supply disputes, etc.

9 Recent reforms in the legal services sector in Singapore have resulted in a number of local law firms forming joint law ventures and formal law alliances and strategic alliances with foreign law firms. Foreign law firms have entered the Singapore legal market which was previously reserved only for Singapore law firms. The objective of such alliances and joint ventures is to make Singapore comparable to traditional legal service providers such as those in United Kingdom and the United States. With more competition, the quality of legal services would be enhanced. These reforms may eventually lead to a gradual globalisation of Singapore maritime law practice.

10 Arbitration has an important role in the shipping field. The Singapore International Arbitration Centre (“the SIAC”), in existence for the last 10 years, plays an active role in this area. Shipping and maritime arbitration has accounted for 36% of SIAC’s caseload for the last 10 years. The SIAC has a distinguished local and international Panel of Accredited Arbitrators on shipping and maritime matters which can be tapped for resolution of disputes on such matters. It provides full facilities and services for the conduct of

international arbitration proceedings in Singapore. Furthermore, parties arbitrating at the SIAC can now make use of the advanced audio-visual and state-of-the-art facilities of the Supreme Court's Technology Courts and Chambers. Foreign parties or witnesses who are unable to personally attend proceedings at the SIAC can have access to live video-conferencing facilities. The use of technology in the resolution of disputes will increase the efficiency in the conduct of the arbitral proceedings and result in considerable cost-savings.

The Piracy Menace

11 I note that the problem of piracy will be discussed at this Conference. This is timely because the menace of piracy is rearing its ugly head again. Recent media and expert reports show an increase in pirate activity in many areas.

12 Apart from sea robberies, the more organised of the pirate criminals have moved to hijacking a whole ship with its cargo, changing its marking and selling the cargo. Piracy cases have occurred in many parts of the world, but let me mention the situation in this region.

13 According to the latest annual report of the London-based International Maritime Bureau (IMB)¹, there were 469 attacks or attempted attacks on ships at sea, at anchor or in port worldwide. The IMB classifies piracy very broadly as the boarding of vessels by persons who intend to rob or commit other crimes. The figures are supposed to be the highest in 10 years. The IMB report also highlighted that in this region, the waters surrounding Indonesia and the Straits of Malacca were the most prone to attacks by pirates in 2000.

14 The piracy problem concerns all those in the shipping and related industries, law enforcement officials, law practitioners, those involved in administering the law and the countries around the region. All of us need to co-operate to contain the menace. The shipowners, the ship officers, the crew, the law enforcement officials, the navies and each of the countries, especially those in whose waters such acts occur, need to play their part.

15 The Singapore authorities have been vigilant in ensuring there has not been an incident of piracy in Singapore territorial waters in the last ten years. But that alone is not enough. The Singapore Police Coast Guard also has bilateral arrangements with their Indonesian and Malaysian counterparts for coordinated patrols in the Straits of Singapore. A similar arrangement exists between Indonesia and Malaysia for the Straits of Malacca. In the interests of the safety of maritime traffic, the countries in the region have become more vigilant about the piracy problem, but more needs to be done. Cooperation to deal with the issue must be enhanced and enforcement needs to be stepped up. The outcome of your discussions at this Conference can help forward that objective.

¹ See Straits Times, 2 Feb 2001.

Maritime Insurance

16 Another issue that this Conference is set to examine is that of maritime insurance. I understand that you will consider the work of an International Working Group that undertook a comprehensive review of the most pertinent issues, including the question of harmonisation of maritime insurance law.

17 As part of Singapore's efforts to become a maritime hub, we continually strive to attract world-class insurance players who can offer products and services at the best rate terms and security. We are also working to enhance our regulatory framework for maritime insurance by making it more conducive for specialist classes of underwriters like Protection and Indemnity clubs. Our continual market liberalisation initiatives which began last year reflect our commitment and desire to become an insurance centre of world-class standards. In this connection, your deliberations on maritime insurance issues will be of great interest to Singapore.

Conclusion

18 CMI has a long tradition of influencing the development of international maritime law. Piracy and the rights of passengers carried by sea are two of the important subjects which this Conference will discuss. It seems to me that the development of a model national law on piracy, by ensuring greater uniformity, will help to ensure that there are sanctions for acts of piracy committed outside the jurisdiction of affected states. With regard to the rights of passengers carried by sea, it is important that issues on passenger liability be looked into for the protection of an increasing number of cruise passengers as Singapore promotes itself as a cruise hub.

19 I am confident that this Conference will uphold CMI's long tradition and once again make significant contributions to future development of maritime law not only in the field of piracy and the rights of passengers carried by sea but also transport law and liability, general average, marine insurance and salvage. As an international maritime and legal services centre, Singapore and her legal fraternity welcome good progress and developments in these important areas of maritime law.

20 In conclusion, I hope that participants will be able to use this Conference as a forum to share and exchange useful ideas and information on the various legal and practical issues in the maritime sector. I wish you an interesting and fruitful Conference. To all our foreign visitors, I hope that you will take some time off your deliberations to savour the many delights of Singapore and perhaps the region as well.

AGENDA OF THE CONFERENCE

Issues of Transport Law

*S.N. Beare (Chairman), J.-K. Gombrii (Deputy Chairman),
M. Sturley (Rapporteur), EDI Ms J. Gauthier*

Marine Insurance

*J. Hare (Chairman), J.S. Rohart and T. Remé (Deputy Chairmen),
Ms T.L. Wilhelmsen (Rapporteur)*

General Average

T. Remé (Chairman), R. Shaw (Rapporteur)

Model National Law on Acts of Piracy and Maritime Violence

F. Wiswall (Chairman), S. Menefée (Rapporteur)

Implementation and Interpretation of International Conventions

F. Berlingieri (Chairman), R. Shaw (Rapporteur)

Passengers Carried by Sea

P. Griggs (Chairman), B. Kroger, C. Haddon-Cave Q.C.

ISSUES OF TRANSPORT LAW

REPORT OF COMMITTEE A

I. Background

The topic discussed by this Committee has been considered by an International Working Group (“the Working Group”) set up in May 1998 and by an International Sub-Committee (“ISC”) set up in November 1999. The terms of reference of the ISC 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 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.

Four papers were before the Committee. First, the ISC and the Working Group prepared, in accordance with the ISC’s terms of reference, a draft Outline Instrument. Second, the Working Group prepared a paper entitled “Door to Door Transport” as a background paper for discussion as to how the Outline Instrument might accommodate other forms of carriage associated with the carriage by sea.

The electronic commerce implications of the Outline Instrument were considered by the E-Commerce Working Group and it brought forward a report entitled “Electronic Commerce Implications of the Outline Instrument”. This was the third document before the Committee.

Fourth, the Working Group prepared an Agenda Paper to provide a framework for the Committee’s discussions. This Agenda Paper identified a number of issues which were regarded as being of particular importance and as such deserving particular consideration by the Committee. The Committee accepted the Agenda Paper as a basis for its discussions and the sections below correspond with sections in the Agenda Paper.

Report of Committee A

*II. Scope of Application**Type of Instrument*

In section 2.1 of the Agenda Paper, the Committee was invited to consider what kind of instrument should ultimately be produced and the extent to which its provisions should be mandatory for the private parties involved in the performance of a contract of carriage.

After discussion, there was a clear majority for the view that there should be a convention. At least the core provisions should be mandatory. Provisions governing liability on the sea leg of an international transport would clearly be part of this core. The discussion revealed some difficulty in identifying what else should be included in the core provisions. This problem will require further work. Non-core provisions could be handled in some other way (such as with an optional annex, or with non-mandatory default rules). There was not any substantial support for excluding particular subjects from the instrument at this stage.

Period of Responsibility and Door-to-Door Transport

There was considerable support for extending the period of responsibility 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. Of course, the formula adopted must permit the period of responsibility to be limited to the tackle-to-tackle or the port-to-port period for cargo that is carried on a tackle-to-tackle or port-to-port basis (as will often be the case in the bulk trades). Every delegate who addressed the issue agreed that, if the period of responsibility is to be extended beyond the traditional “tackle-to-tackle” period, there must be a sea leg involved. There was also some support for the alternative view that the period of responsibility should be extended only to the port-to-port extent provided in the Hamburg Rules.

While there was some support for a uniform liability regime to govern the carriage preceding or subsequent to maritime carriage, primarily for the reasons set out in the Door to Door Transport Paper, and some delegates thought that a uniform liability regime was a desirable long-term objective, there was greater support for a “network” system of liability because (1) it was more readily achievable, at least in the short run, and (2) it would not create inconsistencies with existing unimodal law (such as the Convention on the Contract for the International Carriage of Goods by Road 1956 [the CMR Convention] in most European countries).

Through Transport

There was no general support for prohibiting through transport. There was widespread support for the transport documents including safeguards and clearly setting out the limits on the carrier’s liberty to contract as an agent for the shipper.

III. Liability

It was emphasised that the allocation of responsibilities between the carrier and the shipper was part of a package and the package would need to be considered as a whole, including the issue of liability for delay.

Basis of Liability

In section 3.2 of the Agenda Paper, the Committee was invited to consider whether liability should be imposed on a fault basis (as in the Hague, Hague-Visby, or Hamburg Rules) or on a more stringent basis (as in the CMR Convention).

After discussion, there was overwhelming support for a fault-based regime. Most delegates favoured a regime based on the Hague or Hague-Visby Rules, while there was some support for a regime on the lines of the Hamburg Rules.

General or Detailed Provisions

In section 3.3 of the Agenda Paper, the Committee was invited to consider whether the relevant provisions should be of a general nature (as in the Hamburg Rules) or whether they should be more detailed (as in the Hague and Hague-Visby Rules).

After discussion, there was support for a detailed list of the relevant provisions, although it remains to be determined how long the list should be and exactly what items should be included on the list.

Exemptions

In section 3.4 of the Agenda Paper, the Committee was invited to consider whether there should be any exemptions from the general rules on liability, and in particular whether there should be an exemption for errors in the navigation or management of the vessel (as in the Hague and Hague-Visby Rules).

After discussion, there was considerable support for eliminating the exemption for errors in the navigation or management of the vessel. In addition, a number of delegates were willing to consider the elimination of this defence in the context of a larger package. Some delegates spoke in favour of unconditionally retaining the defence.

Burden of Proof

In section 3.5 of the Agenda Paper, the Committee was invited to consider the question of burden of proof.

The consensus appeared to be that the burdens should remain as they are under the Hague and Hague-Visby Rules, with the carrier bearing the burden of proving that it is not liable (once the cargo claimant has proved a loss). There was some discussion as to the burden of proof in relation to the allocation of damage when a breach of the carrier's obligations combines with another cause to produce loss, damage, or delay, but no consensus emerged.

Report of Committee A

Performing Carrier's Liability

In section 3.6 of the Agenda Paper, the Committee was invited to consider the draft Outline Instrument's treatment of performing carriers.

Some delegates wished to exclude the concept of performing carrier from the draft Outline Instrument completely, but there was not sufficient support for this view to justify such an action at this stage. There was more support for narrowing the definition of performing carrier, which the chairman (without objection) interpreted as favouring a narrower definition for the purposes of establishing a performing carrier's liability, but retaining a broad definition for the purposes of providing Himalaya protection to a wider class of parties in order to avoid multiplicity of litigation.

There was considerable support for the view that the performing carrier's liability should not be affected by the contents of the transport document unless the performing carrier expressly or impliedly agreed to the new liability. A view was expressed that the description of the goods in the transport document should nevertheless constitute *prima facie* evidence of their condition as of the time that the transport document was issued.

There was more support for the proposed presumption in draft Outline Instrument 7.4.2. that the registered owner of the vessel named in an ambiguous transport document shall be the contracting carrier than there was for a presumption that the registered owner of a performing vessel is the performing carrier. But views were very much divided on these issues and the desirability of any presumption affecting the registered owner.

Delay

In section 3.7 of the Agenda Paper, the Committee was invited to consider whether there should be a special provision governing liability for delay and, if so, whether there should be special provisions regarding the limitation of such liability.

After discussion, there was wide-spread support for a special provision governing liability for delay when a specific time for delivery had been agreed. The views on liability for delay when *no* specific time for delivery had been agreed were fairly evenly divided. The concept of "reasonableness" was too vague for those delegates opposing liability on this basis. In any event, there was substantial support for a limitation on a carrier's liability for delay, although not necessarily a limit based on a multiple of the freight. There was no support for a constructive loss provision after a delay of some specific time (as exists in the Hamburg Rules for delays longer than 60 days).

Loss of Right to Limit Liability

In section 3.8 of the Agenda Paper, the Committee was invited to consider whether a servant's or agent's "breakable behaviour" should result in the loss of the contracting carrier's right to limit its liability.

After discussion, there appeared to be unanimous support for the draft Outline Instrument's treatment of this question whereby the servant's or agent's

“breakable behaviour” generally does not defeat the contracting carrier’s right to limit its liability.

Shipper’s Responsibilities and Liability

In section 3.9 of the Agenda Paper, the Committee was invited to consider the basis for a shipper’s liability, whether a distinction should be made between liability for damage caused by inherently dangerous cargo and that caused by other cargo, whether a shipper may limit its liability, and whether there should be a time bar.

After discussion, there was considerable support for a shipper’s liability being based on fault, and for there being no distinction between inherently dangerous and other cargo (for the reasons explained in the commentary to draft Outline Instrument 6.6). Some delegates argued that liability for the shipment of inherently dangerous goods should be more stringent. It was also argued that the failure to comply with special regulations regarding dangerous goods should attract more stringent liability. Finally, a distinction was drawn between liability for failing to provide accurate information and liability for damage caused by the goods. The conclusion following from that suggestion was that liability for failing to provide accurate information should be more stringent.

There was general support for the view that the liability of the shipper should not be subject to limitation, and that some sort of time bar on claims would be appropriate.

IV. Transport Documents

Transfer of Rights and Obligations and Rights of Control

In section 4.1 of the Agenda Paper, the Committee was invited to consider the transfer of rights under a transport document, the right of control, the function of a bill of lading as a document of title, and the rights and obligations of the carrier and consignee regarding delivery.

After discussion, it appeared that there was broad support for addressing many of the issues raised in chapters 10 and 11 of the draft Outline Instrument, particularly in view of the e-commerce implications of the subject, but that the draft must be rewritten with a fresh approach in light of the differing views that were expressed by the delegates. Care should be taken to avoid drafting provisions on property rights, and the framework of article 6 of the existing CMI Rules on Sea Way Bills 1990 relating to the right of control should be borne in mind. A view was expressed that the question of making the receiver liable *in personam* for freight and perhaps for other charges should be considered. The view was also expressed that it was necessary to address the question of delivery of cargo when the negotiable transport document was not available.

Report of Committee A

Cargo Information in Transport Documents

In section 4.2 of the Agenda Paper, the Committee was invited to consider whether the draft Outline Instrument was satisfactory with respect to the detail of the information required in the transport document, the carrier's duty to check and right to qualify the information, and the liability for incorrect information.

Although one delegate objected that the balance between cargo and carrier interests had shifted to the benefit of carriers, there was broad support for the general approach taken in the draft Outline Instrument. It was nevertheless recognised that the drafting is still subject to review.

V. Electronic Commerce

In section 5 of the Agenda Paper, the Committee was invited to comment on the issues outlined in document no. 3 ("Electronic Commerce Implications of the Outline Instrument").

There was a consensus that the final instrument must facilitate and be compatible with electronic commerce. The provisions covering these aspects must be simple and technology-neutral. In addition, regard should be given to the 1990 CMI Rules on Electronic Bills of Lading and other known systems. Some delegates suggested that the ISC should consider the extent to which these provisions should be mandatory in a future convention.

RESOLUTION OF THE CONFERENCE

The Assembly of the Comité Maritime International (CMI)

TAKING DUE NOTE of the work done by the International Sub Committee on Issues of Transport Law and of the deliberations and conclusions set out in the Report of the Committee on Issues of Transport Law of the 37th International Conference of CMI:

- REQUESTS the International Sub Committee to
- undertake further work on the basis of the draft of the instrument (CMI Yearbook 2000 – Singapore I, p.122) and the conclusions of the Conference,
- and particularly to
- complete the Outline Instrument to include provisions able to facilitate the needs of electronic commerce, and to cover the possibility that it should apply also to other forms of carriage associated with the carriage by sea (“door to door transport”),
- and to
- consult the Member Associations and the Consultative Members of CMI as well as sectors of the industries involved in international carriage of goods by sea or otherwise affected by the outline instrument,
- and to
- revise the Outline Instrument upon collection of the replies,

AND FURTHER REQUESTS the Executive Council of the Comité Maritime International to report on the work of the Comité Maritime International to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) at an appropriate time and in appropriate form.

MARINE INSURANCE

INTERNATIONAL WORKING GROUP ON MARINE INSURANCE

DISCUSSION PAPER

The CMI's International Working Group on Marine Insurance (IWG) has, for the past two years, focussed on an evaluation of the national marine insurance laws of member countries. To that end, the IWG has

- Presented papers and discussion at the Oslo Conference in 1998
- Issued a CMI questionnaire on Marine Insurance late in 1999
- Presented papers and discussion at the Antwerp Conference in 1999
- Reviewed replies to the CMI questionnaire received from national associations
- Presented a preliminary analysis of those replies at the Tulane London Conference in May 2000
- Presented papers and a fuller analysis of those replies as they relate to certain key issues of marine insurance at the Toledo Conference in 2000
- Presented papers and a final analysis of replies relating to good faith, disclosure, alteration of risk and warranties at the Singapore Conference, 2001-01-16

The exercise thus far has been of great academic worth. For it now to progress to a level where it can make a meaningful difference to the way in which the law regulates marine insurance business, both domestically and internationally, the IWG needs a further mandate from the CMI in assembly.

This discussion paper attempts to set an agenda for discussion during the two sessions on marine insurance scheduled to take place at the Singapore Conference on Monday 12 February 14h00 to 17h00, and Tuesday 13 February 09h00 to 12h30. The IWG will seek guidance from the national associations in the form of answers to the following questions, *inter alia*. Answers to the questions of section A may be taken to the Assembly for confirmation, and will then be used as guidelines for any further steps to be taken by the IWG. It is premature to ask for formal answers to the specific issues raised in Section A, which is included to facilitate discussion, and to gauge opinions from those present. The Section A questions will be taken forward from Singapore to a full consultative process.

A. GENERAL ISSUES

A.1 Is an evaluation of the national laws of marine insurance such as is presently under way by the IWG considered to be an exercise worth continuing?

- Academically
- In practice, for
 - the marine insurance industry
 - maritime lawyers?

IWG comment:

It may be that an answer to this paramount question will only be called for at the end of the debate.

A.2 If its mandate is to proceed further, should the IWG then identify

- Those areas of *similarity* in the approach of national legal systems to certain issues of marine insurance
- Those areas of *difference* where a measure of uniformity would better serve the marine insurance industry
- Those areas of difference where *differences are sound reason for competitive edge* and where seeking uniformity would be undesirable
- Those areas where *differences are profound*, and where seeking uniformity would be unrealistic?

A.3 In the process, should the IWG continue to seek to identify areas of the law of marine insurance which may be rationalised, clarified and generally improved, thereby serving the marine insurance industry and the shipping industry in which it operates?

A.4 Should the IWG seek solutions to problems in the law of marine insurance that allows the law to take into account and address

- The role which marine insurance should be playing in promoting the highest internationally accepted standards of safety at sea, with particular regard for the insistence upon and enhancement of safety of all marine personnel, both sea-going and shore-based.
- The current economic structures within which marine insurance is underwritten, taking into account *inter alia* regional co-operation, competition and regulation such as the EC
- The differences and similarities in the civilian and common law legal systems, both in relation to the content of substantive law, procedural issues, and idiosyncrasies in draughtsmanship?

A.5 Should the IWG's further efforts accordingly and in the context of the above general guidelines, be focussed upon certain issues of marine insurance, by means of a fully consultative process in which the IWG's goal is to produce:

Either [the Singapore Conference to express a preference]

Discussion Paper

- (a) a Model Law upon Certain Issues of the Law of Marine Insurance; or
 - (b) an International Convention on Certain Issues of the Law of Marine Insurance; or
 - (c) a set of CMI Rules for the Regulation of Certain Issues of the Law of Marine Insurance
- for final discussion and, if approved by delegates, for adoption by the 38th International Conference of the CMI?

IWG comment:

The IWG does not believe that a Convention is a realistic option. It would create a framework too inflexible for general acceptance in the market. A Model Law would give direction to those jurisdictions which are now engaged in a review of their domestic marine insurance legislation, and would hopefully foster uniformity in future approach. Marine Insurance Rules, (operating contractually, in a similar way as the York Antwerp Rules) may provide the most flexible answer, allowing for regular updating to cater for the demands of the market and the law.

A.6 In preparing an international instrument, which of the following issues of the law of marine insurance should the IWG consider?

1. The formation of a contract of marine insurance – the proposal, slip and contractual formalities
2. The duty of good faith*
3. Pre-contractual (material) non-disclosure*
4. Pre-contractual (material) misrepresentation*
5. Failure to disclose (material) alteration of risk during period of cover*
6. Insurable interest as a pre-requisite for valid cover
7. Insured value – undervaluation and overvaluation
8. Implied terms
9. Ordinary wear and tear
10. Inherent vice – ship and cargo
11. Fault in design, construction & materials
12. Unseaworthiness generally
13. Inadequate maintenance
14. Breach of internationally recognised safety regulations
15. Misconduct of the assured, its servants and agents (identification) during the period of cover
16. Management of ship & shipowner and the ISM Code
17. Change of flag, class, ownership, management and crewing agency
18. Warranties – express or implied – and the consequences of their breach*
19. Breach of material terms of the policy, not being ‘warranties’, which automatically terminate the contract of insurance or which give the insurer the right to terminate on notice
20. Premiums – including method and place of payment, payment to brokers and grace period for non-payment
21. Loss – constructive, total and averaging
22. Claims – submission, good faith, time bar and prescription

23. Sue and labour
24. Subrogation
25. Insurance agents and brokers

IWG comment:

The IWG recognises that not all of the issues identified below may be suitable for inclusion in an appropriate international instrument, it being the aim of the IWG to identify those which are best left to domestic interpretation and those which should be included in the Model Law. The issue of causation is thought by the IWG to be based upon such disparate legal principles in the common and civilian legal systems as to defy any attempt at uniformity. It has thus been omitted from the list. Each issue will be dealt with separately below. Delegates are invited to present further topics for consideration by the IWG.

An asterisk indicates issues covered by the deliberations of the IWG thus far, and included in Prof Wilhelmsen's analysis of CMI questionnaire replies <Singapore 1 page 332 and www.comitemaritime.org>. These issues will be debated more fully in Singapore than others on this list which still require the attention of the IWG.*

A.7 Should the IWG consider any specific aspects of P&I insurance which are not common to hull, cargo or freight policies?

A.8 Should the IWG consider any specific aspects of Reinsurance which are not common to hull, cargo or freight policies?

B. SPECIFIC ISSUES OF MARINE INSURANCE

1. The formation of a contract of Marine Insurance – The proposal, slip and contractual formalities

Possible problem areas for future discussion include:

- Domestic requirements that the contract be in writing and/or formally executed
- The proposal and its 'fine print' being made *the basis of the contract*
- Minimum content of a marine insurance policy
- Signing of a slip as the formation of the contract - pre-contractual disclosure implications

IWG comment:

It is unlikely that any form of instrument would attempt to regulate the formation of a contract of marine insurance, though it the creation of an English law warranty by elevation of the proposal to being the 'basis of the contract', and the signing of a slip signifying the commencement of the contract may have bearing on the issues of the warranty and of disclosure respectively.

2. The duty of good faith

2.1 Should marine insurance law require

- from both parties to a contract of marine insurance
- strict adherence to
- objective / subjective
- standards of good faith, both
 - pre-contractually (part of which would embrace the obligation to disclose - see below), and
 - for the full period of cover,
- including during the submission of claims?

2.2 Should the accepted standard of faith be

- Good faith (eg Germany, France, Belgium and South Africa)
- Utmost good faith (eg England, the USA, Australia, and China)
- Defined in any way as to content?

2.3 In the absence of such good faith, should that absence in itself give rise to the power of the aggrieved party to

- claim damages and/or
- rescind the contract
 - in all situations
 - only where the breach of the duty of good faith is in some way material to the risk or the loss/claim and/or has induced the innocent party into a position in which loss or prejudice may result
 - only where such breach amounts to a fraud?

IWG comment:

The IWG recognises the wide disparity in approach not only between the common law and civilian systems, but also in national regimes within those systems. It is probably easier to regulate the operation of principles of good faith within separate notions which embody elements of good faith (such as disclosure and alteration of risk) than to envisage a generally acceptable overarching requirement of good faith (or utmost good faith) spreading throughout the contract. That such a principle has precedent in history and in current practice is clear. Much debate would be necessary to reach international consensus on the content of a general requirement of good faith and upon the consequences attendant upon its absence.

Nevertheless there is considerable support for the re-establishment of an actionable requirement of contractual good faith generally, and the IWG accordingly has not closed the door to the possibility of a bold approach to a general requirement of good faith in the contract of marine insurance, giving rise to a stand-alone remedy in the event of its absence.

Any attempt at regulation of good faith would need to take into account mandatorily applicable international regulation such as the EC Directive on Unfair Terms in Consumer Contracts.

3. Pre-contractual (material) non-disclosure

IWG comment

In general, the common law jurisdictions regard the duty to disclose as part of the more general duty (ill-defined as it may be) to exercise good faith. Some systems regulate disclosure as a separate issue. Similarly, whereas some jurisdictions know no difference between positive misrepresentation and misrepresentation by silence as a breach of the duty to disclose, others regulate positive misrepresentation, but not passive failure to disclose. It is thus considered prudent to treat good faith, disclosure and misrepresentation separately at this stage. Issues of materiality impact however on all three concepts, and very similar issues are involved.

3.1 In marine insurance contracts, should

- the assured, and
- the insurer

be required by the operation of law

- during negotiations before the conclusion of the contract
 - at times of renewal of the contract
 - at all times during the contract
- to disclose all material facts, each to the other?

3.2 Should the standard of materiality in relation to the duty to disclose be defined?

3.3 If so, should materiality be

- in relation to non-disclosure by the assured
 - material to the acceptance of the risk by the insurer and/or
 - material to the assessment of premium by the insurer
- in relation to non-disclosure by the insurer
 - material to the acceptance of cover by the assured
- determined with regard to the norm of
 - the insurer
 - the assured, or
 - a combination of both
- determined by standards of
 - objectivity, or
 - subjectivity, or
 - a combination of both?
 - other defined standards, such as “decisive influence”?

3.4 Should either party be able to waive the requirement of the duty to disclose

- generally, or
- specifically, in relation to particular facts not disclosed?

3.5 Should the duty to disclose include

- only facts subjectively known to the party on whom the duty rests
- facts which ought to have been known as constructive knowledge
- facts in objective common knowledge in the industry?

3.6 What sanction should follow a breach of a duty to disclose?

Should there be

- a pre-requisite that the non-disclosure induced the innocent party into the contract?
- automatic termination of cover?
- voidability at the instance of the innocent party?
- cover, subject to payment of an increased premium sufficient to embrace the increased risk, and assessed with reference to
 - the particular insurer, subjectively, or
 - the insurance market, objectively?

4. Pre-contractual (material) misrepresentation

4.1 In marine insurance contracts, should

- the assured, and
 - the insurer
- be required by the operation of law
- during negotiations before the conclusion of the contract
 - at times of renewal of the contract
 - at all times during the contract
- to refrain from misrepresenting any material facts, each to the other?

4.2 Should the standard of materiality in relation to the duty not to misrepresent be defined?

4.3 If so, should materiality be

- in relation to misrepresentation by the assured
 - material to the acceptance of the risk by the insurer and/or
 - material to the assessment of premium by the insurer
- in relation to misrepresentation by the insurer
 - material to the acceptance of cover by the assured
- determined with regard to the norm of
 - the insurer
 - the assured, or
 - a combination of both
- determined by standards of
 - objectivity, or
 - subjectivity, or
 - a combination of both?
 - other defined standards, such as “decisive influence”?

4.4 What sanction should follow a material misrepresentation? Should there be

- a pre-requisite that the misrepresentation induced the innocent party into the contract (‘actual inducement’)?
- automatic termination of cover
 - in all cases
 - only in cases of fraudulent misrepresentation

- and then in all such cases, or
 - only where there is also inducement?
- voidability at the instance of the innocent party?
- cover, subject to payment of an increased premium sufficient to embrace the increased risk, and assessed with reference to
 - the particular insurer, subjectively, or
 - the insurance market, objectively?
- in relation to
 - all cases of misrepresentation, or
 - only in cases of innocent (unintentional) misrepresentation?

5. Failure to disclose (material) alteration of risk during period of cover

If there has been a material alteration of risk (upon which the same issues of materiality would arise as are dealt with in §3 above)

5.1 Should there be a duty imposed by the law on the assured to disclose this alteration to the insurer?

5.2 Is this duty to be regarded in the same light as, and to be governed by

- the same principles as apply to pre-contractual non-disclosure?
- general principles of good faith?

5.3 What sanction should follow a breach of a duty to disclose? Should there, as in pre-contractual non-disclosure, be

- automatic termination of cover?
- voidability at the instance of the innocent party?
- cover, subject to payment of an increased premium sufficient to embrace the increased risk, and assessed with reference to
 - the particular insurer, subjectively, or
 - the insurance market, objectively?

IWG comment:

There can be no requirement of inducement in relation to failure to disclose an alteration of risk. Many such failures to disclose would not necessarily be at the time of conclusion or renewal of the contract.

6. Insurable interest as a pre-requisite for valid cover

Possible problem areas for future discussion include:

- Should an assured be required to have an insurable interest in the property / the risk to be insured
 - at all
 - when concluding the contract
 - at the time of the loss
 - If no insurable interest is required, should the law nevertheless outlaw insurance contracts which are mere wagers?
 - Should insurable interest be defined as to its content?

Discussion Paper

- Should insurable interest in relation to cargo be treated the same as that in relation to ship?
- Should the law recognise for either ship or cargo?
 - PPI policies
 - Lost or not lost policies

7. Insured value – Undervaluation and overvaluation

Possible problem areas for future discussion include:

- Should marine insurance be limited to contracts of indemnity?
- Should valued and unvalued policies be defined?
- Should
 - under-insurance,
 - double insurance and
 - over-insurance
 and their respective consequences be defined?
- In relation to under-insurance, should the law
 - impose automatic averaging of claims
 - recognise averaging only where contractually agreed by the parties?
- In relation to double insurance, should the rights of insurers to a contribution *inter se* be statutory or contractual?
- Should the consequences of over-insurance, be determined with regard to ordinary principles of
 - fraud
 - breach of good faith?

IWG comment:

In certain jurisdictions, such as South Africa (quaere UK?) there is averaging by the operation of law only in relation to marine insurance, but not in non-marine, where parties must agree average. rights of contribution are similarly vague in certain jurisdictions.

8. Implied terms

Possible problems for discussion include:

- Should there be implied terms recognised by the law?
- If so, what terms should be implied by law into
 - voyage policies,
 - time policies?
- When should such terms operate?
- Specifically, should implied terms relating to
 - seaworthiness of ship
 - seaworthiness of cargo
 - legality of voyage and purpose
 - change of voyage
 - deviation from geographical route
 - due dispatch in the prosecution of the voyage
 be entrenched in a uniform law?

9. Ordinary wear and tear

Possible problems for future discussion include:

- Distinguishing ordinary wear and tear from fortuitous action of an insured peril
- Claims made in both good and bad faith for machinery damage resulting from ordinary wear and tear.

10. Inherent vice & latent defect – Ship and cargo**11. Fault in design, construction & materials****12. Inadequate maintenance****13. Breach of internationally recognised safety regulations****14. Unseaworthiness generally**

Paras 10–13 are closely related, and will need consideration with causative unseaworthiness. But seaworthiness generally may present special issues, including:

- The standards of sea/cargo-worthiness to be applied to ship and cargo. Should they be
 - predetermined?
 - objective? or
 - subjective? or
 - a combination of both?
- The requirement that such unseaworthiness be causatively linked to the loss
- The extent of that link.

15. Misconduct of the assured, its servants and agents (identification) during the period of cover

Possible problems for future discussion include:

- The extent to which general principles of agency cater for vicarious liability and identification of one person's actions with another
- The extent to which such vicarious liability or responsibility can affect a policy in which the assured obtains cover against his/her own actions.

16. Management of ship & shipowner and the ISM code

Possible problems for future discussion include:

- The extent to which the ISM Code should be recognised
 - by law, and or
 - by contract

as the yardstick of good management

- The extent to which failure to comply with the Code amounts to actual fault or privity of the assured in relation to Inchmaree type cover
- Policy terms in relation to the Code and to other codes such as the STCW

17. Change of flag, class, ownership, management and crewing agency

Possible problems for future discussion include:

- The use of policy terms which require strict compliance failing which there is automatic termination of cover
- The scope of these terms, for instance, whether they should include crewing agency changes

IWG comment:

This measure, introduced in the Institute Clauses, is one of the most positive steps taken by the marine insurance industry to play a more active and effective role in ridding the seas of substandard, unseaworthy ships whose owners surround themselves in an ever-changing mist of anonymity and avoidance of accountability. Because they are unpopular in certain market circles, it may be that a measure of international uniformity that such clauses be mandatory in marine policies may give more strength to the insurance industry's arm in relation to this scourge.

18. Warranties – express or implied – and the consequences of their breach

IWG comment:

The concept of the English law warranty giving rise to automatic termination of cover, and of its more acceptable counterpart, the civilian essential term, the breach of which gives a right to terminate the contract to the aggrieved party, has been dealt with fully in Prof Wilhelmssen's paper, in the ALRC and in other sources such as papers by Hare available on the UCT Marine & Shipping Law website at <www.uctshiplaw.com>. Yet, offensive as the English warranty may be to some commentators, they are nevertheless so well entrenched in English practice that they may present to the marine insurance industry perhaps the greatest challenge to reform. This area especially is one where underwriters and lawyers need to resolve whether change is desired. If certain aspects of the law of warranties is generally regarded as bordering on the immoral, and in need of reform, establishing international uniformity on that reform should help ensure that what have been judicially described as the 'toxic' aspect of warranties are removed from the equation of competitive edge.

18.1 Should the law of marine insurance recognise

- any policy term the breach of which automatically terminates cover?
- only terms, the breach of which, in appropriate circumstances (see 19 below) gives the aggrieved party the right to treat the contract as having come to an end?

18.2 If automatic termination of the contract upon breach is countenanced,

- should the breach be
 - causative of the loss
 - not necessarily causative of the loss, but nevertheless in relation to a material term (whatever the term may be called)?

18.3 Specifically in relation to the English warranty:

18.3.1 Should a warranty be

- implied by the law in any circumstances
- expressed by the parties in the contract?

18.3.2 If expressed, must such expression be specific, identifying that the term is a warranty and that its breach may give rise to

- a right to terminate
- automatic termination

18.3.3 Should a warranty be deemed as such by wording in a proposal stating that *the proposal is the basis of the policy*

- in any circumstances
- only if that 'warranty' be material to the risk / premium?

18.3.4 In essence, should the English law warranty be

- outlawed totally, in favour of the recognition of essential or material terms, and the consequences of their breach
- watered down to require that
 - *the warranty be objectively material to the acceptance of the risk or the assessment of the premium*
 - the breach of the warranty be causative of the loss

19. Breach of material terms of the policy, not being 'warranties'

IWG comment

Most systems make use of the essential term (clause or condition), breach of which gives rise, in appropriate circumstances, to the right to terminate and claim damages. It is widely felt that were the warranty as such abolished, the insurer would be left with adequate means of avoiding loss where the assured falls far short of performance expectations.

Certain issues remain, including:

19.1 Should the parties be at liberty to agree in a marine insurance contract which terms are to be regarded as essential?

19.2 Should the law, in the interests of promoting safety at sea or for any consumer protection motivation, presume certain terms or types of terms as essential?

19.3 Should the law allow for automatic termination of the insurance contract in any circumstances short of fraud?

19.4 Should the law provide for automatic termination of an insurance contract where either party commits a fraud

- upon the other
- generally, upon third parties or the world at large

IWG comment:

It may be that the insurance industry should consider that commission of a fraud terminates the policy from the time of the fraud. In that it introduces an illegality to the contract, the consequences of a fraud should perhaps leave the aggrieved party without the option to overlook the fraud and proceed with the contract, perhaps even at the price of an AP.

20. Premiums – including method and place of payment, payment to brokers and grace period for non-payment

Possible problem areas for future discussion include:

- Payment of premiums to brokers recognised by the law as payment to the insurer (who is not generally the broker's principal)
- Regulation of method and place of payment
- Payment of premiums other than in money
- Notice of non-payment and periods of grace for non-payment of premiums

21. Loss – constructive, total and abandonment

Possible problems for future discussion include:

- Types of losses recognised by marine insurance
- The consequences of such types of loss, especially
 - in relation to CTL, the requirement of notice of abandonment

IWG comment

Not all jurisdictions recognise CTL and ATL differently in law. To those which do not know the concept of a CTL, notice of abandonment is a formality with which they may easily fall foul.

22. Claims – submission, good faith, time bar and prescription

Possible problems for future discussion include:

- Unfair
 - notice of claim provisions
 - reporting of loss provisions
 - contractual time-bars
- Lack of international uniformity in legal prescription of insurance claims
- Absence of good faith in the submission and support of claims, especially whether, in the absence of fraud, 'puffing' supporting documentation for a claim vitiates cover.

23. Sue and labour

Possible problems for future discussion include:

- The power to sue and labour
- The duty to sue and labour
- Suing and labouring and indemnity and the resulting ability to recover more than the insured value

24. Subrogation

Possible problems for future discussion include:

- Subrogation of the insurer to the rights of the assured being an automatic consequence in law only upon full payment of a claim
- Contractual subrogation to take effect either before payment or upon part payment of a claim

25. Insurance agents and brokers

Possible problems for future discussion include:

- The nature of an insurance agent and an insurance broker
- Regulation of rights and duties of both
- Regulation of the conduct of agents and brokers
- Payment of premiums to brokers
- Dual mandates in which brokers act both for insurers and for the assured.

REPORT TO THE PLENARY SESSION OF THE CMI

Marine insurance is a venerable and venerated institution, its antiquity in jurisprudence being second only to general average.

And marine insurance, problematic as its market forces may be from time to time, works relatively comfortably across borders, in and out of differing jurisdictions and legal systems. On its way, it applies a curious mix of local law, received foreign law, and established practice. It has its roots in the civilian law, yet it was fine-tuned to modernity under the mantle of the common law. It was the French marine insurance authority, Emerigon who told us in 1783

“Marine Insurance is a law not peculiar to one, but common to all commercial nations. Whence is it derived but from natural reason, existing in all men, and reaching the same results in all countries alike.”

Throughout our work in this fascinating field of maritime law, we are reminded of two truisms, one on either side of the argument for review and reform:

First, and perhaps foremost, *if it works, don't try to fix it*. One is reminded of the executive who is required by his life insurer to submit to a medical examination, notwithstanding his own belief that he is invincible. While reading the doctor's report, he develops his first migraine; he has a twitch in his left eye by the end of the week, and high blood pressure within the month.

Second, as Dr Remé pointed out in our sessions this week on GA, *nothing is too old to be changed for the better*.

Somewhere between these two extremes is where the CMI's International Working Group on Issues of Marine Insurance finds itself.

The Background to the IWG's Work

At the CMI Antwerp Conference in 1998, Lord Mustill offered the suggestion that the CMI undertake a comparative study of the laws of marine insurance. He pointed out that it was many years since such a study had been made. The CMI took up the challenge, and with most valuable help from the Scandinavian Institute for Maritime Law, convened a colloquium on marine insurance in Oslo in the same year. The discussions in Oslo led to the identification of certain issues of marine insurance which appeared to warrant a comparative study. Those issues are listed in the IWG's conference papers at page 326. Curtailing the issues to be reviewed was felt to be the only way to achieve focus. Of course it has always been realised that the list may be expanded from time to time, though we must take heed of Lord Mustill's

caution at this week's sessions, which I can perhaps illustrate with some old Cape folklore: *spread your net too wide, and the shoal will escape*.

The upshot of Oslo was the formation of our Working Group, the members of which are listed at page 326. The chairman of the group, Dr Thomas Remé, prepared a questionnaire which was sent out to all national associations, and to which many replied with useful synopses of their national laws. The questionnaire is at page 39 of the Yearbook.

The daunting task of evaluating the replies was undertaken by Prof Trine-Lise Wilhelmsen of the Scandinavian Institute. Her efforts have resulted in the preparation of an exhaustive (and I am sure at times exhausting) paper, parts of which she has delivered at a symposium in London in May 2000 convened by the BMLA and Tulane University, at our Spanish colleagues' CMI Colloquium in Toledo in September last year, and now at this conference.

This paper, limited as it may now be to what the IWG perceived as the issues of marine insurance most in need of a better understanding, represents perhaps the most comprehensive study of comparative marine insurance law since the labours of Sir MacKenzie Chalmers which gave birth to the 1906 English Marine Insurance Act. We are all indebted to Prof Wilhelmsen (and to her supportive family and Institute) for her hard work and incisive analysis.

Such was the complexity of the issues analysed by Prof Wilhelmsen, that the IWG decided to prepare a discussion paper for this Conference, in which an attempt was made to identify the main marine insurance problems in point form. The discussion paper was handed out to delegates at registration, and is on the University of Cape Town's shipping law website at <www.uctshiplaw.com>. It was used to facilitate discussions after Prof Wilhelmsen had dealt with each issue of the topics she covered. Though mindful of the danger of *losing the shoal*, the discussion paper nevertheless tries to point to many further problem areas in the law of marine insurance, if only for academic purposes.

The Singapore Conference Proceedings

Because the IWG is at an early stage of its marine insurance review, it was decided that it is premature to seek from delegates any national commitment to any specific issues. Instead, what we sought to do was to present certain of our findings to the sessions, stimulate debate, and then ask for an indication of whether or not we should proceed. I say *then*, because, although the way forward is the "Question Paramount" of our sessions, I thought it best for us first to show to delegates at least a small part of what we, and especially Prof Wilhelmsen have achieved, and only thereafter ask if we should carry on. At the outset however, and in the discussion paper, delegates were warned that we would be seeking a formal mandate to continue if our quest was considered worthwhile.

We decided to concentrate on

- non-disclosure
- good faith
- alternation of risk

Report to the Plenary Session

- warranties, and
- special clauses having special consequences.

Our first session, on **Monday**, opened with introductory comments from the Chair, much of which is available in the Yearbook at pages 325–329. It was pointed out that the common roots of all of our marine insurance would appear to us even in this early stage of our studies, to have many threads which run through most systems. These threads, once identified, could perhaps still be woven together by the IWG to form the fabric of appropriate harmonisation of attempts known to be under way in some countries to change areas of their marine insurance laws.

To set the proceedings into an international context, an invitation was then extended to delegates from a selection of countries to report upon their jurisdiction's approach to marine insurance and its possible review or reform. It was made clear that comments made by the speakers would not be taken as formal submissions of their national associations.

- Applying the CMI mission that the industry should be heard first, **David Taylor** reported that the London market was cautiously supportive of the CMI initiative for a detailed study of marine insurance law. He was encouraged by the commitment of the IWG to conduct its study by a fully consultative process and we are grateful to him for his ever-present and infectious enthusiasm. He confirmed the support of the market of the IWG effort by its nomination of Simon Beale, an active hull underwriter, to serve on the group.

The London market was not, according to David Taylor, resting on its laurels. The British Insurance Law Association under the guidance of Lord Justice Mance, has recently started an examination of insurance contract law, and may conclude with recommendations to the Law Commission on both marine and non-marine insurance.

The Joint Hull Committee was also taking a fresh look at hull wordings, and had deferred the start of its deliberations until it could take note of the outcome of this Singapore conference.

The London market had also been watching the efforts and the output of the Australian Law Reform Commission closely, and has agreed to comment on the report.

And against this background, there is an initiative in the European Union to work on a Restatement of Insurance Contract Law. Mr Taylor thus sees the CMI initiative as coming at an opportune time and as having demonstrated already that there is in the practice of marine insurance a lack of clarity and of transparency in relation to certain important legal issues.

- **Dr Gerfried Brunn** then spoke, wearing the hat of the German market and of IUMI, and indicated that although he and IUMI supported the initiative of a comparative study to improve the knowledge and understanding of marine insurance laws, no need was seen at this stage for any formal regulatory reform. He felt that the industry, which had for long been successful with self regulation, could look after its own needs, achieving flexibility through

contractual terms, though he pointed out that the UNCTAD Model Clauses had found very little support. He expressed the view that even if ultimately only used to improve knowledge of marine insurance law, the IWG labours were worthwhile.

- **Lord Mustill QC** then regaled us with his characteristic combination of entertainment and sage advice. He too was fully supportive of an academic study, and of the benefits it may bring in either informal or appropriate reform measures undertaken nationally or by the market itself. But he cautioned against ideals which are too lofty - such as any consideration of an international convention on marine insurance. He also warned against the IWG taking on too much, and losing focus and credibility in the process. He mentioned that whatever his own views may be (acknowledging parenthood of the CMI process) the BMLA does not at this stage consider that international measures to change marine insurance law and practice are appropriate.

- **Graydon Staring**, the USA representative on the IWG, was next in line. He drew our attention to the anomalies of the federal v state problems in approaching marine insurance issues, and the confusing effects of that notoriously substandard legal ship, *The Wilburn Boat*. He pointed out that there have been calls from within the United States, from individuals and small interested groups rather than with US MLA endorsement, for a review and perhaps even reform of the law of marine insurance. One call is that of Prof Michael Sturley for a "Restatement" of the law of marine insurance to be undertaken. He expressed the pragmatic view that it was most unlikely that any formal legislative measures would be undertaken on a federal level, but that worse still, in his personal view, would be the enactment of state legislation - perhaps with differences in all 50 states.

Equally, it was his view and that of the USA MLA that formal internationalised marine insurance 'reform' by means of any type of international instrument is not, at this stage, appropriate. He pointed out also that there was, in many jurisdictions, consumer protection in place to correct possible inequities.

Notwithstanding, he supports the review initiative of the CMI as a means of promoting better understanding of the problems of marine insurance in an international context.

- **Andrew Robinson**, of South Africa, was then invited to give the background to the South African marine insurance law. South Africa is an English 'satellite' jurisdiction which inherited much of the English law of marine insurance, though not the 1906 Act *per se*. Although most South African policies are written subject to English law, that law is construed in what is a civilian legal system. And, he pointed out, South African admiralty law applies the indigenous Roman-Dutch law as the fall-back regime which governs issues of marine insurance.

This has resulted in inconsistencies and uncertainties in certain aspects of marine insurance law which prompted an initiative from South African marine

Report to the Plenary Session

insurers to promote the preparation of a local marine insurance Act. Efforts have been on hold for some time, and the profession and the market are both keeping watch on the CMI review initiative. The South African MLA will draw on the IWG's research to guide any future South African reform.

- Last, but by no means least in achievements in the field, was **Ian Davis**, the Australian Law Reform Commissioner. Mr Davis took the meeting through the Australian marine insurance reform process, currently summarised in the Commission's published report upon which he invited all present to comment in the future.

The Australian initiative results from a formal reference from the Government of Australia that the 1909 Marine Insurance Act, based largely upon the English 1906 Act, be subjected to close scrutiny in the context of maintaining and enhancing the effectiveness of, and competition within, the Australian marine insurance industry. He drew our attention to the workings of the market, which underwrites extensively on Institute clauses.

The aim of the Australian initiative is to address some of the anomalies of English (and to an extent international) marine insurance law which have been inherited by Australia and to streamline Australian law and practice while still keeping a balance between seeking workable Australian alternatives to those anomalies and the concern that radical domestic reform may make it difficult for Australian insurers to find reinsurance or co-insurance in the international market.

The ALRC had been given until the end of last year to submit its formal report to government. In the light of the CMI initiative and in anticipation of this conference, the commission had been allowed an extension to the end of April 2001. The Commission hopes that the continuing work of the IWG will help it in understanding the degree to which law and practice have become standardised around the law and practice of England and the extent to which there is variation. With this in mind, the ALRC supports the CMI initiative, and will make available to it the experience of its own research.

An invitation was later made for any other nations who may be engaged in a similar process, to take the floor. There were no volunteers.

The session then proceeded to the main business of the presentation of Prof Wilhelmsen's report, in topic order, with each topic being followed by discussions broadly considering the points raised in the discussion paper. The topics for the day had the audience either in complete awe of the academic complexities of non-disclosure and good, better and best faith, or suffering from serious jet-lag induced reticence. Jean-Serge Rohart pointed out that had we taken a vote on the way forward at the end of Monday's sessions, few hands would have been raised. But important issues were discussed upon the extent of the duty to disclose, the norms against which an absence of such duty should be assessed, and the consequences of a failure to disclose.

Good faith, too, was clearly a fundamental issue subject to diverse interpretation across legal systems and even within national laws operating in those systems. Of particular interest was the extent to which the absence of

good faith gives rise to any remedy to the aggrieved party. *Does good faith have teeth?* was the question asked, regrettably rhetorically. The English invention of utmost good faith was also discussed, especially in the light of the very recent House of Lords' opinions in *The Star Sea*.

Tuesday saw a much more spirited and participative audience whose contributions gave great encouragement to those of us involved in the quiet background and often lonely academic process. Particularly gratifying was the contribution of those from the market. We are acutely aware that no change in marine insurance law (whether this be perceived as reform or retrogression) could ever be effective without the support of the industry which the law of marine insurance should serve.

Because we felt it was necessary to provide a platform for as many contributions as possible, and because we were not to seek a vote on the specifics of review or reform, it was decided to open the debate to all present. This gave vigour to the contributions.

Prof Wilhelmssen made her presentation on the consequences of an alteration of risk during the currency of cover. This re-visited much of the material on non-disclosure, and elicited practical examples from Dr Remé to put the problem into context. It was clear that there was much divergence in the approach of different nations to the obligation to disclose alteration of risk. Of particular interest was the approach to the vexed question of materiality. And in the absence of a specific defined obligation in some jurisdictions to inform an insurer of a change in risk, the whole issue of good faith was re-visited. What emerged was that while many civilian regimes had a defined obligation of contractual good faith, those nations which drew on English law lacked a clear lead as to the content of good, or utmost good faith, and to the consequences of its absence in the behaviour of either of the parties.

The debate then turned to warranties, presented as one of the most profound differences between those applying English law (or perhaps more problematically, a local interpretation of English law) and those relying on civilian based, and largely codified systems. For most European (used in its neutral geographical rather than its political sense) systems express no need for the English warranty, with its consequences of automatic termination of cover, regardless of whether the breach was material to the loss (thereby probably being causative of it) or even if it had already been remedied. The continental opinion appeared to be that there was no need for a "warranty" when the parties were free to contract special terms as essential to there being cover. Such are, for instance, the newer terms requiring consistency of ownership, class, management and ISM certification.

And it was in relation to this debate that it was most useful to have the informal input of delegates from the USA, Israel, Greece, Australia, Spain, South Africa, Italy, France and others (to whom omission from this imperfect summary should not give any offence). Especially useful were the comments from both the UK market and the legal profession, for pains were taken to assure them that what they were witnessing was not an attack on the English legal system, but rather an enquiry whether the laws which England exported to so many countries were being correctly understood and applied in those

countries. It was clear that English law and practice would not give up its warranty easily, yet equally clear that the warranty was anathema to others - even those working comfortably within their received English law applied in their own courts.

Such was the cut and thrust of the debate that the enemy that is time robbed us of delving into the legalities of special clauses with special effects, and the demands made upon policies and the law by more recent attempts by the insurance industry to play a meaningful role in improving the dreadful loss statistics that so shame shipping. Our inability to schedule these vital issues into our discussions should not be construed as in any way relegating them to the B league.

But the hospitality of our hosts called, and we were left with a comparatively short time to discuss what had been referred to at the outset as “Section A Issues” upon which the IWG would be seeking a lead from this conference.

The Way Forward

In asking for an informal show of hands for the way forward, even to get to this next stage of plenary and then to a resolution of the Assembly, we had to know if you, our colleagues, wanted us to continue, and if so, to what end. It was pointed out that a journey without a destination could leave its travellers wandering in a wilderness. Yet we could at this stage in all fairness not name the station at which the train would stop. Perhaps only the line along which it would travel.

Hence the following “Question Paramount” was put to the floor:

Is an evaluation of the national laws of marine insurance such as is presently under way by the IWG considered to be an exercise worth continuing, academically, and or in practice, to the benefit of both the marine insurance industry and maritime law?

The short debate which followed produced, without expressed demur, the view that whilst it was neither necessary nor prudent to determine the precise way in which the exercise would end, the IWG review initiative was seen as of great benefit in promoting better knowledge and understanding of often diverse laws, and equally often diverse interpretations of the same laws. Its agreed usefulness warrants a continuation of the exercise. The meeting held the view that even if the product of the IWG’s efforts was merely the dissemination of knowledge which itself would promote harmonisation in the approach of national jurisdictions to common problems, this would fall within the ambit of the CMI’s aims.

It was pointed out from the chair that the group would like to have the freedom to recommend, at an appropriate time, some tangible result. Some paper, of whatever nature and effect. This may take the form of a set of CMI approved guidelines which could help countries engaged in their own initiatives to re-write their laws of marine insurance; or a set of Rules on

Certain Issues of Marine Insurance such as may be incorporated into marine insurance contracts in a way which will provide more certainty about the law to which those contracts may be subject; or even contractual terms devised in consultation with the industry which may address some of the problems identified. At this stage, the only end result which is not considered feasible or desirable is a formal convention. But the IWG is not now at the stage where it can ask approval for any particular form of instrument, be it private or public in its legal nature.

Though not fully debated, the mood of the sessions seemed to approve the approach that the IWG focus its attentions on the primary issues already identified, though some may not be able to be viewed in isolation from complementary secondary issues which are not themselves under review. There was broad acceptance, if only by lack of challenge, of the terms of reference which Section A attempted to define.

It is accordingly my pleasure to submit the attached resolution for consideration and adoption by the Assembly of the Comité Maritime International.

JOHN HARE

RESOLUTION OF THE CONFERENCE

The Plenary of the Comité Maritime International (CMI)

TAKES DUE NOTE of the work done by the International Working Group on Certain Issues of Marine Insurance Law (IWG), and of the discussions during the sessions devoted to marine insurance at the 37th International Conference of the CMI;

CONSIDERS the current study by the IWG of the national laws of marine insurance to be an exercise worthy of continuing from both an academic and a practical perspective;

REQUESTS the IWG to continue its study of the national laws of marine insurance, in a fully consultative process, and in a manner which seeks to identify and evaluate areas of *difference* in the national laws of marine insurance (primarily drawn from those identified in CMI Yearbook 2000 – Singapore I page 326) where either

- a measure of harmonisation may be feasible and desirable and would better serve the marine insurance industry; or
- the dissemination by the CMI of the products of the IWG's research would promote better knowledge and understanding of such differences.

REQUESTS the IWG in its continuing study to take into account

- the role which marine insurance should be playing in promoting the highest internationally accepted standards of safety at sea, with particular regard for the insistence upon and enhancement of safety of all marine personnel
- the current economic structures within which marine insurance is underwritten, taking into account *inter alia* regional co-operation, competition and regulation
 - the differences and similarities in the civilian and common law legal systems, in relation to the content of substantive law, to procedural issues, and to draftsmanship;

REQUESTS the IWG to report upon its endeavours periodically to the Executive Council of the CMI, and thereafter to the 38th International Conference of the CMI (with any draft discussion proposal as the IWG may then recommend for discussion in conference).

GENERAL AVERAGE

REPORT TO THE PLENARY SESSION BY THE INTERNATIONAL WORKING GROUP

The Executive Council of CMI had appointed the International Working Group to submit a questionnaire to the national MLAs based on the proposals by IUMI for a reform of the York Antwerp Rules. In preparation of the Singapore Conference, the Working Group had sent a circular letter to the national MLAs suggesting that the discussion on the proposals by IUMI should focus on four main questions without excluding further issues.

The meeting of Committee C was introduced by a report from Mr. Gooding of Lloyd's showing the background of IUMI proposals: the experience of general average claims had shown to underwriters a lack of economic balance between the interests bound in a common shipping adventure. That is why IUMI advocate a reform of the YAR relieving cargo underwriters from some of the burden which they have to bear under the present form of YAR.

Mr. Hudson then presented his view as an average adjuster on a reform of the YAR along the lines suggested by IUMI. He is afraid of losing uniformity in the settlement of general average cases if no agreement will be reached between shipowners, underwriters and average adjusters on such a early reform of the YAR 1994.

These contributions aroused a lively discussion on the general issue whether CMI should continue its work on the IUMI proposals at all and, if so with what terms of reference. Some delegates advocated the end of the debate, namely Mr. Myerson (USA), in view of the short period which has gone by since the 1994 Sydney reform. The majority, however, held that discussion should go on in the normal form of CMI's work, i.e. in an international sub-committee the task of which would be to weigh the arguments in favour of and against any amendment of the YAR.

The discussion thus briefly described left little time to talk about the four questions raised in the circular letter. Mr. Shaw in his capacity as Rapporteur of the Working Group gave a short résumé of the responses to the questionnaire. The main interest centred on the question whether the principle of common benefit would be restricted in favour of the principle of common safety, thus eliminating most of the port of refuge expenses presently accepted in general average. Mr. Browne advocated such restriction in favour of cargo underwriters arguing that normally the common safety of ship and cargo was regained as soon as a port of refuge was reached. Some delegates and

Resolution of the Conference

observers held that the present form of YAR should be preserved as showing a balance of interests achieved as recently as 1994 in Sydney.

Several delegates were in favour of eliminating the re-adjustment of salvage claims in general average which had been settled separately. Time did not permit to go into the other questions mentioned in the circular letter.

An indicative vote at the end of the meeting showed a majority in favour of continued work of the CMI without restricting the terms of reference to the IUMI proposals.

The Working Group draws the conclusion that CMI should continue its work and therefore submits the following resolution for adoption.

RESOLUTION OF THE CONFERENCE

The Plenary of the Comité Maritime International (CMI) takes due note of the work done by the International Working Group on General Average and of the deliberations and conclusions of the meeting of Committee C which took place at Singapore on Tuesday 13th February 2001 at the 37th International Conference of CMI.

REQUESTS the International Working Group to continue further work and to consider what if any revision of the York Antwerp Rules should be made in the light of the deliberations and conclusions of Committee C, of the proposals made by, amongst others, IUMI, and of other matters.

MODEL NATIONAL LAW ON ACTS OF PIRACY AND MARITIME VIOLENCE

REPORT ON THE CONFERENCE SESSION

I. History of the Work

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. 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, 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 recently 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);
- 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);

Report on the Conference Session

- the International Transport Worker's 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).

At an early stage, 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 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 Joint International Working Group, with Dr Samuel Menefee as Rapporteur. As of the Singapore Conference, the Group had held four meetings in London. 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.

At the outset of its work, the Group was made aware of the activities of IMO concerning piracy and maritime violence, centred in its Maritime Safety Committee. A conscious effort was 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.

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 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.

II. Consideration at the Singapore Conference

It is difficult to exaggerate 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. To illustrate the scope of the problem, the Group presented a Seminar on Piracy and Maritime Violence to the Singapore Conference on the morning of Thursday, 15th February 2001. Dr Wiswall served as Chairman, and the following presentations were made:

- **Captain Jayant Abhyankar**, Deputy Director of the ICC International Maritime Bureau, made a visual presentation that clearly documented the increasing seriousness of the problem while at the same time illustrating the information-gathering functions of ICC-IMB with regard to maritime criminal activity. He noted that legal inability to effectively prosecute or extradite the accused in several recent incidents, notably the case of the ALONDRA RAINBOW in 1999, clearly underscored the need for a Model National Law.
- **Mr Sivakant Tiwari**, Senior State Counsel and Head of the International Affairs Division in the Singapore Attorney-General’s Chambers, stressed the seriousness with which his Government viewed the problem and the importance of the work undertaken by the Group. He endorsed the concept of the Model National Law, which he was certain his Government would review with great interest once the Group had prepared and recommended a final version.
- **Captain Joseph Thuillier** of the ITF stressed the emotional traumatising, physical injury and loss of life wreaked upon seafarers by these crimes. It is the seafarers who, in person, are at the receiving end of both the robbery and violence in these incidents, and the level of brutality in such attacks was lately rising at an accelerated pace. Captain Thuillier pointed out the danger that numbers of otherwise able persons will be justifiably discouraged from seeking seafaring employment unless effective action is taken to bring perpetrators to justice, and he emphasised the need for more effective reporting and law enforcement. The ITF strongly supported the Group’s work and the work of IMO, and would support the universal adoption of the Model National Law.
- **Mrs Linda Howlett**, Legal Adviser to ICS, spoke of its efforts to encourage shipowners to report all incidents of piracy and maritime violence, and its co-operation with IMO in forwarding such reports and participating in IMO-organized missions to several of the high-risk areas. She noted that all such reports received by ICS would be available on the Organization’s website (www.marisec.org). Mrs. Howlett applauded the work of the ICC-IMB, and stated the full support of ICS for the work of the Group and the adoption of the Model National Law.
- **Detective Superintendent Suzanne Williams** of the Metropolitan Police, formerly of the Royalty and Diplomatic Protection Department at Buckingham Palace and now heading the piracy and kidnapping unit at New

Report on the Conference Session

Scotland Yard, spoke on behalf of INTERPOL. She described the horrific nature of these maritime crimes and the shattering effect upon those victims who survived the attacks, and alluded to the frustration of police and law enforcement authorities that so many of these serious criminal acts were not even reported, let alone successfully prosecuted. Superintendent Williams pointed out that, with National Bureaus in 178 countries, INTERPOL had the infrastructure to be able to receive and co-ordinate information reported to it concerning incidents of piracy and maritime violence, and that it supported and would promote adoption of the Model National Law as a most useful new crime-fighting weapon. Because of the on-scene experience so vividly related by Superintendent Williams, her remarks are reproduced *in toto* as Annex “A” to this Report.

- **Dr Rosalie Balkin**, Director of the Legal and External Relations Division of IMO, described the work being done within IMO on the subject and noted the co-operation between IMO and CMI in ensuring that the Group’s work did not needlessly duplicate IMO’s efforts. It appeared that the IMO Assembly in November 2001 would adopt the Code for Reporting and Investigation of such incidents, so the work of the Group to produce a complementary Model National Law was both timely and welcome in the view of IMO.
- **Dr Gerhard Brünn**, Chairman of the Liability Committee of IUMI, stated the concern of the property and casualty insurers and expressed the unreserved support of his Organization for the concept of the Model National Law.
- **Mr Peregrine Massey**, on behalf of IGP&I, likewise endorsed the concept of the Model National Law on behalf of the liability insurers.
- **Dr Samuel Menefee** recapitulated the work of the Group and explained its aims in drafting the Model National Law. He noted the emphasis in the Report of the Group to the Conference that the threat posed by maritime criminal activity could not be overestimated, 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.

An opportunity was given for Conference delegates to pose questions to the panel members, after which the session was adjourned for luncheon.

On the afternoon of 15th February, the Conference’s Committee on Piracy and Maritime Violence met to discuss the draft text of the Model National Law and to hear the comments and suggestions of the Conference delegates for its improvement.

Dr Wiswall called attention to the Report of the Group, noting that the principal objective of the draft Model National Law was 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 suspected offenders for prosecution in another State. A second objective in drafting the Model Law was 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 was 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 sought 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.

Dr Wiswall stressed that the task of the Singapore Conference was to review and comment upon the draft Model National Law. However, because the draft was *not* the work product of the CMI but of a Group composed of international organizations, the Conference might suggest changes for future consideration by the Group, but would not itself make changes to the document.

In the ensuing discussion, several delegates expressed reservations concerning the use of the word “recklessly” in the definitions of crime in Section I of the Model National Law. It was suggested that this word weakened the customary test of *malum in se* to determine criminal intent, and/or might conflict with use of the term in certain IMO Conventions. Others felt that the word could be suitably qualified and usefully retained.

One delegation felt the definition might be too complicated for the national laws of some countries. Another objected to criminalization of the offence re threatened or actual damage to the marine environment by Section I, § 4, but other delegations supported the text. One delegation believed that the provisions of the law should be made applicable in respect of pipelines in Section I, § 4; another favoured the expansion of coverage of offshore installations under Sections I, § 8 and III, but it was pointed out by several others that the broad definition of “ship” should take care of that concern. Some delegations sought assurance that political acts would be covered by the Model Law, and one wished to see the problem of “phantom ships” addressed as well as hijacked ships. It was suggested that the definition of “ship” should be broadened in Section I, § 8 to include hovercraft, seaplanes and platforms, and that “recklessly” should there be defined.

It was suggested that Section II should split jurisdiction and extradition into separate paragraphs, and that the words “on board” in Section II, § 3, should be expanded to “on board or against”. It was pointed out that Section II, §§ 3, 4 and 5 should expand jurisdiction, whereas they might be read to restrict it. Several delegations felt that national jurisdiction should be specifically stated to apply to incidents occurring within the EEZ. One delegation pointed out that extradition in Section II, § 6 should be “from” and not “to” a State.

With regard to Section III it was suggested that § 5 might be redrafted to improve clarity. Several delegations objected to vesting a court with discretion in Section III, § 7, and would make it mandatory that property be returned to innocent persons; it was urged that this protection should be specifically

extended to cargo owners or consignees. One delegation believed that the words “subject of” should be deleted from § 7. As to Section III, § 8, it was suggested that the emphasis be shifted to freedom of innocent persons from port expenses, and that the goods should only be returned to the owner upon satisfactory proof of title. One delegation added that the return of property should not be linked to a criminal conviction, and also that State authorities should be prohibited from asserting salvage claims with respect to the goods. Another delegation thought that problems could arise if detention pursuant to a statutory lien could be overridden by a State detention pending prosecution, but other delegations did not feel that this was a concern that should be addressed by the Model Law. The same delegation felt that the definition of “owner” should exclude “beneficial owners” in favour of the owner of record.

The delegation of the United States offered specific amendments for Section III, §§ 7 and 8, as follows:

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, but any such property shall be restored as expeditiously as possible to its rightful owner unless the State proves the complicity of such owner in the piracy or acts of maritime violence. If the owner is denied return of its property due to proof of its complicity in the prohibited acts, the property shall nonetheless be returned to any mortgagee of such property unless the State proves the complicity of such mortgagee in the prohibited acts.*
8. *Property which is not restored to its owner or mortgagee under the foregoing provision shall be sold and the proceeds distributed to other claimants according to admiralty/maritime law, with any balance remaining being forfeited to the State. The State shall use such funds to finance State or regional action to fight piracy or maritime violence. Parties found innocent of any wrongdoing under Section III (7) shall not be liable for any costs incurred during investigation or prosecution of such acts or pending resolution of said parties' claims to return of the property.*

As to Section IV, it was suggested that incentives be provided for the reporting of incidents, including the operation of a ‘witness protection programme’ when necessary. The ensuing discussion demonstrated agreement with these suggestions, but no consensus as to sources of funding for such incentives. It was also questioned whether incident reports should be made public as in Section IV, § 3.

Following discussion of the substance of the Model National Law, it was proposed that a draft Resolution, directed to the CMI Assembly, be offered by the Committee to the Plenary Session of the Conference. This Resolution would request the Assembly to give CMI’s approval and endorsement to the concept of the Model National Law, would request the Joint International Working Group to convene a further session and to produce a final version of the Model National Law, taking into account the observations and suggestions made during the Committee’s discussion of the text, and to transmit the final

text, together with its Final Report, to the governing bodies of the Group's constituent international organizations, including the Executive Council of the Comité with the request that the Model National Law be forwarded to the National Member Associations of the CMI and to its Provisional and Consultative Members, asking each to do its utmost not only to bring the Model National Law to the attention of national governments, but to urge and assist such governments to enact the Model National Law (or as much as possible thereof) into national legislation. Finally, the Resolution would request the CMI, through its Member National Associations, to keep track of enactments of the Model Law and any variations thereof, and to post the information in tabular form on its website. This proposal was adopted, and the text of the Resolution appears in the Report of the XXXVII Conference of the Comité.

Respectfully submitted,

FRANK L. WISWALL
Chairman of the Group
SAMUEL P. MENEFFEE
Rapporteur

ANNEX A**SEMINAR REMARKS OF DETECTIVE SUPERINTENDENT
SUZANNE WILLIAMS,
HEAD OF THE PIRACY AND KIDNAPPING UNIT,
METROPOLITAN POLICE , LONDON**

Thank you Dr. Wiswall; good morning, ladies and gentlemen. Before I put on the INTERPOL hat I would like to make a statement based upon my personal experience as a senior investigator with Scotland Yard.

I have dealt all too often with murder on board ship – yes, murder on board a ship – a far less romantic term and a world away from the romantic land of mythical pirates and Agatha Christie novels. These murders, however, have all been committed during piratical attacks.

I have spoken to many seamen; some have been so traumatised by pirates that they have never returned to the sea; some have become physically disabled in the course of attacks and left with no financial means of support for themselves or their families.

I have spoken to the widows of sea captains; I understand, but cannot answer, their perception of a total lack of retribution and recall of the pirates to justice.

I personally hope this Conference can go some way to addressing the fears of so many victims – and believe me there are many, many innocent victims who have suffered at the hands of pirates and armed robbers at sea. I hope you will all give this draft Model National Law most serious consideration, and at the conclusion of this process I really do hope that an acceptable Model Law can be produced, because otherwise people will – literally – continue to get away with murder.

Now to my brief: INTERPOL have asked me to leave you all in no doubt that they view the proliferation of acts of piracy and maritime violence as a very serious escalation of international crime. INTERPOL is becoming increasingly involved in the subject matter. Each of 178 countries has an INTERPOL National Bureau (NCB). NCBs are multi-agency law enforcement agencies with the police element being closely linked to national or federal bodies. The fact that they are multi agency means they are an excellent point in each country through which to liaise with other agencies, particularly the maritime ones. That the police element is closely linked with national or federal authorities also gives the ability to task the appropriate body to investigate crimes, amass evidence, arrest offenders, seize property and advise with prosecution and/or extradition. With international police investigations, evidence must be transmitted via INTERPOL channels in order to be admissible in judicial proceedings. Failure to adhere to the established procedure would likely render evidence inadmissible.

INTERPOL are also able to assist to combat offences by providing a swift and secure communications network between its 178 National Bureaus. In practical terms, this means that reports of incidents received by any National Bureau can be disseminated to any selected neighbouring Bureaus (or world-wide) instantly and securely.

INTERPOL is therefore positioned as the logical agency to deal with offences of piracy and maritime violence, as information can be instantly transmitted to the relevant body or bodies with powers to investigate, arrest, and arrange judicial action. In addition, INTERPOL Headquarters in Lyon, France, continually collates information from each NCB, and disseminates the resulting data through the INTERPOL Network. When crime patterns from different countries are identified, INTERPOL can then advise on global supportive measures.

However, INTERPOL can only provide this assistance if it receives detailed reports of incidents. INTERPOL's chief problem is delay in being notified of incidents and/or insufficient provision of details to enable effective action to be initiated.

In addition to the practical difficulties, a diversity of laws between countries – or a complete lack of them – hampers effective investigation. For this reason, universal adoption of the Model National Law will be a major step forward, and is therefore strongly urged by INTERPOL.

As with all law enforcement, prevention is the prime concern. INTERPOL hopes to continue to work with all relevant national authorities and international organizations to adopt effective measures to combat this growing threat. To this end, an INTERPOL Working Party on the subject of Piracy and Maritime Violence is now due to convene in September 2001.

Thank you all for your kind attention.

RESOLUTION OF THE CONFERENCE

THE PLENARY of the Comité Maritime International (CMI), meeting in Singapore on 16th February 2001 upon the conclusion of the XXXVII International Conference of the CMI, takes note of the work of the Joint International Working Group (JIWG) on Uniformity of Laws Concerning Acts of Piracy and Maritime Violence and of the Committee of the Conference considering the work of the JIWG, and RESOLVES as follows:

- That the Comité Maritime International approves and endorses the concept of the Model National Law as a valuable instrument of justice in combating the scourge of piracy and maritime violence, and
- That the CMI approves and endorses the structure and provisions of the Model National Law produced by the JIWG (CMI *Yearbook 2000 – Singapore I*, p. 418 *et seq.*), subject to consideration by the JIWG of the points raised in various interventions during the discussion of the proposed Model National Law that took place in the Conference Committee during its meetings on 15th February 2001, and
- That the CMI Secretariat transmit to the JIWG the Report of the Conference Committee (also to appear in the CMI *Yearbook 2001 – Singapore II*), for use in the JIWG's preparation of a final draft of the Model National Law; and
- That the JIWG is requested to transmit its final draft of the Model National Law to the Executive Council of the CMI as well as to the other constituent organizations of the JIWG, and
- That the Executive Council review the final draft of the Model National Law at the earliest possible opportunity and, if it sees fit, approve the final draft and cause the Model National Law to be transmitted to all Member National Associations of Maritime Law and to all Provisional and Consultative Members of the CMI with the request that they apply their utmost efforts not only to bring the Model National Law to the attention of national governments, but to urge and assist governments to enact the Model National Law (or as much thereof as possible) into national legislation, and
- That the Executive Council upon its approval of the Model National Law cause the same to be transmitted to the Secretary-General of the International Maritime Organization with a request for endorsement of the Model National Law by the IMO Assembly, and
- That the Member National Associations of Maritime Law and all Provisional and Consultative Members of the CMI are requested to report the enactment of the Model Law (or any variation thereof) by any government to the CMI Secretariat, in order that a table of such enactments may be prepared and revised for publication on the CMI website and in subsequent editions of the *Yearbook*.

IMPLEMENTATION AND INTERPRETATION OF THE 1976 LLMC CONVENTION

REPORT OF THE CMI WORKING GROUP TO THE CMI SINGAPORE CONFERENCE

Executive Summary

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 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 and by the Assembly at its 21st session.

A Working Group consisting of Prof. Francesco Berlingieri, Mr. Richard Shaw and Mr. Panayotis Sotiropoulos has been appointed by the Executive Council of the CMI, with instructions to carry out a study on the implementation of the LLMC Convention.

The Working Group prepared and circulated a questionnaire amongst the CMI National Associations in States Parties and the competent governmental authorities in States Parties where there did not exist a Maritime Law Association member of the CMI.

The responses received as of 15 October 2000 by the Working Group have been arranged under each question in order to facilitate the review of the position existing in each State Party in respect of each of the issues dealt with in the Questionnaire.

The Working Group then proceeded to the analysis of the manner in which each individual article of the Convention had been implemented by the States Parties in respect of which responses had been received.

On the basis of the responses to the Questionnaire and of the aforesaid analysis the following tentative assessment has been made of the level of actual legislative uniformity and of the prospect of uniform interpretation of the provisions of the Convention. Such assessment in turn enabled the

Working Group to express some views in respect of which methods of implementation are likely to ensure a higher degree of actual uniformity.

2. *States that have implemented the Convention by ratification and publication and by giving the force of law to its provisions.*

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 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.

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, 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, France, Greece, Hong Kong China, the Netherlands and the United Kingdom.

3. *States that have implemented the LLMC Convention by means of the incorporation of all or part of its provisions 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 code¹ or an act regulating generally the law of transport.² It was therefore felt useful to find out whether and to which extent the national rules correspond to the provisions of the Convention.

As it appears from Annex VI to the Report, the individual articles of the Convention have been implemented practically without any change by certain

¹ This is the case for Denmark, Finland, Georgia, Norway and Sweden.

² This is the case for New Zealand.

Implementation and Interpretation of the 1976 LLMC Convention

countries, while they have been implemented with more significant changes or their implementation has been omitted by other countries. In table I the countries of the first group are listed in column 1 and those of the second group are listed in column 2. In table II the manner in which implementation has been effected by the countries of the second group is summarized.

Table I

	COLUMN 1	COLUMN 2
<i>Article 1:</i>	Denmark Finland Japan Norway	Georgia New Zealand Sweden
<i>Article 2:</i>	Japan New Zealand	Denmark Finland Georgia Norway Sweden
<i>Article 3:</i>	Georgia Japan New Zealand	Denmark Finland Norway Sweden
<i>Article 4:</i>	Georgia (probably) Japan New Zealand	Denmark Finland Norway Sweden
<i>Article 5:</i>	Denmark Finland Georgia Japan Norway Sweden	New Zealand
<i>Article 6:</i>	Denmark Finland Japan New Zealand Norway Sweden	Georgia
<i>Article 7:</i>	Japan New Zealand	Denmark Finland Georgia Norway Sweden

Report of the Working Group

<i>Article 8:</i>	Denmark Finland Japan New Zealand Norway Sweden	Georgia
<i>Article 9:</i>	Japan New Zealand	Denmark Finland Georgia Norway Sweden
<i>Article 10:</i>	Denmark Finland Norway Sweden	Georgia Japan New Zealand
<i>Article 11:</i>	Japan	Denmark Finland Georgia New Zealand Norway Sweden
<i>Article 12:</i>	Denmark Finland Japan	Georgia New Zealand Norway Sweden
<i>Article 13:</i>	Denmark Finland Japan Norway Sweden	Georgia New Zealand

Table II

Denmark 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, (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).

Implementation and Interpretation of the 1976 LLMC Convention

Finland	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	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	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 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

Report of the Working Group

the limitation procedure exist in the great majority of the States parties and those which have been made available have been assembled in an annex to the Report of the Working Group referred to below.

4. *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 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.

The Working Group prepared a draft Report for consideration by the CMI Conference to be held in Singapore from 12th to 16th February 2001.

There were annexed to the draft Report the following documents:

- Annex I - States Parties to the LLMC Convention
- Annex II - IMO Legal Committee, 80th Session
- Annex III - 21st IMO Assembly
- Annex IV - Questionnaire
- Annex V - Responses to the Questionnaire
- Annex VI - Implementation by States Parties
- Annex VII - National Rules of Procedure

The Draft Report was approved by the Conference and has thus become together with its Annexes an official CMI document which has been submitted to IMO by the President of the CMI with a letter dated 1st August 2001.

RESOLUTION OF THE CONFERENCE

The Plenary of the Comité Maritime International

TAKES NOTE

- of the Draft Report on the Implementation of the 1976 LLMC Convention (as appears on pages 435 to 664 of the CMI Yearbook 2000);
- of the deliberations of Committee D on the Implementation and Interpretation of the 1976 LLMC Convention

APPROVES THE DRAFT REPORT

RESOLVES

- to send to IMO a copy of the Draft Report together with a summary of the deliberations of the Committee for consideration by the IMO Legal Committee;
- to inform IMO that the CMI will be pleased to co-operate with IMO with a view to finding all possible ways and means of ensuring the most satisfactory implementation and the uniform interpretation of the LLMC Convention as well as of other maritime conventions;

REQUESTS

the Working Group to continue its work on the possible measures which may be taken by CMI to promote the uniform implementation and interpretation of international conventions, such as:

- the establishment on the CMI website of a database of decisions by the courts of the states of member associations and of other states parties to the LLMC Convention on the interpretation of the LLMC Convention and of other international conventions;
- the transmission to Professor Berlingieri by Member National Maritime Law Associations of copies, in English if possible, of any decision of their courts concerning implementation and interpretation of international conventions;
- the development of standard clauses dealing with implementation and interpretation of international conventions as international instruments for inclusion in future conventions;
- the establishment of a CMI Consultation Service/Panel to provide services, whenever required in connection with the implementation of international conventions;
- the rendering of assistance to training organisations such as IMLI where the drafting of legislation to implement international conventions is a curriculum subject;
- the possible reference to the International Court of Justice, or to another international tribunal, for rulings on the interpretation of international conventions in the course of litigation.

REPORT TO IMO BY THE COMITÉ MARITIME INTERNATIONAL (CMI)

Executive Summary The CMI at its Singapore Conference in February 2001 approved the report of its Working Group on the implementation and interpretation of the 1976 LLMC Convention. This paper summarises the decisions taken and areas of planned future action by the CMI, and invites comment from the members of the Legal Committee on the proposed areas of work.

Action Requested See final paragraph.

Following the decision of the Legal Committee of the International Maritime Organisation at its 80th session in October 1999 to support the work of the CMI in researching the various methods adopted by governments for the implementation of the 1976 International Convention on Limitation of Liability for Maritime Claims (LLMC) together with the legal decisions of the courts of state parties in interpreting that convention, the CMI appointed a working Group consisting of Professor Francesco Berlingieri (Italy), Chairman, Dr Panaghiotis Sotiropoulos (Greece), and Mr Richard Shaw (UK) to study these topics.

At the 37th Conference of the CMI held in Singapore in February 2001, a draft report of the Working group was presented, debated, and adopted. This report highlighted the number of different ways in which states parties had applied the LLMC Convention in their own law, and the range of variations permitted by the Convention itself, either by permitting reservation of certain aspects, or by leaving specific issues to be decided by national law. While therefore the principal features of the LLMC Convention (increased limitation funds and a presumed right to limitation except in extreme cases) have been respected, there is still a considerable range of variation between states parties in the application of this convention.

The principal thrust of the debate at the CMI Conference was that, while the report (copy of which is enclosed) was considered to be useful in itself, it was not a wise use of the resources of the CMI to conduct a similar study of other international conventions on maritime private law at the present time, but that the CMI should concentrate on the practical aspects of this field of study.

The conference also resolved that the Working Group should continue its work, but with the emphasis on practical measures to collect relevant information which might be of assistance to those governments which were able to use it in their programmes to develop legislation for the implementation of IMO-sponsored international conventions in a consistent and coherent manner. It was considered that the following measures (inter alia) should be investigated by the Working Group:

1. The establishment on the CMI website www.comitemaritime.org of a

Implementation and Interpretation of the 1976 LLMC Convention

database of decisions by the courts of states parties to the LLMC Convention, and to other international conventions, on the interpretation of those conventions. The database will be set up at the Headquarters of the CMI in Antwerp, but will be administered by Professor Berlingieri in Genoa, assisted by Mr Richard Shaw at the University of Southampton Institute of Maritime Law. It is hoped that this database will provide a useful resource for work by parties to litigation which involves issues concerning the interpretation of international conventions and, in appropriate cases, by the courts deciding such issues.

2. The development of standard clauses dealing with the interpretation of international conventions as international instruments. A typical example of such a clause is Article 3 of the Hamburg Rules.¹
3. The possibility of establishing a CMI Consultation Service to provide services whenever required in connection with the implementation of international conventions. It is expected that a list will be prepared of individuals with relevant experience in the field of legislative drafting etc. whose advice can be made available on request by governments contemplating the implementation of maritime law conventions.
4. The rendering of assistance to training organisations such as the International Maritime Law Institute in Malta where the drafting of legislation to implement international conventions is a curriculum subject. It is hoped that a list of suitable lecturers willing to teach this subject can be built up from among the CMI member national maritime law associations.
5. The Working Group will also study possible means of referring issues concerning the interpretation of international conventions to an international tribunal such as the International Court of Justice or the International Tribunal for the Law of the Sea for an independent ruling. Research subsequent to the Singapore Conference has indicated that in view of the rules governing the jurisdictional competence of these bodies such a possibility is extremely remote. On the other hand a model for such a procedure may be found in the provisions governing reference by national courts to the European Court of Justice on issues of European Law.

The CMI at its Assembly held in Singapore on 16th February 2001 approved the resolution of the Conference on this topic and resolved to inform the IMO that it will be pleased to cooperate with the IMO with a view to finding all possible ways and means of ensuring the most satisfactory implementation and the uniform interpretation of the LLMC Convention as well as of other maritime conventions. In so far as the LLMC Convention is concerned, it was felt that an analysis of the provisions of the Convention,

¹ "In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity."

Report to IMO

with comments on the meaning of the expressions used, also with the aid of the travaux préparatoires, could be of assistance in the satisfactory process of implementation of the Convention. Such analysis could, at the same time, be of assistance in the interpretation of the Convention and foster uniform interpretation. It was also felt that suggestions could be given as to the need for supplementary legislation in connection with certain provisions and as to the manner in which the options granted in the Convention can be exercised.

Any proposal or request for the assistance of the CMI in connection with this project should be addressed in the first instance to the CMI Secretariat, Eiermarket Building, Sint Katelijnevest 54, boîte 15, B2000 Anvers Belgique; Email <admini@comitemaritime.org>. Professor Berlingieri may be contacted at 10 Via Roma, 16121 Genova, Italia; Email dirmar@village.it and Mr. Shaw at the Institute of Maritime Law, University of Southampton, Highfield, Southampton SO17 1BJ, UK; Email Richard.Shaw@soton.ac.uk
Action Requested of the Legal Committee

The CMI will be grateful for observations by the IMO Legal Committee on the proposed work programme set out above. The list of items 1 to 5 is not intended to exclude other projects if they meet the general criteria of relevance and practicability.

PASSENGERS CARRIED BY SEA

LIMITATION AGAINST PASSENGER CLAIMS: MEDIEVAL, UNBREAKABLE AND UNCONSCIONABLE

PAPER BY CHARLES HADDON-CAVE QC

The role of the limitation in the modern world is increasingly under scrutiny. This paper focuses on sea and air carrier's rights to limit liability under the Athens, LLMC and Warsaw Conventions, and examines three questions in particular. First, what are the origins of limitation of liability? Second, can one ever really hope to break the limit? Third, can we really justify limiting sea passenger claims any longer, particularly when the aviation industry has made moves to remove the limit? The answer to the first question is 'medieval'. The answer to the second question is 'No'. And the answer to the third question will occupy the shipping and insurance industry's conscience for some time to come. It is imperative that the industry addresses public disquiet regarding limitation of passenger claims before the political momentum to sweep away all forms of limitation becomes unstoppable.

Introduction

The *NACCA Law Journal* of 1959 described the US Limitation of Liability Act 1851 as follows:

"An act which is vicious in its impact, unconscionable in its results and outmoded in an age of institutionalised protective insurance, if it cannot be repealed outright, deserves only a narrow grudging and constrictive construction."

Some modern commentators speak with even greater vehemence in relation to the limitation provisions of the Athens Convention, the LLMC and the Warsaw Convention as regards passenger claims.

We live in a brave new world in this new century. Two strong populist forces are at work. People have rights and, what's more, they increasingly *know* they have. And there is a growing philosophy (which probably originated in Texas) that if somebody is hurt, then it *must* be somebody's fault – and they should pay full compensation. These populist forces are "unruly horses" to which the media and politicians have hitched their wagons. They cannot now unhitch them. They represent a potent and inexorable challenge to the shipping and aviation industry – as the recent Paris *Concorde* crash and French oil pollution case the "*Erika*" have shown. The challenge is all the greater because

they may just have a point: feudal days have been long consigned to history and people *do* have rights; and one has to ask 'Is there any good reason why in the year 2001 the surviving wife and children of a breadwinner killed on board a passenger ferry or aircraft should *not* be fully compensated for the death of a husband and father according to national levels of damages? Is there any good reason why the compensation received by a person rendered paraplegic whilst travelling as a passenger by sea or air should depend upon not just which mode of transport, but also the particular nationality of that carrier?'

Origins

It is logical to start any discussion of limitation of liability with an examination of its origins so that we can see the present state of affairs in its proper perspective.

The origins of the principle of limitation of liability can be traced back to the maritime law of the Middle Ages and to the contract of *command* or partnership, used by 14th century Mediterranean shipowners and merchants. Under these contracts, the liability of the shipowner for contracts entered into by his agent with third parties was limited to the value of the *res*, ship.

Attempts by scholars to find traces of the concept in Roman law have failed: the wrongdoer in Roman law, whether *ex delicto* or *ex contractu* (ie arising from tort or arising from contract), was liable *in solidum* - to make full compensation - even for damaging other people's slaves.

According to the founding father of international law, Hugo Grotius, writing in 1625, the principle of limitation of liability existed in his day and had prevailed for a long time previously in Holland. Grotius said that the normal rule of Roman law had not been followed in Holland because it was both 'inequitable and injurious to the interests of trade'. He was an early and powerful apologist for limitation of liability.

In the 17th century limitation provisions sprouted up throughout continental Europe, and are to be found in the Statutes of Hamburg of 1603, the Hanseatic Ordinances of 1614 and 1644, the Maritime Code of Sweden 1667, and the Marine Ordinance of Louis XIV in 1681, which codified maritime law in France and was used as the model in the Netherlands, Venice, Spain and Prussia.

Curiously - or perhaps not, as England may have distrusted Europe just as much then as some Tory politicians do now - no similar provisions existed in England at the time.

It took the case of *Boucher v Lawson* 1733 to wake the English up. In that case a shipowner was found liable, without limit, for the loss of a cargo of gold coins that had been stolen by the master of his ship, who had sailed it off into the sunset. (The shipowner was fortunately let off on a technicality on appeal.) This case resulted in a great deal of protesting by shipowners outside Parliament. They were worried sick about the implications for themselves, as well as being annoyed at discovering that their competitors on the Continent already had the advantage of limitation. Parliament was quickly pressurized into passing the Responsibility of Shipowners Act 1733 (some modern cynics

would no doubt rename this the Irresponsibility of Shipowners Act 1733). The preamble to the Act reads:

“[An Act] ... of the greatest consequence and importance to this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein ... which will necessarily tend to the prejudice of the trade and navigation of this kingdom.

There were strong echoes of these sentiments down the centuries at the Paris Air Law Conference of 1925 and beyond.

The scope of limitation was increased over the next century by the Acts of 1786 and 1816, but it was not until the Merchant Shipping Act of 1854 that shipowners were entitled to limit their liability for loss of life and personal injury. This came about following another bout of hand-wringing by shipowners, after it was realized that Lord Campbell's Act 1846, which gave dependants the right to sue for loss of life, not only applied to the burgeoning railways but also applied, by an accident of wording, to loss of life at sea. Hansard reports one MP as arguing that unless the shipowner's right to limit was extended nobody would be able safely to emigrate to Australia because no prudent men would own vessels. The MP for Tynemouth, a Mr. Lindsay, was reported as saying:

“[H]e saw no reason why [the shipowner's] responsibility should be limited in the case of passengers. He thought that in a country like this every facility should be afforded to capitalists to invest their money in ships; but as the law now stood, capitalists had reason to dread such investments, because their responsibility was not limited to the value of the ship and freight, but extended to every penny the owner possessed; so that the wealthiest capitalist who held but a small portion of a ship might at any moment find himself a ruined man.”

Breaking the limit is a chimera

Article 13 of the Athens Convention, Article 4 of the LLMC and Article 25 of the Warsaw Convention all now contain the same wording placing on the injured party wishing to break the limit the burden of proving that:

“...the damage resulted from an act or omission of the carrier, his servants or agents done with intent to cause damage or recklessly and with knowledge that damage would probably result.”

The phrase “...recklessly and with knowledge that damage would probably result ...” is now regarded as having the same subjective meaning in many jurisdictions: the wrongdoer must be proved actually to have known or realized that damage would *probably* (not just possibly) result. (It should be noted that the French Courts - and the courts of certain other Continental countries - have steadfastly maintained that the test is objective despite raised judicial eyebrows around the world. The French judges presumably see something in the official French Text of the Hague Protocol - *avec conscience qu'un dommage en resultera probablement* - that is not so apparent to those who do not claim French as a mother tongue.)

The path of analysis leading to the conclusion that the test is indubitably subjective is well trodden in well-known aviation cases such as *Berner v British Commonwealth Pacific Airlines* in the USA, *Tondirau v Air India* in the Beligum Cour de Cassation, and *Goldman v Thai Airways* in England. I would commend the impressive analysis of Kirby P recently in his dissenting judgment in the Court of Appeal's decision in *SS Pharmaceutical v Quantas*, in which he hammers the nail into the coffin of this point in the following passage:

"Any ambiguity remaining [between the objective and subjective test] is removed by a reflection on the alteration from the phrase used in the Warsaw Convention ('wilful misconduct') to that adopted by the Hague Protocol ['recklessness with knowledge that damage would probably result']. And a study of the minutes of the Working Group which developed that Protocol shows conclusively that its purpose was to limit even more rigorously the circumstances of escape from the general regime of limited entitlement, when compared to the already strict regime which it had obtained under the Warsaw Convention itself ... *Proof of reckless conduct is itself, and alone, not enough. It must be shown that, at the time of the reckless conduct the servants or agents of the carrier concerned knew that such conduct would [probably] cause damage but went ahead regardless.* (emphasis added).

Thus, however, 'narrow, grudging and constrictive' is one's construction of these words, they and *the travaux préparatoires* admit of only one meaning.

In that case Gleeson C J and Handley J A held by a majority that Qantas ground staff who left cartons of pharmaceuticals out in the rain in Sydney must have known that damage would probably result. Kirby P disagreed. It is not necessary to analyse the facts of that case, because it involved wet cardboard not dead or injured people (but it has to be said that leaving the boxes out in the rain was somewhat lacking in foresight).

It is, however, a useful exercise to 'throw' some of the most recent examples of alleged airline folly at this subjective test to see whether there is ever any prospect of breaking the limit.

In the Russian International Airlines Airbus crash in Siberia in March 1994 all 75 persons on board were killed. Published transcripts of the CVR tapes confirmed the startling fact that the pilot's 16 year old son, Eldar, was at the controls when the jet went into the fatal spin (his daughter Yana had apparently already had a go at the controls). The transcript makes harrowing reading, not least the passage where the pilot shouts at his son to get out of his seat 12 times, but the hapless boy got stuck. Armed with this transcript, will the relatives stand any chance of breaking the limit? Not in my view. No father is going to put his children at the controls of a plane if he thinks that an accident will *possibly* let alone *probably* occur.

The fact is, of course, that pilots are at the sharp end of the aircraft and are likely to be reluctant wilfully to endanger the lives of their passengers, as this is likely to involve them meeting their maker first.

Another startling case was the 1994 Air Moroccan crash. Some newspapers suggested that the pilot in that case formed a compulsive 'death

wish' and, unperturbed by the protestations of his female co-pilot and the fact that his suicide would involve the deaths of all his passengers and crew, he deliberately flew the plane into the ground. However, more thoughtful recent reports have suggested that his cries of '*Mourir! Mourir!*' were not so much expressions of desire as of his appreciation of the (rapidly approaching) inevitable. Would the genuinely suicidal pilot scenario be enough to break the limit? Even in this case possibly not, because of the argument that when the crazed pilot forms and begins to execute his plan to meet his maker he is stepping outside the scope of his employment. Indeed, it might be argued what better example of 'frolic of his own' could there be?

It is a curious fact that in English law at least, and (I suspect) the law of many other countries, a cruise liner captain or aircraft pilot's conduct could give rise to a charge of manslaughter but still be insufficient to break the limit under the Athens, LLMC or Warsaw Conventions. The test of involuntary manslaughter was restated by the English Courts in *R v Adomako* to be:

"Gross negligence, which a jury might properly find on proof [A] of indifference to an obvious risk to injury to health, or [B] of actual foresight of the risk coupled with either the determination nevertheless to run it or with an intention to avoid it but involving such a high degree of negligence in the attempted avoidance as the jury considered justified conviction, or [C] of inattention or failure to advert to a serious risk going beyond mere inadvertence in respect of an obvious and important matter which the defendants' duty demanded he should address."

The House of Lords upheld the conviction of an anaesthetist who failed to notice that a ventilator tube had become disconnected during an operation, as a result of which the patient died. It had been noted that the evidence before the jury demonstrated that the appellant 'gave no thought to the possibility' of disconnection. It follows therefore that if one applied Article 25 to the latter case, whilst the anaesthetist may have been reckless he could not be said to have had the requisite 'knowledge that damage would probably result' because he gave no thought to the matter.

Conclusion

So, the limit really is unbreakable; and lawyers may weep, or breathe a sigh of relief, depending for whom we are acting at any particular time.

Is keeping the limit now unconscionable?

I should like to turn now to consider the final question, namely, whether it is really justifiable to keep the limits at all as far as ship passenger claims are concerned.

The aviation industry's 'Road to Damascus'

The shipping industry has much to learn from the aviation industry's journey on the 'Road to Damascus'. Initially, the aviation industry took its lead from the shipping industry. The minutes of the 1925 Paris Air Law Conference

show that fledgling airlines were driven by very similar considerations to those which drove the shipping industry centuries before. The aviation industry regarded it as a “necessity” to work out a way of enabling the carrier to measure and limit his exposure to passenger, baggage and cargo claims.

The Paris Conference soon led to the CITEJA Draft of 1927-28, which was worked on and ratified by the Warsaw Conference. There have been several attempts at revision: some successful (such as the Hague Protocol), some unsuccessful (such as the Montreal Additional Protocol known as ‘MAP-3’). And there have been several inter-carrier agreements (such as Montreal in 1966) that have resulted in certain carriers, most notably US carriers, unilaterally increasing limits. The result today is a ‘hotchpotch’ of limits ranging from about \$20 000 through £75 000 to \$140 000 depending on which airline you fly and where you land and take off. One distinguished commentator, Bin Cheng of University College London, referred to it all as a ‘disgraceful shambles’. It is indeed.

The same is true of shipping limits: compensation for e.g. ferry travel is a lottery and will vary from £50,000 to £250,000 depending on whether one boards an English, Dutch, Scandinavian or French ferry.

A sea change in public attitudes came about as a result of two accidents. One shipping – the loss of the “*Herald of Free Enterprise*” in 1987. The other the *Japan Airlines* crash in 1989 when a full aircraft suffered tail problems and circled for half an hour before crashing into a mountain in Japan. During that half hour, many of the doomed passengers wrote letters home. There was a national outcry and the Japanese Government forced the airline to waive limits. This started a process which has led to the unravelling of limitation against passenger claims in the aviation world – and is having a knock-on effect in the shipping world. Many applauded the Japanese for politely (and unilaterally) bowing out of the Warsaw shambles in October 1992 and waiving all limits on national and international flights by Japanese carriers. A subsequent meeting of the world’s major airlines in Kuala Lumpur agreed in principle to do the same. A European Directive which came into force in October 1999 removed the right to limit from European air carriers. What should the shipping industry now think and do, the gauntlet having been thrown down by the aviation industry?

The rationales of limitation law

One can only arrive at an informed and rational answer to this question by examining the original justifications for limitation of liability and seeing whether they still hold water in the modern world. In his thoughtful book published in 1954, *Limitations of Liabilities in International Air Law*, Professor Drion listed eight reasons that were traditionally put forward in justification of the right of an air carrier or operator to limit. It is worth examining each of these in turn to see whether they still fly or hold water (to coin a phrase or two) in either the aviation or shipping context.

(a) Analogy between aviation and maritime law.

As stated above, maritime law exerted a strong influence on the thinking of those involved with shaping aviation law in its early stages. Aircraft and

ships (unlike railway trains) were thought to share many of the same problems and proclivities - to cataclysmic losses, for example - and to require similar treatment. Is the same true today?

The debate about limitation against maritime claims has been going on in England for nearly a decade now. I will remind you of two great titans who crossed swords in the early 1990s. In the left-hand corner of this debate - and capturing the high moral ground - was Lord Mustill who, in a speech in 1992, identified three broad categories in which the right to limit liability could arise

- (1) The first category he identified as the 'closed' situation. Here a limited number of persons - such as in carriage by sea, the shipowner, charterer, hull and cargo underwriters, P&I clubs and reinsurers - voluntarily undertake an 'adventure' together and assume their share of the risk by choice.
- (2) The second category was what he termed 'partly closed' situations. This comprised the large class of persons who engaged in 'closed' situations from time to time but who did not have sufficient continuity of interest for the long-term benefits to be appreciable: for instance, passengers going on the occasional holiday abroad. It is very doubtful whether what are said to be long-term advantages of limitation allowing airlines and shipowners to prosper enabling greater travelling choice, can be regarded as other than minimally beneficial to this class compared with being prevented by limitation from recovering a sum that reflects its true loss caused by the carrier's negligence.
- (3) The third category comprised what he termed 'open' situations. The members of this group have not chosen to be a party to the risk-creating situation, and are linked to the situation solely by unhappy coincidence of time and geography (or, in the case of environmental groups, by inclination). The example given by Lord Mustill was that of a passenger aircraft coming down in a residential area. The passenger on board has had what are the imperceptible benefits of the 'partly closed' group, and is limited in their recovery. The unfortunate victim on the ground, on the other hand, has gained nothing from the carriers' right to limit and can recover in full.

Lord Mustill included in the third category environmental groups, who had captured the political area in which it is taken for granted that every misfortune must be compensated in full. (The punitive damages in the Exxon Valdez were \$5 billion, on top of \$2 billion spent on clean-up costs, \$300 million to fishermen and others and a \$1 million fine.)

Lord Mustill confessed that he was 'unashamedly romantic', but felt driven to condemning what he called the 'freakish results' that followed from a passenger's choice as to which mode of transport, which airport and which carrier as 'not only illogical but *immoral*'. He concluded by calling for a review of limitation of liability in all fields and saying:

"It may still take a number of years, but the time will come when the ethics of limitation will be firmly put in issue. Surely, if the international insurance market is to resist these pressures [and he was referring in particular to the area of environmental pollution] it must first eliminate

the elements which would rightly be identified at first sight by any objective observer as wholly indefensible.”

In the right-hand corner of this debate was David Steel QC (now Mr. Justice Steel, the Admiralty Judge, England) who, in a speech to the Cambridge Academy of Transport in September 1994, mounted a vigorous defence of limitation at least in relation to shipping. He, however, readily admitted and averred two points:

- (1) The characteristics of shipping that continued to make limitation a necessity were in stark contrast with the airline industry.
- (2) The position of passengers (whether by sea or air) called for different treatment from freight.

And he drew attention to the BMLA report published in March 1994, which concluded that:

“... as the 20th century draws to a close no civilized nation should permit the continued existence of rules that deny passengers ... fair compensation for death and personal injury judged by the normal domestic principles.”

What is normal in downtown Melbourne or Manchester, England, may not, however, be normal in Manhattan. The reader will need no reminding of the Alice-in-Wonderland awards of damages that one sees being granted by juries in the USA. A recent example is the \$600,000 awarded to a widow for the anguish suffered by her husband in the minute before he was killed in an air crash. Another is the £6 million punitive damages awarded against McDonalds for ‘overheated’ coffee. However, such freakish awards should not be a bar to the removal of limitation worldwide.

Since these two titans, Lord Mustill and Sir David Steel, were debating this question, public attitudes and government attitudes have hardened – and more and more questions are being asked about the justification for limitation of any sort (see e.g. The “*Erika*”). This is precisely what Lord Mustill predicted.

(b) Necessary protection for a financially weak industry.

The second ‘rationale’ mentioned by Drion was the perceived necessity to protect a financially weak industry. The aviation industry was fledgling in 1920s but not now; and, moreover, the playing field has been entirely changed by the advent of the modern insurance and reinsurance industry. The same is equally true of the shipping industry – if not more so.

Nowadays, the world’s top airlines generate well in excess of \$200 billion in revenue and, no doubt, are paying pretty hefty premiums. They carry over 1000 million passengers per annum, and even in a ‘bad’ year, such as 1993 when over 1000 passengers were killed (significantly more than the average annual fatality figure of 700), this still amounts to only a one in a million chance. (Flying is still the safest form of travel.) The removal of limits against air passenger claims has not affected premiums at all.

I do not have similar figures for the shipping and cruise line industry; but they will be large. It is not clear what material difference the removal of limits against sea passenger claims will make to shipowners’ premiums.

(c) *Catastrophic risks should not be borne by aviation alone.*

Professor Drion next refers to the notion that 'catastrophic risks' should not be borne by the industry alone. They are not any longer: the insurers bear the burden.

(d) *The necessity of the carrier or operator being able to insure against these risks.*

Drion next lists the necessity of the carrier or operator being able to insure against these risks. The carrier can, at reasonable cost.

(e) *The possibility for the potential claimants to take insurance themselves.*

Next, Drion mentions the possibility for the potential claimants to take insurance themselves. Travel insurance is widely available, but is relatively expensive compared with cover obtainable by the industry.

(f) *Limitation of liability was the 'quid pro quo' for the aggravated regime of presumed liability.*

Drion next refers to the point that limitation of liability was the 'quid pro quo' for the aggravated regime of presumed liability of the carrier.

(g) *The avoidance of litigation by facilitating quick settlements.*

Finally, Drion refers to the argument that the Warsaw regime has facilitated quick settlements and avoidance of litigation. In recent years this has not been the case: limitation regimes have been an increasing source of litigation.

Conclusion - action is required

In conclusion, therefore, the historical 'rationales' for the aviation and shipping limitation regimes have long disappeared, and the continued limitation of passenger claims by carriers are difficult to justify in 2001. The industry should recognize this and respond with proposals what will meet legitimate public and political concerns - before those who have captured the political area are successful in pressing for unlimited liability for every claim in every catastrophe.

The industry must act fast. Another serious incident – such as the "*Herald of Free Enterprise*" or "*Estonia*" – could occur at any time. The risk of another catastrophic marine tragedy occurring is very real and increasing:

- (a) the international maritime community have made slow progress in implementing recommendations made at the "*Herald*" Inquiry for bulkheads on the car decks;
- (b) there is continuing growth in the passenger cruise market as people increasingly have more time and money to spend on travel and holidays;
- (c) the size and passenger carrying capacity of ferries and cruise liners is continuing to increase;
- (d) there are now many more operators involved in this lucrative market and not all are well known.

Many members of the public are entirely unaware of the concept of

limitation of claims for air and sea travel and would be astonished that such systems – which many would regard as “unfair” if not positively “medieval” – were allowed to continue in the modern world. The politicians are worried about a public outcry – and political fall-out – if they do not act “by making those responsible, pay” (to quote one comment following the “Erika”).

Proposals

If I had the plaintiff’s brief and was acting as the barrister for the families of ‘the man on the Clapham Omnibus’, I would make the following arguments and proposals:-

Raising the *per capita* limit (to 250,000 or 300,000 SDRs) is not enough. It will not assist in addressing the fundamental iniquity of large deserving claims arising from e.g. loss of breadwinners or paraplegia or brain damage (which can be in the region of £1 million) being limited.

There is a strong case for scrapping *per capita* limits altogether. They operate capriciously and are unfair and outmoded in a modern, civilised society.

The shipping and insurance industry has yet to justify the need even for any *global* limit. There is a case that ‘ships are different’ because e.g. of enormous passenger carrying capacity of modern cruise liners – and that a *global* limit is needed as a ceiling for the really catastrophic “Titanic” incident. However, the insurance industry has yet to demonstrate a cogent case that a *global* limit is really necessary to enable them to offer insurance at a realistic premium.

If *per capita* limits are to be retained, there is no reason why a system should not be devised whereby the unused portions of funds are pooled and available to satisfy larger claims that exceed the *per capita* limit. Such a system would merely require that all individual claims were paid in full up to the *per capita* limit and any ‘un-used’ limitation sums put into a supplementary fund which would then be distributed *pro rata* to such claimants whose claims exceeded the *per capita* limit. This clever and elegant solution was the brainchild of Mr. Patrick Griggs, the President of CMI. This proposal was put forward by the UK Delegation at the informal IMO committee meeting in December last year but not taken up. I was there but clearly did not explain the proposal clearly or attractively enough to persuade the other delegates!

I hope that I have been sufficiently contravertial and though-provoking in this Paper.

Cases

R. v. Adomako [1995] A.C. 171;

Berner v BCP Airlines 346 F 2d 534 (1965) cert denied 382 US 98 (1966)

Boucher v Lawson (1733) Cas. Hard. 53 (95 ER 1116)

Goldman v Thai Airways in [1983] 1 W.L.R. 118

SS Pharmaceutical v Qantas [1991] 1 Lloyd’s Rep.

Tondirau v Air India (1977) RFDA 193.

PASSENGERS CARRIED BY SEA - SHOULD THEY BE GRANTED THE SAME RIGHTS AS AIRLINE PASSENGERS?

PAPER BY BERND KRÖGER

The legal committee of the IMO is currently discussing a revision of the Athens convention. That's why in the CMI we are also coming close to asking the question: "Should passengers carried by sea be granted the same rights as airline passengers? The same question could be asked about passengers carried by railway, by road transport or by inland waterways. The law of liability is not only different for sea and air transport: It is different for all transport modes. A satisfactory answer to the question posed at the beginning can only be found if one looks to some principles. Why is liability law different for the various transport modes? Does liability law reflect the differing interests of those who are active in the various markets? Are the interests of passengers identical to those? Have the views of society changed, meaning that public policy is demanding a balancing out of transport laws? Is this public policy the same in all regions of the world? What is the connection with the insurance markets?

I will attempt to present short arguments about some of these questions. We can examine how important the arguments are in the discussion which follows.

1. In passenger transport law, there are three different basic regulatory frameworks:

a) A liability for damages placed on the carrier, against whom the claimant has to prove a causal connection between the incident and the damage and also the actual fault of the carrier. We see this model in non-ship related accidents in passenger shipping.

b) A liability for the presumed fault of the carrier, against which the carrier has the burden of proof that he took all necessary precautions to avoid the accident. We meet this model in air transport law when the liability amount of 100,000 SDR is exceeded. We also find this model in passenger transport by sea in connection with ship-related incidents.

c) Strict liability with the exemption that the damage is due to the negligence of the damaged party or is wholly caused by the act or omission of a third party. This model is also found in air transport law.

These models are partly connected with maximum liability amounts and sometimes with unlimited liability. The air carrier is liable up to 100,000 SDR on the basis of strict liability, but above this on the basis of negligence with a reversed burden of proof. This concept is very close to strict liability in the second stage as well.

B. Kröger, Same rights as airlines passengers?

2. How can this fundamental divergence in liability law for passenger transport be explained?

It can be partly explained in that development of liability law for the different transport modes was undertaken by separate international institutions. A perspective covering all transport modes is difficult given this start position.

But the main reason for the divergence lies first in the differing estimates of potential risks of the individual transport mode, second in the economic background of the markets in which they move and third in political influence on liability clauses. Political influence was especially seen in air transport. There was considerable state pressure in two large markets which caused the airlines to increase their own contractual liability framework in the IATA Inter Carrier Agreement substantially over the limits of the Warsaw convention. The Montreal convention built on this “voluntary” regulation.

A further element of public policy has to be added : If a mode of transport becomes used as a mass transport method, payment of damages due to accidents becomes an issue for a society. In this case the financial and social security of the passengers is the primary goal.

The number of accidents in road transport is an example of this. Third parties are mostly involved in these. Passengers make up only a small number of those involved. The main idea of liability law in road transport is to protect non-participating third parties as much as possible. Paying their damages becomes a task for society. The liability rules of passengers are regulated as an annex under the principle of social safety. This means liability was set from the beginning at a suitably strict level.

In shipping and air transport this was different. The primary aim was not to regulate damages for third parties. Accident related damages of the passengers themselves was the main focus. The more that air transport developed into an essential transport mode for long distance flights and the more significantly the numbers of passengers transported from all levels of society increased, so the social dimension of air transport accident damages came to the forefront. In liability law this means strict liability for the transport carrier with only a few liability exemption clauses plus increased levels of maximum liability payments up to unlimited liability.

3. How are these developments reflected in sea transport? To answer this question you have to look firstly at the development of the markets. Intercontinental passenger transport with ocean going ships from point A to point B was completely replaced by air transport. Pure passenger transport is only carried out on short distance routes by ferries. For ferries there are two market sectors: Firstly national ferry transport with mostly small ships between a country’s mainland and nearby islands or between the islands. This often takes place inside the territorial waters of one country. This transport is regulated by national law. The public policy of the individual country decides whether the liability of the transport carrier is regulated as an individual liability under sea transport law or whether liability is brought to the same level as liability for land transport modes. If ferries are also able to transport

railway trains, parts of railway law can also apply. A parallel to air transport generally does not exist.

A second market is international ferry transport linking two nearby countries, such as the channel between England and France, in the Baltic Sea, in the Mediterranean or in the Asian archipelagos. In this case there is a requirement from shipping lines and the insurance market for standardised liability criteria, which can be used as the basis for creating insurance concepts and for price calculations. This transport requires international transport agreements such as the Athens convention. From the economic viewpoint, these ferry links are transport which replaces bridges. Parallels to air transport are not in the foreground.

A clear requirement for international regulation exists in the section of sea transport whose interests are in the foreground when the Athens convention and its revision are being considered - I mean the cruise shipping market. This is a market sector which is by the structure of the customers, by the basis for economic calculations and by the competitive markets part of the tourism industry. Transport between two points is not the main goal. Transport by sea as such is the main performance provided during the trip. This performance is combined with a large number of additional services such as hotel accommodation on board, a wide spectrum of restaurants, an extensive programme of sport, leisure or entertainment programmes and generous - possibly maximum - freedom of movement on board the ship itself. Passengers use sport facilities on board from tennis courts to free climbing on artificial rock walls and skating rinks. They use wide-ranging entertainment programmes including night bars and dancing floors. They use staircases, lifts and hotel rooms. They are living on board. This is an environment which cannot be compared to other transport modes. In this environment a large role is played by self-responsibility, self-decision making, accepting the danger of actions you take and naturally the taking out of accident insurance. These factors play a larger role than in passenger transport with an aircraft or in all other transport modes.

This market involves almost 300 cruise ships which have together about 250,000 beds. That means, the cruise market still offers a fewer number of beds than hotels in Las Vegas alone. The fact that around 50 newbuildings with bed capacity of around 100,000 will come into market soon, does not make a lot of difference to the result that this market represents only a small percentage of the total leisure market. Among the 15 top-ranking cruise shipping companies are six lines from the United States, two from the United Kingdom, two from Monaco, the fourth largest is from Singapore and one each comes from Greece and Cyprus. There are others in Europe and Asia. The main flag countries are the Bahamas, Liberia, Panama and with a large gap Norway. The three big players hold about 70% of the market. The market's main focus is in North America far and away the biggest, Asia and Europe.

Sceptics see the new ships which will arrive in the markets as a build up of over-capacity. This means that cruise shipping companies are already aiming at reaching cost leadership and holding cost leadership. This involves exploiting all productivity reserves and to fully exploit the economies of scale

B. Kröger, Same rights as airlines passengers?

of larger ships. Competition compels thoroughly-calculated price offers. Every cost position must be examined for possible savings. This includes insurance costs in the liability sector.

Competitor markets are not other sea transport markets, but markets in the leisure industry such as land-based holiday resorts. Their financial cost to cover liability risks is not orientated on the principles of air transport and not on the principles of a strict liability. Airlines play a role as feeder transport for these markets, not as a competitor during the sale of the product.

Finally, a special market is transport of passengers on cargo ships. This is an independent market sector without general cruise ship standards. This transport also offers passengers maximum freedom of movement. The passenger is in the first instance transported but he also lives on the ship. This transport mainly offers the experience of a sea voyage as such, linked with viewing the reality of life as a seaman. Both parties in the contract, carrier and passenger, are aware under the transport contract that residence on a ship whose role is primarily transport of freight and on which work is underway demands extra caution in behaviour on board to prevent accidents. This involves - more than the other transport categories - self-responsibility, taking action at your own risk and it is natural to take out your own accident insurance. These points are at the forefront of the transport contract. This contract is characterised not by the extensive requirement for social safety and compensation needed by the user of a mass transport mode, but taking responsibility for your own actions in the framework of an individual contract.

This is the social-economic environment in which the liability rules in sea transport must be embedded. In comparison with the transport of a passenger in an aircraft, the environment on board ships is completely different. It is not a case of “fasten your seat belt” if possible during the entire flight, but “enjoy yourself on board” which governs the behaviour of passengers.

4. What principles of liability would be best suitable for this special situation in shipping?

I believe it is the principles of the Athens convention which should be applied. They should in part be put into a more modern conception. This could satisfy the financial safety requirements of passengers without inappropriately changing the cost structure of the markets and the insurance capacity.

What does that mean?

a) In sea transport too, the burden of damages should be placed on the party which has primary responsibility for taking measures to prevent risks. This mainly applies to the shipping company. It should be responsible for all damages which are connected to the safety of its ships. The Athens convention provides in this area for liability for negligence with a reversed burden of proof. In practical terms such a proof of innocence would have little chance of success. The difference to strict liability is therefore small when practical factors are considered. Changing this liability for technical risks of ship

operation into strict liability appears to me to be appropriate. This would bring the liability of the sea carrier in line with the principles of product liability and in line with the fundamentals of liability law of other transport modes. Such a sharpening of liability would make the claims procedure even more simple. The market structures would not be changed. At the same time the most essential elements of liability in sea transport would be brought in line with liability in air transport. Really substantial damages in air transport are always applied to causes which are in the sphere controlled by the carrier. All other factual conditions are not comparable with sea transport.

b) Specially there is a difference in comparison to those sectors on board ships whose potential for danger is not related to technical ship operation but to prudent or imprudent behaviour of the passenger himself. To care for the technical condition of facilities on board for leisure activities lies in the sphere controlled by the carrier. The use of the facilities lies in the sphere of control of the passenger. Many services are only activated through the participation of passengers and their behaviour. To introduce strict liability of the carrier in these sectors would not justifiably reflect the distribution of risk responsibility. These non-ship related incidents should be handled on the basis of normal liability for fault. *Prima facie* evidence provides sufficient ease of proof for the claimant, without transferring the entire risk of liability onto the carrier. This is also appropriate for another reason: The maintenance of a normal duty of care, as laid down in the Athens convention, encourages both responsible shipowners and responsible passengers.

If the interest of individual passengers is aimed at avoiding having to prove negligence of the carrier or at gaining an extraordinarily high financial settlement for damage then the taking out of a relevant accident insurance is reasonable. The shipping company can also be given a duty to place a clause recommending this in its conditions of transport. This could be connected with the offer to assist in arranging such insurance. In the European legislation we find legal obligations for the carrier to inform passengers about the limits of liability. The European Union's regulation number 2027/97 of 9 October 1997, which regulates liability in European air transport, places a duty on carriers from third countries to give information when their liability limit is below specific European standards.

c) In comparing liability in air transport and sea transport you will find another interesting differentiation. The definition of damages in sea transport and air transport is not identical.

The Athens convention speaks of "damage suffered as the result of the death or personal injury to a passenger." The Montreal convention speaks of "bodily injury" instead of "personal injury". This is aimed at preventing claims for damages possible under some legal systems for mental injury, for loss of society, loss of companionship, loss of support, loss of inheritance and descendants' conscious pain and suffering. The preamble in Montreal refers to "the need for equitable compensation based on the elements of restitution." This again underlines that the definition of damages in this convention is

B. Kröger, Same rights as airlines passengers?

intended to be narrowly interpreted. There is nothing comparable in the Athens convention. In Athens the definition of damages is perceptibly wider. So it is once again clear that every convention is a result of compromises and can only be valued when taken as a whole. “Cherry picking” or taking over individual clauses of a convention to apply to other transport modes is not appropriate.

d) Whether a maximum level of liability should be retained in sea transport and how high that should be depends on two further problems: Firstly from the viewpoint of society, that is whether public policy generally permits the setting of maximum liability levels. Secondly this depends on the structure and capacity of insurance markets for sea transport.

Public Policies are not following the same way of thinking in different jurisdictions. Overall limitations of liability with different actual limits have therefore been accepted in other modes of passenger transport as well. The preconditions to test the breakability of the limits are not the same either. In various national laws it is accepted as a principle that an overall limitation should be regarded as a *quid pro quo* for introducing strict liability. If IMO therefore is inviting member states to ratify a new protocol to the Athens Convention on a world wide basis these principles have to be taken into account and political compromises will be inevitable.

To accept an overall limitation and to find compromises various questions have to be considered. Are we dealing with means of mass transportation or could the contract or the risk environment be individualised? What is the basis of liability? Is the liability connected with a special financial security system for the passenger by i.e. obliging the carrier to conclude a liability insurance? Is this insurance connected with a direct action in favour of the passenger? Is it reasonable for the customer to conclude an additional personal accident insurance? What are the consequences of a limited or unlimited liability especially for catastrophic risks for the structure, costs and prices on insurance markets?

These elements and maybe others taken together could justify sticking to an overall-limitation. Then this limit should be high enough to cover at least the average damage or the „normal” individual damage claim of a single passenger. In addition the limit should contribute to the demand to provide prompt compensation to passengers without having to rely on extensive judicial procedures. To achieve this one single overall limit would be more suitable than introducing a second or a third layer of a limitation fund connected with different precondition which have to be fulfilled for every layer. And finally it should be avoided to destroy the capacity and the structure of insurance markets if these markets are working efficiently and at reasonable costs.

Past experience shows that capacity of insurance markets grows according to demand for insurance cover. Experience has also shown that only a few cases of catastrophe are enough to reduce insurance capacity very rapidly or to make re-insurance markets so expensive that for economic reasons only limited use can be made of them. Even if insurance costs

comprise only a small part of operating costs, the argument that the customer always pays in the end is only theoretically correct. In reality, competition restricts the price of the product. Competition decides whether the costs of individual operators can be passed on in the market or not. With increasing capacity in shipping markets this is not the case.

In practice the opposite may happen and that could lead to attempts to achieve savings on insurance costs. So it is understandable when the legal committee of the IMO has expressed the demand that ship owners should be legally obliged to take out insurance against liability risks and have a duty to prove this to port state control and to flag states.

The further step, a direct action against the insurer who provided the insurance, is close here. This is increasingly found in newer international liability conventions. A direct action mostly concerns claims from third parties based on tort, not on contractual claims. For passengers, a direct action would make it possible to get economic and legal security for contractual claims. The Montreal convention does not recognise direct action. But introducing this in sea transport would strengthen the legal position of passengers. On the other hand a direct action could also make the claims procedure more complicated. According to the Athens convention, the contracting carrier and the performing carrier both have liability. The contracting carrier can be a land-based tour operator which does not own any ships. The performing carrier is the ship owner. Does it make sense to compel both to take out insurance and make both insurers open to direct action, or should attention be concentrated on the performing carrier? The insurance markets and the insurance structures can both be very different and the insurer can be situated in convention countries or non-convention countries. If it is possible to take direct action against every insurer in differing jurisdictions this would make a fast processing of claims more difficult. This especially applies when in cases of large damages a maximum level will be exceeded.

Liability insurance in passenger transport is also generally connected with deductibles. They reduce the premium levels and secure competitiveness in operating costs. Large shipping companies carry this risk themselves. Small companies cover the additional risk by purchasing insurance in open markets. This could create problems for direct action. Overall it can make processing of claims more difficult.

A direct action also means that the insurer must provide guarantees which can reach substantial levels and which may also have to be provided in differing places of jurisdiction, if claims against the insurer are to be made possible in different places of jurisdiction. This will place a burden on the capital and liquidity position of the insurer, will reduce financial capacity and also generally reduce the opportunities for cover on the market.

This is closely connected with the risk accumulation on board a single ship. The maximum capacity of a Jumbo jet is something like 400 passengers. The new Airbus, expected to be in service in 2006, will carry 555 passengers. Some cruise vessels can carry 2,000 passengers and the largest vessels entering service can carry more than 3,000 passengers.

Air passenger liabilities are generally insured in commercial insurance

B. Kröger, Same rights as airlines passengers?

markets with carriers often purchasing cover from different insurers for different levels of liability. The P & I clubs in the International Group provide sea passenger liability insurance for the vast majority of cruise lines and ferries.

But the numbers involved in maritime transport therefore represent an enormous insurance risk if concentrated on a single ship. The shipping industry has responded by developing an insurance structure which spreads the risk among shipowners through the mutual system. On the other hand the number of ships engaged in passenger trades is so relatively small that the exposure is not easily mutualized.

The proposals to amend the Athens convention to allow unlimited liability therefore are likely to have a significant impact on the ability of shipowners to obtain insurance. Certain countries have unlimited liability under their domestic law. But in practice liability is limited to the amount of available P&I cover. In 1998, the International Group of P&I Clubs introduced a limit on its cover of about 4.25 billion dollars. It is not difficult to imagine a scenario which would result in a large proportion if not all of that total insurance being taken up. This would create instability in the insurance market. In fact some P&I clubs have already decided not to admit passenger ships on the basis that the risk is too great and especially because the risk is not mutual in nature because passenger vessels constitute such a small percentage of the world's tonnage.

Against this background, international legislators must be urgently advised to very carefully balance these inter-connecting factors before an inappropriately high or even an unlimited liability is agreed on. A world wide ratification of such an agreement would also be very difficult to achieve because of the international problems connected with it.

To prevent the devaluation of the maximum liability limit through inflation, a simple process to revise the liability amount could be introduced as has been undertaken in other liability conventions.

e) Finally a further important argument remains. This is the question of whether a high or unlimited liability provides the necessary incentive for a carrier to do everything possible to prevent accidents. This means using liability as an incentive to increase the safety standards of ships. This is a plausibly attractive but theoretical argument. In shipping, especially in passenger shipping and cruise shipping, the prevention of damage through liability law is displaced by safety standards imposed by public law. The IMO has implemented a detailed network of safety regulations for passenger ships which are constantly implemented into technical developments. It is especially rescue equipment, training of crews for a crisis management and the compulsion to implement the ISM code for passenger ships. This legal framework is laid down by flag states and is controlled by port states. Compliance with these standards is generally a precondition for insurance cover. Over and above this there is little room for pressure to comply with safety standards using liability law. This is already taking place using other methods.

5. In conclusion I believe

a) The differing, factual, economic and social fundamentals of sea and air transport of passengers prevents a standardisation of liability law between these two modes of transport. This means that the 1999 Montreal convention cannot simply be applied to sea transport.

b) The liability fundamentals of the Athens convention could lead to appropriate results. The Athens convention could and should be supplemented with the following additional points:

- A strict liability could be introduced for damage which could result in the exclusive sphere of the carrier. These are the Athens convention's ship-related incidents (shipwreck, collision, stranding, explosion, fire, defect in the ship).
- A legal obligation of the ship owner to take out liability insurance with sufficient cover and to prove that this has been done to flag and port states could be linked to the convention.
- The introduction of a direct action against the insurer would strengthen the legal position of passengers but could make the processing of damage claims more complicated.
- For the reasons given the principle of a maximum liability limit should be retained. In view of inflationary devaluation of the maximum liability amount, a simple revision procedure could be added to the Athens convention.

c) It is reasonable to expect that passengers in the leisure markets would take out an additional accident insurance if in individual cases a higher economic interest should be covered. In the interest of consumer protection, it could be made a requirement of the carrier to add such an advisory clause in its conditions of transport and to offer to assist in arranging such insurance.

d) It is in the economic interest of the carrier as well to include in his offer to his customers an appropriate compensation for possible accidents. This must take into account the special factual and socio-economic factors of the passenger transport at sea. These are different from air transport. In the revision of the Athens convention, an appropriate balance must be found between the interests of the passengers, the carriers, the insurance markets. This is possible without removing the established structures in the market. Experience shows that only when the markets share in the results of deliberations by international legislators a new Athens convention will be successful.

Resolution of the Conference

RESOLUTION OF THE CONFERENCE

The Plenary of the Comité Maritime International (CMI) takes due note of the papers delivered by Mr. B. Kroger and Mr. C. Haddon Cave regarding the rights of the passengers under the Athens Convention, 1974.

REQUESTS the Chairman of the session on the Athens Convention to prepare a report for submission to the Executive Council summarising the discussions at the meeting,

AND FURTHER REQUESTS the Executive Council to submit the report (with the papers attached) to the IMO Legal Committee as a document to be utilised during preparation of the proposed Protocol to the Athens Convention 1974.

SALVAGE

FIRST REPORT ON UNESCO DRAFT CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

1. The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) has been considering a draft convention on the Protection of Underwater Cultural Heritage since 1995. UNESCO already has held three meetings¹ of governmental experts to develop a draft convention and a fourth session is scheduled to take place in Paris on March 26-April 6, 2001. In the event a final text emerges from the fourth meeting of governmental experts, it is expected that it would be submitted to the 31st General Conference of UNESCO in October 2001 for approval.

2. A copy of the Draft Convention in its current form is attached as Ex. 1.² The Draft Convention includes a proposed Annex which is also attached.

3. There was no clear consensus in favor of the Draft Convention or Annex at the July 2000 meeting of governmental experts and no vote was taken on any part of the documents. Predicting whether an agreed text will emerge from the fourth meeting would be guess work at this point. It can be expected, however, that a strong effort will be made to complete a draft convention at the fourth meeting.

4. The Draft Convention contains numerous provisions which would have an impact on maritime law and are of special interest to the CMI. In particular, the law of salvage and finds would be abolished with respect to property covered by the Draft Convention. In addition, the United Nations Convention on Law of the Sea (“UNCLOS”) would be impacted.

¹ The first was held at UNESCO Headquarters in Paris from 29 June to 2 July 1998; the second was held from 19-29 April 1999; and the third was held from 3-7 July 2000.

² The Draft Convention was issued by UNESCO in July 1999 as the basis for the discussions held in Paris in July 2000 and will be the basis for the upcoming discussions on March 26 - April 6, 2001. A prior version of the Draft Convention is printed in CMI Yearbook 1999 at 336-346, along with the Synopsis of Replies to a Questionnaire circulated by the IWG. The Draft Convention includes numerous provisions which have been proposed by one or more delegates in alternative versions, some of which are in square brackets or in footnotes. To understand the drafting status of many of the sections of the Draft Convention and Annex, it is essential to read the Final Report of the meeting (Ex. 2), which includes a summary of the discussions, as well as reports from three separate working groups.

First Report on UNESCO Draft Convention

5. The purpose of this report is to summarize the potential impact of the Draft Convention on areas of interest to the CMI and recommend a course of action.

6. It is of particular importance that the CMI become an active participant in the debate concerning the Draft Convention. Although the Draft Convention and Annex would have a significant effect on maritime law throughout the world, maritime law associations have had little input in the deliberations which have been held so far.³ A substantial number of the delegates who have participated at the UNESCO meetings of governmental experts have their background in marine archaeology, museum sciences or the protection of the marine environment. We consider it of great importance that experts in maritime law should also be involved in the discussions.

7. Although we fully support the goal of protecting and preserving underwater cultural heritage which is of historical, cultural or archaeological significance, we disagree with the basic premise of the Draft Convention which would abrogate the law of salvage. In our view, the law of salvage is not incompatible with the goals of protecting and preserving underwater cultural heritage. To ensure that this position gains international recognition on a uniform basis, we support adoption of the Brice Protocol to the 1989 Salvage Convention, the text of which is reprinted in CMI Yearbook 2000 at 412-414.

8. It is recommended, therefore, that the CMI adopt a resolution to be presented to the Legal Committee of IMO recommending adoption of the Brice Protocol.

Background

9. International recognition of the importance of taking steps to protect underwater cultural heritage is reflected in UNCLOS, which provides in Sections 109 and 303 as follows:

*Article 149**Archaeological and historical objects*

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

*Article 303**Archaeological and historical objects found at sea*

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

³ As far as we know, only the Maritime Law Association of the United States has issued a position paper concerning the Draft Convention. A copy of that document is annexed as Ex. 3.

Salvage

2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

10. As indicated in the Synopsis of replies to the IWG questionnaire, many governments already have enacted local laws intended to protect and preserve UCH. There is no uniform international agreement or understanding, however, on numerous critical issues, including:

- a) What underwater property should be preserved and protected?
- b) How should it be determined which underwater property should be preserved and protected?
- c) Should underwater property be preserved in situ or should it instead be brought to the surface and taken ashore?
- d) Who should decide these questions and many other related issues, especially with respect to property which is located in international waters?

11. The UNESCO Draft Convention has its origins in a draft treaty originally prepared by the International Law Association ("ILA"). The ILA is an international organization of academic international law specialists, acting in their individual capacities. A draft convention was completed by the ILA in 1994 and submitted to UNESCO in 1995. In a report issued on March 23, 1995, UNESCO's Executive Board considered the feasibility of drafting a treaty to protect underwater cultural heritage. At the 1997 UNESCO General Conference, authorization was given to proceed with the project, with the goal of completing a draft convention by 1999.

12. The Third UNESCO Meeting of Governmental Experts was held to implement Resolution 30 C/26 adopted by the General Conference of UNESCO (Ex. 4) and further to Resolution 54/31 (paragraph 30) of the United Nations General Assembly. (Ex. 5).

13. The main provisions of the current Draft Convention and Annex include the following:

- a) One of the key provisions of the Draft Convention concerns the definition of underwater cultural heritage. The current draft reads as follows:
 "1. (a) 'Underwater cultural heritage' means all traces of human existence [which have been] partially, totally or periodically [situated] underwater for at least 100 years [or are 100 years old and underwater], including:

First Report on UNESCO Draft Convention

- (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural contexts; and
 - (ii) wreck such as a vessel, aircraft, other vehicle or any part thereof, its cargo or other contents, together with its archaeological and natural context.
- (b) Notwithstanding the provision of paragraph 1(a), a State Party may designate certain traces of human existence within its jurisdiction as underwater cultural heritage even though they have been underwater for less than 100 years.”
- b) The Convention would apply in the internal waters of any country, as well as in the Exclusive Economic Zone, the Continental Shelf and the High Seas. The Draft Convention also includes several provisions for the sharing of information about UCH and enforcement .

14. No consensus was reached on the definition of UCH at the third meeting of governmental experts. In its current form, however, the Draft Convention would apply to any shipwrecks, aircraft or cargo which have been underwater for at least 100 years.

15. The proposed Annex to the Draft Convention sets out detailed implementing procedures. The Annex is based on a charter prepared by the International Council on Monuments and Other Sites (“ICOMOS”). The Annex includes a key provision that “the protection of underwater cultural heritage is best achieved through in situ preservation, which should be considered as the first option.” The Annex bars the commercial sale of any objects of underwater cultural heritage. The Annex has requirements concerning project design, work, funding, documentation, curation and related topics.

16. Impact on Maritime Law

The main impact of the Draft Convention on maritime law would be to abolish the application of the law of salvage and finds with respect to UCH. A principal issue to be considered by the CMI is whether this approach is desirable or necessary. In this regard, the replies to the questionnaire circulated by the IWG are instructive.

17. The Draft Convention may also impact on UNCLOS, depending on which version of the text is approved. Strong concerns have been voiced by some governments that the Draft Convention seeks to create what has been described as an underwater cultural heritage zone that grants states new rights which go beyond or are in conflict with UNCLOS. The debate on this point has been one of the main stumbling blocks which has prevented completion of the Draft Convention.

18. The Brice Protocol

One possible alternative or companion to the Draft Convention is to amend the 1989 Salvage Convention to include provisions designed to protect and preserve UCH. A proposal along these lines was suggested by the late Geoffrey Brice, Q.C. A copy of the Brice Protocol is included in CMI Yearbook 2000 at 412-414. An amendment of the Salvage Convention along

Salvage

these lines would appear to be consistent with Art. 303 of UNCLOS. The Brice Protocol is intended to create financial incentives to those who are engaged in salvage operations to preserve and protect what it defines as “historic wrecks.” Thus, in determining what award, if any, a salvor would be entitled to receive with respect to an historic wreck, the factors to be taken into account would include the extent to which the salvor has taken appropriate steps to preserve and/or protect the property in accordance with internationally recognized practices.

19. A direct comparison of the Draft Convention and the Brice Protocol would be very complex and go beyond the scope of this initial report. There are key conceptual differences. For example, whereas the Draft Convention would entirely abrogate the law of salvage with respect to UCH, the Brice Protocol starts from the opposite premise and embraces the idea that UCH can be protected and preserved effectively by salvors by creating financial incentives for them to do so. Another point of comparison concerns in situ preservation. Whereas this is stated to be a preferred option under the Draft Convention, salvage law includes the basic premise that property should be saved. We can see no reason in principle why in situ preservation could not be the result under the Brice Protocol if widely accepted archaeological practices so dictated and appropriate financial incentives can be devised to reward salvors for locating, protecting and preserving the property underwater.

20. Recommendation of the IWG

It is the recommendation of the IWG that the CMI recommend adoption of the Brice Protocol by IMO with a view towards its adoption as an amendment to the 1989 Salvage Convention. In our view, the Brice Protocol should be adopted whether or not the UNESCO Draft Convention is ever finalized and approved. We consider it a matter of high importance that the protection and preservation of UCH become a recognized and accepted goal of salvage law on a uniform basis throughout the world. The Brice Protocol offers a well-conceived and realistic basis for accomplishing this goal.

Respectfully submitted,

Professor Eric Japiske
Chairman of the Group
John D. Kimball
Rapporteur

WORK PROGRAMME OF THE CMI

RESOLUTION OF THE CONFERENCE

The Plenary of the Comité Maritime International (CMI) having taken due note of the Report of the CMI Planning Committee.*

REQUESTS the Chairman of the Planning Committee to invite the Executive Council to consider the Committee's report and implement its recommendations when the availability of time and funds makes this possible.

* The Report of the CMI Planning Committee is published in Yearbook 2000-Singapore I at p. 107.

**THE WORK OF THE CMI
AFTER
THE SINGAPORE CONFERENCE**

ISSUES OF TRANSPORT LAW

- **REPORT OF THE FIFTH MEETING**
- **REPORT OF THE SIXTH MEETING**
- **DRAFT OUTLINE INSTRUMENT OF 31 MAY 2001**
- **CONSULTATION PAPER OF 31 MAY 2001**
- **SYNOPSIS OF THE RESPONSES TO THE
CONSULTATION PAPER AND OTHER COMMENTS
ON THE DRAFT OUTLINE INSTRUMENT**
- **CMI DRAFT INSTRUMENT ON TRANSPORT LAW**

REPORT OF THE FIFTH MEETING OF THE INTERNATIONAL SUB-COMMITTEE ON ISSUES OF TRANSPORT LAW* **

LONDON
16th to 18th July 2001

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)
 Karl-Johan Gombrii (Vice Chairman)
 Prof. Michael F. Sturley (Rapporteur)
 Prof. Lars Gorton (Sweden; member of the Working Group)
 Prof. Gertjan van der Ziel (The Netherlands; member of the Working Group)
 Prof. William Tetley, Q.C. (Canada)
 Tony Young (Canada)
 Prof. Yuzhuo Si (China)
 Dihuang Song (China)
 Li Zengli (China)
 Uffe Lind Rasmussen (Denmark)
 Patrice Rembauville-Nicolle (France)
 Bernd Kröger (Germany)
 Prof. Francesco Berlingieri (Italy)
 Prof. Tomotaka Fujita (Japan)
 José Maria Alcantara (Spain)
 Capt. C.F. Lüddecke (Switzerland)
 Anthony Diamond Q.C. (UK)
 Robert Howland (UK)

* The Draft Report of the Fourth Meeting, published in the CMI Yearbook 2000 at p. 263, has been approved by all Delegates present at the meeting.

** In order to facilitate the consultation of this Report, the pages where individual articles of the Draft Instrument are discussed are indicated below:

article	page	article	page
1.8	293	10.3	268-271, 273-274, 278
2	271	10.4	274-275
4.4	287-295	11.1-2	275-277, 279-281
5.2	296, 301-302	11.3	279-280
6.1	295-301	11.4-5	281
6.3	302-304	12	282-285
10.1	272, 275, 278-300	13	285

George F. Chandler, III (USA)
Vincent M. De Orchis (USA)
Chester D. Hooper (USA)
Jernej Sekolec (UNCITRAL; member of the Working Group)
Christopher Welsh (European Shippers' Council)
Robert Lewis (FIATA)
Kay Pysden (FIATA)
Kurt J. Schimmelpfeng (FIATA)
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)
Nicholas DiMichael (National Industrial Transportation League)
Peter Gatti (National Industrial Transportation League)
Donald W. Chard (UK Chamber of Shipping)
Christopher L. Koch (World Shipping Council)

Mr. Beare called the meeting to order at 11:15 a.m. on Monday, 16th July.

Mr. Griggs welcomed the delegates, and thanked them for their hard work on this project. He noted that the current draft was finally looking more like a finished product, although there was still a lot of work to do before December when the CMI Executive Council would need to approve the final draft before sending it on to UNCITRAL. The UNCITRAL Working Group is scheduled to meet in April, but the CMI's involvement in the project will continue. A CMI delegation will participate in the UNCITRAL proceedings, and this International Sub-Committee will continue to meet in order to assist that delegation.

Mr. Griggs introduced the four new observers that were present for the first time at this meeting: The European Shippers' Council, the UK Chamber of Shipping, the World Shipping Council (representing container carriers trading in and out of the United States), and the National Industrial Transportation League (an organization of U.S. shippers). The International Group of P&I Clubs had objected to the World Shipping Council's invitation, but it was consistent with the Singapore Resolution to consult those who are affected by the International Sub-Committee's work.

Mr. Sekolec reported that UNCITRAL had completed its annual session the previous Friday, 13th July, and that transport law had been discussed. The Commission's broad conclusion was that this topic should be added to the agenda as the result of the co-operation with the CMI. The Commission felt that the focus should be on the port-to-port aspects of the project, but that the door-to-door aspects should be studied. The Commission emphasized the importance of consulting broadly. Many of the UNCITRAL delegates had expressed their appreciation, both publicly and privately, for the vigor with which the CMI was undertaking this project. The continued existence of the International Sub-Committee was welcomed in order to facilitate the CMI's on-going participation in the project.

Report of the fifth meeting

He added that UNCITRAL's Transport Law Working Group was scheduled to meet for two weeks, from 15th to 26th April, 2002, in New York. Future meetings will be one week each. The second meeting, in the autumn of 2002, will be in Vienna.

During the UNCITRAL session, the view had been expressed that this project should be limited to topics in which there is not an existing international convention, but the meeting's prevailing view was that this limited approach would not work. It was accepted that the project should proceed as it has been conceived by this International Sub-Committee.

Mr. Sekolec concluded by expressing UNCITRAL's thanks to the CMI for all of its work on this project thus far.

Mr. von Ziegler, who had attended the relevant portion of the UNCITRAL meeting, added that many of the UNCITRAL delegations had been briefed by their ministries, but that some of the questions that were asked revealed that the delegates from some countries were not familiar with the issues. He stressed how important it was for the national Maritime Law Associations to establish contacts with their government representatives.

Mr. Beare invited comments from the delegates.

Mr. Alcantara explained the Spanish Maritime Law Association's contacts with the Spanish government on this subject.

Mr. Beare proposed that the sixth meeting of the International Sub-Committee be held on 12th and 13th November. He asked that the dates be confirmed, and a place chosen, during the present meeting.

He reminded the delegates that the draft report of the fourth meeting had been published in the Singapore Yearbook, as a draft, and invited comments or corrections. When no one responded, he suggested that delegates make any comments or corrections by the end of the day. Otherwise, the report would be treated as adopted.

He explained that the draft of the Instrument had been revised in accordance with the conclusions of the Singapore Conference. It had been circulated as a basis for consultation along with a consultation paper. The Working Group will prepare a new draft in October. That will be titled the "provisional final draft." He hoped that the International Sub-Committee would discuss and approve this provisional final draft, with such amendments as are necessary, at the November meeting.

The Singapore Resolution had specifically called for provisions to facilitate electronic commerce. Chapter 2 of the new draft responds to this call. Johanne Gauthier, as the chair of the Electronic Commerce Working Group, prepared a paper on the subject that has been circulated to the delegates. The Singapore Resolution also called for covering the possibility of door-to-door coverage. New article 4.4 responds to this call.

Mr. Beare proposed that the International Sub-Committee should first discuss chapters 10-13, which have not previously been discussed in detail. Then the International Sub-Committee could discuss the door-to-door issues, the basis of liability, and such other issues as time permits. He anticipated that the meeting would conclude by Wednesday afternoon.

He explained that some of the square brackets in the previous draft had

been eliminated, but that some remain. UNCITRAL is not looking to receive a draft to be “rubber stamped.” Major policy choices will be left for UNCITRAL to make, which means that some square brackets will remain in the CMI’s final draft.

The draft that is sent to UNCITRAL will include commentary, but it will be shorter than the present commentary. There will be no need to include the “historical” material, which explains (for the benefit of this International Sub-Committee’s delegates) how a particular provision developed.

Mr. Beare asked if this agenda was acceptable. [No disagreement was expressed.]

Mr. Chandler expressed his disappointment that the Electronic Commerce Working Group had not been able to meet in person to discuss this project, and his hope that it would do so soon.

Mr. Beare expressed his sympathy with **Mr. Chandler**’s concerns, but noted that it was not the role of this International Sub-Committee to direct how the Electronic Commerce Working Group should conduct its business.

Mr. Beare opened the discussion of chapter 10. He explained that after the Singapore Conference, following consultation with **Prof. Sturley**, **Prof. van der Ziel**, and other members of the Working Group, he had invited Prof. Francis M.B. Reynolds to join the drafting team. He was happy to report that Prof. Reynolds had accepted this invitation. **Mr. Beare** noted that **Prof. van der Ziel** had taken a particular interest in chapter 10.

Mr. Chandler observed that there was a contradiction between article 10.1 (which is limited to a consignee “who claims the goods from the carrier”) and article 10.4.1 (which does not explicitly limit “consignee”). He feared that a consignee who is stranger to the contract may become liable.

Mr. Alcantara made the same point from the civil law perspective. He added his view that the carrier cannot part with responsibility for the goods without “delivery.”

Mr. Diamond noted that he saw a problem here that he would revisit in his comments on chapter 11. Chapter 10 distinguishes between two situations — when a negotiable transport document has been issued, and when a negotiable transport document has not been issued. In his views, there are at least three situations that should be addressed: when a negotiable bill of lading has been issued, when a document has been issued that specifies that it is not negotiable, and when a waybill has been issued that may be transferable (or at least does not prohibit transfer). He thought that it made little sense to cover only the two situations. He thought that it was worse that the draft made non-transferable documents into documents that may be transferred. He mentioned article 10.3.1(iii) as an example of this concern.

He also found the drafting to be inelegant. It was unclear as between shipper or controlling party, for example. But this was not simply a problem with the drafting. He thought it necessary to return first to principles. Until it is known what the draft is trying to accomplish, it would be impossible to do the drafting.

He also wished to add a few words about article 10.3.2. If the intention in this article is to cover a negotiable bill of lading, then the article should say so.

Report of the fifth meeting

He thought that the entire draft was rooted in the concept of a paper document. The term “document” usually means a writing on paper. It is not the same thing as a “contract.” He agreed with Johanne Gauthier that chapter 2 is insufficient for dealing with electronic commerce.

He argued that the concept of delivery without the surrender of the bill of lading is a subject on which the law is well-established. In his view, it would be foolhardy to replace this established jurisprudence with the single sentence in article 10.3.2, although he did not object to the sentence so far as it goes. Too much is left uncovered.

He endorsed the sentence in the commentary that “it is for discussion whether . . . the duty to deliver against a negotiable document should be further explained.” Of course this issue should be addressed. It greatly affects those who are not represented here, namely banks. If a document is not bankable, it will not matter what this Instrument says because it will not have any impact.

Finally, he circulated a draft paper that he had prepared on behalf of the British Maritime Law Association, commenting on chapter 11. He stressed that it was presently only a draft.

Mr. Beare invited **Mr. Diamond** to specify which concepts needed to be clarified before drafting would be possible. This would enable the draftsmen to have some guidance.

Mr. Diamond proposed to postpone that task until after the International Sub-Committee’s discussion of chapter 11, which is where the real difficulties arise.

Mr. Chandler observed that part of the problem here lies in the very narrow view of a “bill of lading” under English law. Under U.S. law, for example, a non-negotiable bill of lading is still a “bill of lading.” This difference is one of the reasons why the present draft has moved away from using the term “bill of lading.”

He explained that it was important to recognize that the trade does not use the term negotiability to mean transferability. It is possible to transfer the right of control without conveying title to the goods. A receipt at a car park, for example, can be “transferable” without being “negotiable.” A CMI sea waybill allows for transferability without negotiability. The ICC’s Uniform Customs and Practices also recognizes this distinction, permitting the parties to finance a transaction using a transferable sea waybill.

Prof. Tetley made three general observations. First, expanding the scope of the Instrument beyond liability issues to include issues traditionally covered by Bills of Lading Acts is a major task. Second, the International Sub-Committee should recognize that preserving the right to opt out is a possible option. Third, when moving beyond the Hague, Hague-Visby, and Hamburg Rules, it is important not to change things too drastically. It must be possible to convince people to make the change.

Prof. Gorton asked **Mr. Chandler** if U.S. law made a distinction between a negotiable document of title and non-negotiable document that could be transferred.

Prof. Berlingieri noted that when different meanings are given to the same word it is difficult to understand what is intended. For example, a bill of lading

is never a contract of carriage, despite what the British Maritime Law Association says at the top of page 2 of its draft submission. It is important to agree on meanings. He suggested that a small group should address this problem.

Mr. Diamond declared that English law recognized a difference between “negotiable” and “transferable.” He advised the International Sub-Committee to ignore transfer of property issues, as agreed in Singapore. In this context, the true issue appears to be the ability to transfer the right to take delivery (constructive possession) of the goods, and also the transfer of liabilities.

Mr. Alcantara welcomed **Prof. Berlingieri**’s suggestion.

Mr. von Ziegler, speaking as civil lawyer, thought that a contract is always transferable. Negotiability goes beyond that.

Mr. Chandler explained that the U.S. concept is essentially what **Mr. von Ziegler** has described, and that this is how U.S. law departs from the English concept. A non-negotiable document does not transfer title. It is essential to get beyond these differences. The trade is already using non-negotiable documents to transfer rights.

Mr. Beare invited **Mr. Diamond** to summarize his point about article 10.3.2, setting aside his electronic commerce points.

Mr. Diamond explained that he embraced the concept that when a contract is evidenced by a traditional bill of lading, then the carrier must deliver the goods against the production of at least one copy of the bill of lading. The International Sub-Committee needs to decide if this subject is in or out. He argued that the present draft is so skeletal that it will only invite litigation. It seems designed to offer some protection to the carrier, but it does not explain enough. When does the carrier have not only the right but also the duty not to deliver? To fully answer these questions, it would be necessary to go back to first principles and start from scratch. The CMI would not be thanked for doing that.

Mr. Hooper proposed including a provision comparable to the U.S. Uniform Commercial Code article governing stale checks (U.C.C. § 4-404), under which a bank is entitled but is not obligated to pay a check that is more than six months old.

Mr. Rasmussen expressed his general support for these provisions. They could be extended. Article 10.3.2(ii), for example, could say what happens if the carrier follows the instructions. (The carrier should be free from liability in that case.) Of course, the Instrument cannot cover every detail and should be careful not to try.

Mr. Diamond, commenting on article 10.3.2, declared that under a conventional bill of lading the holder has the right of control. There is no need to deal with that scenario any further. It makes no sense to give the shipper any further rights. The 1992 British Carriage of Goods by Sea Act does not give the carrier a right to go against the shipper if the holder does not take delivery.

Mr. Alcantara agreed that provisions such as these were unneeded for negotiable bills of lading.

Mr. Beare invited **Prof. van der Ziel** to respond.

Prof. van der Ziel explained that the previous draft did not contain a provision comparable to article 10.3.2. The commentary had attempted to

Report of the fifth meeting

provoke discussion. This draft had been prepared without the benefit of any clear prior discussion.

Mr. Beare suggested that from time to time the Rapporteur should sum up the instructions that the International Sub-Committee was giving to the drafting team. He hoped that this would advance discussion. All comments made here would be considered tentative, with delegates retaining a right to revise their views in written comments (which would be due by September 28). He also noted that written comments would be circulated as received so that others could also respond to them. Further revisions of the written comments would be permitted.

Prof. Tetley suggested that written comments should be posted on the CMI web site.

Ms. Pysden apologized that FIATA would have difficulty submitting final views before October.

Mr. Beare explained that it would be impossible to extend the deadline. The Working Group must have comments in hand before its meeting on 4th October. This accelerated schedule was necessary to meet UNCITRAL's end-of-year deadline, which in turn was necessary in order to circulate documents (in all six U.N. languages) in time for the April meeting of UNCITRAL's Working Group.

Mr. De Orchis noted that, as lawyers, we try to develop systems for the benefit of the industry. Industry representatives are present at this meeting who have not attended earlier meetings. He particularly welcomed their comments.

The meeting adjourned for lunch at 12:50, and reconvened at 2:20.

Mr. Beare announced that the Chinese delegation had distributed a tentative paper for this meeting's delegates. He then invited **Mr. Diamond** to address the electronic commerce issues.

Mr. Diamond identified a general drafting issue—how to draft an instrument to address traditional paper documents *and* electronic commerce. He thought that the current draft was too closely tied to paper documents. Chapter 2 by itself was insufficient. Johanne Gauthier, as chair of the Electronic Commerce Working Group, appears to agree with this view. He suggested that it might be better to start with concepts, such as “contracts,” “contract particulars,” etc.

Mr. Beare noted that from the beginning it had been envisioned that the final Instrument would accommodate paper documents and electronic commerce.

Mr. Howland agreed with Johanne Gauthier's statement about the inadequacy of chapter 2. You cannot have a “blanket conversion kit” that will “electronic-fy” every provision. Some provisions in the draft are designed for traditional paper documents, and should not be converted. It will be necessary to draft parallel provisions that specifically address electronic commerce. This is not hard; it just needs drafting. When the fundamental issues have been resolved, the Electronic Commerce Working Group can easily propose the necessary drafting to accomplish the electronic commerce goals.

Mr. Beare asked whether anyone disagreed with that proposition, leaving aside the particular problems of chapters 10-12.

Mr. Diamond was troubled by the duality of drafting teams.

Mr. Beare clarified that this International Sub-Committee's drafting team will be the final drafters, relying on input from the Electronic Commerce Working Group's drafting team.

Mr. Chandler added that **Prof. van der Ziel** is a member of both teams.

Prof. van der Ziel felt reassured that **Mr. Howland** thinks this will be an easy task.

Mr. Beare returned to chapter 10. He noted that this meeting had heard one comment that the draft is basically sound, and **Mr. Diamond's** comments. He invited comments that will enable the Rapporteur to summarize instructions for drafting in October.

Prof. Berlingieri referred to article 10.1. Like **Mr. Alcantara**, he had difficulty understanding when the goods would remain with the carrier after delivery. In the second sentence, he asked what "at risk" means. Under the civil law, the goods are always at the owner's risk. Liability for any loss is a different matter. Finally, he wondered how the last sentence relates to the rest of article 10.1. Why does the carrier need "defenses and limitations"?

Mr. Hooper confessed that he also had trouble understanding this provision. He asked if it had been intended to address constructive delivery.

Mr. Young observed that there are situations in which the carrier can deliver the goods without any surrender of possession.

Mr. Chandler added that terminals and stevedores are sometimes controlled by other parties. The carrier may have delivered to the terminal, but not to the consignee. He wondered if this provision applied when the carrier controls the terminal.

Prof. van der Ziel explained that article 10.1 must be read in conjunction with article 4.1.3, which sets out when the responsibility of the carrier ends. That time limit is somewhat artificial. Sometimes the carrier's responsibility has ended, but the carrier still has possession of the goods. The final sentence is necessary when the judge is not prepared to accept the constructive delivery solution.

Prof. Berlingieri suggested that if this is the intent then the draft should say that goods are not under the carrier's responsibility any more. It should not use the terms "risk" or "account."

Mr. Alcantara felt that this provision is most unfortunate.

Mr. Hooper expressed the view that when constructive delivery has occurred but the terminal is in possession of the goods, then the terminal is the agent of the consignee.

Mr. Diamond was grateful to **Prof. van der Ziel** for his explanation of this provision, but shared **Prof. Berlingieri's** doubts about whether the clause works as drafted. This will be a fault-based system. After constructive delivery, the carrier should still be liable if it is at fault (and not otherwise). The last sentence would signal to any judge that the carrier is liable for its negligence, at least. Perhaps the draft should allow the carrier to store the goods with a warehouse without making the warehouse the carrier's agent.

Report of the fifth meeting

Thus the carrier escapes liability for the warehouse's negligence, but not for its own.

Mr. Chandler agreed that the last sentence shows that a bailment has been created. He was concerned that the discussion seemed to assume there had been an abandonment. Sometimes the delay is due to port congestion. Perhaps the draft should be limited on this point to the true abandonment situation.

Mr. Rasmussen viewed the situation here as one in which the goods are still in the custody of the carrier, but beyond the period of responsibility. The solution should be that the carrier may be liable for any loss or damage, but not under the terms of this convention.

Mr. Gombrii thought that the draft could go beyond the scope of the contract, but not beyond the scope of the convention. The last sentence is comparable to the Himalaya situation: if the carrier is sued outside the scope of the contract, it still gets its defenses under the convention.

Mr. Rasmussen disagreed, arguing that this was not a Himalaya situation.

Prof. Song suggested that the concept of constructive delivery is too difficult. It would be easier to stay with physical delivery.

Prof. Berlingieri argued that carriers should be either in or out; they should not get the benefits of the convention without assuming the duties of the convention.

Prof. Gorton replied that, in a case beyond the scope of the contract, if the parties create a bailment then liability can be excluded by contract.

Mr. Diamond suggested that perhaps the carrier should be allowed to have its cake and eat it, too. When the consignee does not show up to take delivery of the goods, the carrier should be allowed to store the goods with a third party on reasonable terms without liability. But if a court finds that the carrier is liable, then it should be on convention terms.

Mr. Rasmussen saw these as different situations. When delivery occurs, there is no further liability.

Prof. van der Ziel clarified that the draft addresses a situation covered by the contract when the consignee defaults. This is a situation beyond the period of responsibility, but not outside of the convention.

Mr. Beare felt that there was as yet no clear mandate for the drafting team.

Mr. Diamond did not object to article 10.2, but wondered if it would have legal effect.

Prof. Berlingieri asked whether, in article 10.3.1, it would be more appropriate to refer simply to the "controlling party," recognizing that this will often be the shipper.

Mr. Schimmelfeng observed that the shipper may well have transferred the right of control.

Mr. Chandler suggested that article 10.3.1(iii) may be circular.

Mr. Diamond agreed with **Prof. Berlingieri's** suggestion.

Mr. Alcantara preferred to use the familiar term "shipper," and avoid the esoteric.

Prof. van der Ziel explained the reference to article 7.7, which might be seen as a "performing shipper" definition. The person identified in article 7.7 might be the contractual shipper, or it might be a different person.

Mr. Chandler was troubled because he felt that “shipper” had been defined once, but that the definition had been altered later. It would be better to define the term once, including the article 7.7 gloss, at the beginning.

Prof. Tetley recalled his earlier observation that problems arise when covering Bill of Lading Act issues. The term “shipper” needs to have different meanings in different contexts.

Mr. Chandler replied that this demonstrated all the more clearly why it was important to define the term carefully.

Prof. Tetley agreed.

Prof. Gorton asked whether the International Sub-Committee had agreed to retain the negotiable transport document concept and terminology.

Mr. Beare thought that it had been agreed to retain the concept, but recalled the suggestion that a small group should meet after this meeting to consider the terminology.

Mr. Diamond urged that the interrelationship between article 10.3.1 and chapter 11 needed to be considered carefully. He thought that the word “consignee” was not being used very clearly.

Mr. Beare invited discussion on article 10.3.2.

Mr. De Orchis proposed that in article 10.3.2(i), “production” should be “production to the carrier.” In the second sentence, the draft should add that the remaining originals will stand void. Omitting this language would be an invitation to litigation.

Mr. Alcantara argued that the carrier should not have a duty to find the consignee. If no one claims the goods, the carrier should have its rights under article 10.4.

Mr. Chard asked how the draft could cover the situation in which the carrier is asked to deliver the goods without production of the bill of lading. It is necessary to protect the carrier and still enable the consignee to get the goods when it needs them.

Mr. Rasmussen proposed that if article 10.3.2(iii) is included, it would be better to delete the final clause (“unless such holder did not have or could not reasonably have had knowledge of such delivery”).

Mr. Diamond favored including the last clause of article 10.3.2(iii). The draft has tried hard to give carriers some protection in this context, and this is best that can be accomplished. Defining a “stale bill of lading” is difficult, but the drafters have done their best with the presumption that the bill of lading is stale after the delivery of the goods. Leaving it there would be unfair.

Mr. Chandler agreed with **Mr. Diamond**. He noted that there is also a hidden liability here. In a string sale, an intervening bankruptcy could give a third party rights against the carrier.

Mr. Diamond was still unhappy about the phrase “production of the negotiable document” in article 10.3.2(i). At the very least, it should be “surrender of the negotiable document.” The carrier should be liable if it delivers without demanding surrender, and it should be protected if it delivers according to the rules.

Mr. Chard supported **Mr. Diamond**

Mr. Beare invited discussion on article 10.4.

Report of the fifth meeting

Mr. Chandler suggested that article 10.4 should have a label, such as “Abandonment of Cargo,” to signal what it is addressing (and that it is not addressing simple port delays).

Prof. Berlingieri noted that article 10.4.1 refers to “applicable” law, whereas elsewhere there were references to “national” law. Article 9.6(b) refers to “applicable national law.”

Prof. van der Ziel explained that “applicable law” could be national law, an international convention, or some other source of law. In other contexts, the reference may be to “national” law when only that is intended.

Prof. Berlingieri accepted this explanation, but wanted to ensure that same term was used whenever the same meaning was intended.

Prof. van der Ziel promised that the drafting team would review the usage.

The meeting adjourned for tea at 3:45, and reconvened at 4:05.

Mr. Chandler was troubled that in article 10.4.2 such important rights could be exercised on bare notice. He felt that something more was needed.

Mr. Diamond proposed “reasonable notice.”

Mr. Chandler agreed that “reasonable notice” would be better.

Mr. Alcantara, referring to article 10.4.1, asked whether the right of sale is wholly governed by local law.

Prof. van der Ziel explained that the intention was to give the carrier a right, but to leave to national law to determine how the carrier should exercise that right.

Mr. Beare observed that chapter 11 had been completely redrafted after the Singapore Conference.

Mr. Rasmussen found it odd to define the right of control as a right under the contract, but article 11.1(iv) covers variation of the contract. In any event, what is the relevance of article 11.1(iv) when an instruction is not effective until the parties agree? The parties can always vary the contract by agreement.

Prof. van der Ziel explained that the real problem here is identifying who are the parties to the contract. The draft gives the controlling party the rights specified.

Mr. Diamond felt that article 11.1(iv) does not do much harm, but he did not see how it does any good, either.

Mr. Gombrii agreed that it was important to identify who has the power to vary the contract, but article 11.1(iv) speaks of “instruction.”

Mr. Chandler noted that there was a cross-reference to article 4.1, but the draft has no article 4.1—only article 4.1.1 and article 4.1.2.

Mr. Beare clarified that article 4.1 includes both article 4.1.1 and article 4.1.2.

Mr. Alcantara expressed confusion about the identity of the controlling party.

Mr. Diamond noted that article 11.2 is the meat of this chapter, and argued that it goes far beyond anything in prior conventions. He recalled his prior suggestion that limiting the discussion to two categories was overly simplistic.

If the parties agree that a document should not be transferable, why not respect that? Different parties have different needs. He argued that it does not make sense to have a “one size fits all” convention.

It is important to recall that the draft transfers not only rights, but also liabilities. This raises the question whether these provisions should be mandatory. This project should avoid uniform solutions, but should facilitate what the parties are trying to accomplish. Furthermore, it is essential to take account of changing technical needs, such as electronic commerce. Under Bolero, rights could only be transferred by conveying unique information. This draft would override that approach. The draft should specify that a person can become the “controlling party” only with the consent of the prior “controlling party.” He was troubled that either the transferor or the transferee can notify the carrier. It also might be a good idea to specify when the right of control is lost (e.g., when delivery is about to take place). In any event, this part of the Instrument should not be mandatory. It would be better to have nothing than to have a uniform mandatory system.

Mr. Rasmussen agreed with **Mr. Diamond** that these rules should not be mandatory.

Mr. Young thought there was a need to preserve article 11.2(a) on a mandatory basis to deal with cases in which the “shipper” is not the “true shipper” but a non-vessel-operating carrier (NVO). Some countries do not recognize NVO bills of lading. In those cases, NVOs need to be able to give instructions to ocean carriers.

Prof. Tetley thought that article 11.1 still has some sales elements.

Prof. van der Ziel agreed that article 11.2, particularly article 11.2(a), is the meat of the subject. But he noted that the issue here is the right of control under the contract of carriage. The draft is not talking about property rights or rights under a sales contract. It is simply looking at who has the right under the contract of carriage to control the goods.

As to the suggestion that this chapter should not be mandatory, the draft already gives the parties the right to specify who has the right of control. Article 11.2(b) is less important because the rules for negotiable bills of lading are already well understood. Article 11.2(b)(ii)-(iv) simply specify rules that could benefit from a clearer statement. He recognized that the draft here differs from the inland cases.

Prof. Song understood that when the shipper transfers the right of control under article 11.2(a)(ii), then its right of control ceases. He asked what happens if the transferee then becomes bankrupt. Can the shipper rescind the instruction? What if the shipper transfers the right of control to both A and B? What if B notifies the carrier first?

Prof. van der Ziel clarified that the transfer is effective when the carrier receives notice.

Mr. Alcantara asked how it was possible to discuss the contract of carriage independently of the contract of sale.

Prof. Berlingieri recalled that **Prof. van der Ziel** had said that the right of control is a right under the contract. He asked whether the right of control must be transferred with the contract as a whole. Or may the free-standing right of

Report of the fifth meeting

control be transferred without the rest of the contract? If the entire contract is transferred, and the original party is released from the contract, then the carrier should have to consent. What if the transferee is not creditworthy?

Prof. van der Ziel replied that **Prof. Berlingieri** has answered his own question. He asked the delegates to consider the case in which no document at all has been issued. This is very common in the ferry trade.

Prof. Berlingieri suggested that the Instrument should specify that the right of control is one specific right that can be transferred separately from the rest of the contract, and that once it has been transferred then the transferor has lost all future claim to the right of control.

Prof. Gorton reported that many years ago in Sweden a survey had been made of the cases in which no document had been issued. The current draft is very much in line with what Sweden would be able to accept.

Ms. Pysden contended that this should be a facilitative provision, not a mandatory one.

Mr. Diamond recalled that **Prof. van der Ziel** had asked the delegates to consider the case in which no document at all has been issued. But on the question of its mandatory nature, article 11.2(a) goes beyond that case to govern all cases in which no negotiable transport document has been issued. The draft should deal with this in a more detailed way, remain flexible, and leave it non-mandatory.

Prof. van der Ziel assured **Mr. Diamond** that this draft was consistent with Bolero. On the mandatory/non-mandatory issue, it should not be possible to make the excising of the right of control subject to the carrier's agreement. Article 11.3 should provide for sufficient safeguards to the carrier.

Mr. Young argued that article 11.2(b) would be very hard to apply in the electronic context. As a result, article 11.2(a) would become the operative section for electronic commerce. The carrier should not be able to ignore those instructions.

Mr. Chandler disagreed. Electronic commerce will need equivalents to negotiable documents. Bolero in essence creates new bill of lading on every transfer. Instead of a non-mandatory rule, this should be at least a default rule.

Mr. Beare proposed to adjourn the meeting for the day, and to reconvene at 10:00 o'clock the following morning.

The meeting adjourned for the day at 5:25 p.m. on Monday, 16th July 2001.

Report of the Second Day

Mr. Beare reconvened the meeting at 10:05 a.m. on Tuesday, 17th July 2001. As there had been no comments or corrections on the draft report of the fourth meeting, he proposed that it should now be taken as adopted. [There was no objection.]

Mr. Beare invited **Prof. Sturley** to summarize the instructions that the drafting team had received during the discussion of the first day of the meeting.

Prof. Sturley noted the difficulty in summarizing the instructions that the drafting team had received when several of the delegates had been unclear how the provisions should be drafted. He nevertheless saw agreement on at least a few key points. It was widely accepted that chapter 2 by itself is not sufficient to ensure that the Instrument is fully adapted to facilitate electronic transactions. Thus the meeting accepts the views expressed by Johanne Gauthier as the chair of the Electronic Commerce Working Group. The meeting also appeared confident that the Electronic Commerce Working Group would be able to propose adequate amendments to address this problem, and that this International Sub-Committee's Working Group would be able to incorporate these suggestions into the provisional final draft that will be circulated in October. Thus the drafting team's instruction on the electronic commerce issue is to incorporate the Electronic Commerce Working Group's suggestions into the draft.

Turning to chapters 10 and 11, **Prof. Sturley** felt that the meeting had expressed the need to elaborate on several points that had been included in the present draft in a form that was too concise to be readily understood. This "shorthand" needed to be spelled out more fully. For example, in article 10.1, the phrase "at the risk and account of the consignee" is a form of shorthand that is frequently seen in bills of lading, but its meaning needs to be explained more fully. The concept is that the carrier will be allowed to deal with the goods in an appropriate manner, such as putting them into storage; that the carrier will not have direct liability for the acts or omissions of the warehouse; but that the carrier will be liable for its own negligence or misconduct. Article 10.3.1(iii) provides another example. The draft needs to express more clearly the controlling party's rights. In article 10.3.2(ii) & (iv), the draft must spell out the consequences of the carrier's following the instructions that it has received. In article 10.4.2, the draft needs to spell out what is meant by the concept of giving notice. In article 11.1(iv), the draft needs to spell out that it is identifying the party that has the right to negotiate variations to the contract, and is not discussing a right to "give instructions" in the traditional sense. This is, of course, a non-exhaustive list of examples, but it illustrates the types of problems that the drafting team recognizes and plans to address in the next draft.

For the most part, the drafting team's intentions were consistent with the views being expressed by those who object to the current drafting. This is reassuring, for it suggests that the problems are with the drafting rather than with the substance of the proposal. It shows that more work needs to be done, of course, and the feedback from this meeting is very helpful in showing where the work needs to be done.

On one point, however, there may be some more substantial criticism. The meeting could not agree on the instructions that it wished to give to the drafting team on article 10.3.2, but it was clear that the draft would need to specify that it was addressing only some of the rules relating to negotiable transport documents. The drafting team will need to steer a middle course between providing too much detail and not enough detail.

He concluded by encouraging every national Maritime Law Association

Report of the fifth meeting

and every affected observer to submit their comments as part of the consultation process as quickly as possible, and to provide as much detail as necessary to express concerns fully.

Mr. Beare invited the delegates to comment on **Prof. Sturley's** remarks.

Mr. Diamond expressed his disappointment that no conclusion had been reached on article 11.2 yesterday.

Mr. Beare asked if there was general agreement that article 11.2 should be facilitative rather than mandatory.

Prof. Tetley responded that article 11.2 should be properly drafted, and that when properly drafted it should be mandatory.

Prof. Berlingieri observed a fundamental difference between negotiability and assignability. The right of transferring is a fact, and it is not possible to cancel that fact.

Mr. Gombrii reminded the International Sub-Committee that it had been suggested yesterday to have a small group meet to discuss this terminology.

Mr. Beare invited **Mr. Gombrii** to chair such a group, and asked **Prof. Sturley**, **Prof. van der Ziel**, **Prof. Gorton**, and **Prof. Berlingieri** to serve as members of the group. It was agreed that the group would meet that evening, after the International Sub-Committee adjourned for the day.

Prof. Gorton wondered whether it would cause any problems if article 11.2 were non-mandatory.

Mr. Diamond replied that if article 11.2 were non-mandatory, then there would not be a problem.

Ms. Pysden contended that if a transport document says "non-transferable," then it is a sea waybill.

Mr. Beare invited discussion on article 11.3.

Mr. Rasmussen had strong reservations regarding article 11.3. Changing the consignee is not a problem, but changing the place of delivery is a problem—even with all of the conditions and qualifications in the text. Suppose that the ship normally calls at a particular port, but on a given voyage does not plan to call there. Could the shipper demand delivery at that port?

Prof. Berlingieri saw two different ways to view the right of control: What is the shipper entitled to demand? Or who is entitled to negotiate with the carrier (whether or not the carrier agrees to the request)? He believed that the fundamental purpose of this provision is to identify the person entitled to negotiate with the carrier.

Mr. Alcantara asked whether the contract would be novated following the exercise of the right of control. Would there be a new contract? Would the carrier still have an obligation under the original contract? Would it imply additional freight?

Mr. Diamond commented that this article is not without difficulties. Provisions along these lines are common in contracts for the carriage of goods by road or rail, but they are an innovation here. It struck him as a recipe for litigation. Article 11.1(i) covers a wide range of possible instructions. Suppose the contract calls for setting the temperature at a certain level. Can the carrier refuse to change the setting because it interferes with normal operations?

Mr. von Ziegler, supporting **Prof. Berlingieri's** comments, observed that

these provisions exist today. He thought it was important to specify who has these rights, whatever the specific rights may be.

Mr. Hooper thought that the issue had become more complicated than it needs to be. He wondered what would happen if the carrier issued a non-negotiable sea waybill. How would the carrier protect itself if the shipper were dishonest, and replaced the consignee in order to sell the goods twice?

Prof. Song agreed with **Mr. Hooper** regarding article 11.1(iii). In China, changing the consignee might change the contract. The sea waybill could already be a contract between the carrier and the consignee.

Prof. van der Ziel, speaking as the delegate of the Dutch Maritime Law Association rather than as a member of the drafting team, cautioned against watering down the right of control. It exists in every case. It should be a strong right. He asked the delegates to imagine an electronic commerce situation in which no paper document had been issued. A strong right of control was needed for a pledge to work to protect the bank. He opposed deleting article 11.1(ii). He also disagreed with **Mr. Rasmussen**. Article 11.3(a) gives sufficient protection to the carrier. It follows the wording of the Inland Convention, where it has not caused problems. A right of control may only be exercised within the scope of the carrier's normal operations.

Mr. Alcantara wondered who would decide what is normal. Would the carrier make that decision?

Prof. van der Ziel replied that the carrier and the shipper are business people. They both know what are the normal operations. This approach has been used in other conventions without difficulty.

Ms. Pysden argued that business people ought to be able to decide for themselves. It goes back to the issue of freedom of contract. Article 11.3 is quite widely drawn. She agreed with **Mr. Diamond** that the provision is a recipe for litigation. A number of questions could be raised about it. The Instrument should have a facilitative chapter, but this entire chapter should be non-mandatory.

Mr. Diamond thought that the significant problem in this context was in the bulk trades. Perhaps this provision could work in the liner trades, where the draft does seem to have adequate protections.

Capt. Lüddecke disagreed, claiming that in the liner context, article 11.1(ii) would not be possible.

Prof. Gorton added that such an instruction would interfere with the normal rules regarding deviation.

Mr. Chandler observed that the International Sub-Committee appeared to be discussing something that seems to be mandatory with no need to be mandatory. This provision could be the default rule. Article 11.3(a) provides that the "carrier shall execute . . ." It would be more appropriate to say, the "carrier may," or the "carrier shall not unreasonably withhold . . ." This sort of thing happens all the time. If a sale falls through, the parties try to work it out. The Instrument should provide for this possibility. The problem now is that there is no uniformity. It would be better to have a default rule for the parties to consider.

Mr. von Ziegler suggested that article 11.1(i) & (iii) are different from the

Report of the fifth meeting

other clauses. Clauses (i) & (iii) will not usually cause any problems. The carrier should obey these instructions unless doing so would cause major problems. Clause (ii) does not provide for ordering a deviation, but for the early canceling of the contract (as with stoppage in transit). A change of destination is not covered by clause (ii) but by clause (iv).

Prof. van der Ziel explained that, as drafted here, only a limited change of destination would be possible. In liner trades, this clause would permit a change only if it were to another port in normal operations.

Mr. Diamond proposed striking out article 11.1(ii).

Mr. Beare asked how many agreed with **Mr. Diamond**'s proposal, taking account of the explanations for the draft that had been given.

[Views appeared to be evenly divided on this question.]

Mr. Beare invited discussion on articles 11.4 and 11.5.

Mr. Chandler was troubled by article 11.5, which he described as an invitation to disaster. He thought that this article gave the carrier liberty to circumvent the rights of the holder or the controlling party without specifying when the carrier can rely on it. This provision might make sense in cases of abandonment, but not otherwise.

Prof. van der Ziel explained that it was not the intention to draft an invitation to disaster. The intention had been to draft a provision to protect the cargo when the carrier needs instruction (e.g., with respect to dangerous goods). When instruction is needed, whom does the carrier ask? The provision applies more generally than abandonment cases.

Mr. Chandler countered that there was no control over when the carrier goes down the list. What is a "case of necessity"? If the carrier wants to change the port of destination, would that be a "case of necessity"? What if the carrier does not like the controlling party's answer?

Mr. Young also had a problem with article 11.5(d). That person at issue could be a trucker.

Capt. Lüddecke had a problem with the phrase "highest person." He wondered what "highest" meant.

Mr. Gombrii agreed with **Mr. Chandler**. The intentions motivating this provision are good, but it could be abused. He thought that the drafting needs to be fixed.

Mr. Diamond found it a useful provision. Problems arise in practice when carriers need to take instruction, and cannot find the bill of lading holder. There may be a good idea here, even if has not yet been entirely worked out.

Mr. Rasmussen agreed that the intention was good. This provision could facilitate the smooth performance of the carriage. He thought that the provision was something to work on.

Mr. Chandler clarified that he did not dispute that this provision could be useful, but he argued that it must better specify the circumstances under which it would apply. The concept is good, but the draft must recognize and deal with the risks. He predicted that banks would be greatly disturbed by this proposal.

Prof. Berlingieri agreed with **Mr. Gombrii**. The intention is good, but article 11.5 must be redrafted. It must specify who has the obligation to seek

and give instructions, and when. It must explain what constitutes necessity. He suggested redrafting the clause starting from the bottom: "In case of necessity, the carrier shall" The draft should then proceed to identify the subject matter of the instructions.

The meeting adjourned for coffee at 11:25, and reconvened at 11:50.

Ms. Burgess recalled that **Mr. Diamond** had suggested that article 11.1(ii) was unnecessary because trade practice deals with the problem. It is customary now to require security in this context, but the draft does not make provision for security. She asked if provision for security could be made.

Mr. Chandler proposed that article 11.5, when it is reworked, should go into a section of the Instrument dealing with abandonment. He thought it would be better to have comprehensive provisions dealing with these issues in one place.

Ms. Pysden asked whether there had been any resolution on the possible mandatory nature of this chapter.

Mr. Beare invited discussion on Chapter 12. When no one commented, he asked if the absence of comments suggested that the draft is broadly acceptable.

Prof. Tetley commented that it was very ambitious, and very useful, to try to put the substance of the U.S. Pomerene Act or the 1992 British Carriage of Goods by Sea Act into an international convention. By doing so, however, the CMI may be opening the draft to debate in countries that already have such legislation, at least to the extent that the Instrument may be inconsistent.

Mr. Beare reminded **Prof. Tetley** that this subject is within the International Sub-Committee's terms of reference.

Mr. Chandler added that the subject was not only within the International Sub-Committee's terms of reference; it was one of the primary justifications for the CMI's undertaking this project at all.

Prof. Tetley agreed that this was a subject that the International Sub-Committee should include in its work.

Mr. Diamond noted that the amendment to article 9.6, specifying that national law determines whether the consignee is liable for demurrage, freight, damages, etc., seemed to address his earlier concerns, but it also makes the Instrument less uniform. It seemed to him that the draft now deals with only the intermediate bill of lading holder.

Prof. van der Ziel explained that, in practice, the consignee often asks to inspect the goods. After the inspection, it decides whether to demand delivery. In such cases, the consignee has shown a willingness to be bound by the bill of lading, and should be bound to accept delivery.

Mr. Beare specifically asked **Prof. van der Ziel** whether he agreed with **Mr. Diamond's** analysis of how the draft is set out and the reference to article 9.6.

Prof. van der Ziel replied that until this draft, except for article 9.6, the draft Instrument did not deal with a consignee's liability.

Mr. Chard supported **Mr. Diamond's** position that the carrier should be able to seek freight from a consignee that takes delivery.

Report of the fifth meeting

Mr. Chandler suggested that the degree of uniformity that was needed was with respect to the bill of lading itself. He thought that peripheral issues such as liability for freight could be left to national law.

Mr. Rasmussen explained that the Danish code provided that the receiver undertakes to honor all claims that the carrier has under the bill of lading. He would support including such a provision, which is a bit broader than had been discussed thus far.

Mr. Chandler replied that **Mr. Rasmussen** had hit the nail on head. Such a provision would be so broad that it would make a wreck of freight pre-paid bills of lading.

Mr. Gombrii clarified that under Scandinavian law, a freight pre-paid bill of lading precludes the carrier from claiming freight from the consignee.

Prof. van der Ziel explained that what he had in mind was consistent with **Mr. Rasmussen's** and **Mr. Gombrii's** positions. When the consignee interferes in the contract, it assumes whatever obligations appear from the bill of lading.

Mr. Hooper asked whether this provision would subject the consignee to liability for damage caused by dangerous goods.

Mr. Beare wanted to know whether the U.S. Maritime Law Association would oppose the provision if it did.

Mr. Chandler replied that the U.S. Maritime Law Association would oppose such a provision. But it would not oppose limited rights for carriers along the lines that **Prof. van der Ziel** had proposed.

Mr. von Ziegler proposed that the same principles should apply in the context of non-negotiable documents. A consignee that takes delivery of the goods should assume the liabilities that are clear from the document. This proposal would go beyond the current draft of chapter 12.

Mr. Rasmussen commented that the buyer should know what it is buying. If liability is not clear from the document, then the consignee should not assume liability. Generally dangerous goods will not produce such liability. Whatever is in the document should be decisive.

Capt. Lüddecke asked how the Instrument should deal with the situation when the consignee demands the right to inspect the goods, making clear that it will not accept delivery if the inspection is unsatisfactory.

Mr. Diamond suggested that if broader agreement turned out to be possible, that would be better than his fallback position which assumed that broader agreement was not possible. But he was concerned with limiting liability to the four corners of the document. That works well for freight, but the document will not specify demurrage or damages.

Mr. Beare noted that there seemed to be some support for **Prof. van der Ziel's** solution to this problem.

Mr. Alcantara disagreed, declaring that he did not support this proposition.

Prof. Sturley attempted to summarize the discussion of this topic by saying that there was fairly widespread support for the proposition that under at least some circumstances a consignee would assume liability to the extent that the liability was ascertainable from an inspection of the documents. There

appeared to be general agreement that if a consignee takes delivery of the goods, demands delivery of the goods, or (perhaps) gives some other indication of its willingness to act as a party to the contract of carriage, then it should assume liability. At least one member of the drafting team fully understands the position advanced by the Dutch Maritime Law Association, and will seek to prepare the next draft along those lines.

Prof. Berlingieri observed that no one had commented on article 12.1. He asked what article 12.1(iii) means.

Prof. van der Ziel explained that article 12.1(iii) refers to the situation in which a transport document has been issued to the order of “ABC Bank” and delivered to the shipper, who is the first holder. The shipper can transfer the document to ABC Bank without indorsement.

Mr. Diamond accepted that explanation, adding that article 12.1(iii) is very clear under English law.

Prof. Gorton asked what it meant to say, “made out to the order of a named party.”

Prof. van der Ziel replied that if the transport document is made out simply to a named party (not “to the order of” the named party) then it is not a negotiable transport document.

Prof. Gorton explained that under Scandinavian law, such a transport document would be negotiable unless marked “non-negotiable.”

Prof. Berlingieri suggested that this issue should be referred to this evening’s meeting of the terminology subcommittee.

Mr. Chandler noted that the drafting of article 12.1(i) could be tightened.

Mr. Rasmussen asked whether the general rule should be that a transport document is presumed to be negotiable unless the contrary is expressed (as in Scandinavia) or the reverse (as in the United Kingdom).

Mr. Gombrii thought that this may be a drafting point. He also asked whether the controlling party could transfer its rights one by one. He thought not.

Mr. Diamond contended that this provision should not be applied to electronic commerce. In his view, it addressed only paper documents.

Mr. Chandler agreed that there are no bearer documents in electronic commerce.

Prof. Sturley reminded the delegates that article 1.9 defines a non-negotiable transport document. He asked whether this definition is considered satisfactory.

Mr. Rasmussen did not find this definition satisfactory. It does not match the Scandinavian system.

Prof. Sturley explained the interrelationship between article 1.8 and article 1.9. Article 1.8 starts with the class of transport documents, as defined in article 1.7, and provides how a person examining a particular transport document can determine from its face whether it qualifies as a “negotiable transport document.” Article 1.9 defines all transport documents that do not qualify as negotiable transport documents to be “non-negotiable transport documents.” He asked whether **Mr. Rasmussen** was proposing to change the basic underlying policy.

Report of the fifth meeting

Mr. Rasmussen replied that he was. He thought it was appropriate to encourage more negotiable documents.

Prof. van der Ziel supported the draft as it was. He reported that Dutch law is consistent with Scandinavian law, and that it has caused great problems. Furthermore, there is no economic need for a bill of lading made out to a named person. Instead, a sea waybill could satisfy any such need.

Mr. Diamond agreed with **Mr. Rasmussen**. He thought that parties were often surprised to discover they do not have a negotiable document. The bill of lading should be a special category of transport documents, and they should be presumed negotiable.

Mr. Young reported that in practice, even when straight bills of lading have been issued, the carrier often demands the surrender of the original document.

Mr. Chandler identified two practical problems. (1) Too many ports require the surrender of the bill of lading even if it is clearly non-negotiable. (2) Copies of negotiable bills of lading are frequently stamped “non-negotiable,” so evidentiary problems can arise after the fact.

Prof. Berlingieri supported **Mr. Diamond**’s proposal. When the Navigation Code was enacted in 1942, disputes arose. The decision was made that any bill of lading was negotiable even without “order” language. He felt that this rule has been satisfactory in practice.

Mr. Alcantara reported that in civil law countries, every bill of lading is a document of title, and it is always negotiable. He did not think that civil law countries would be willing to change this rule.

Mr. von Ziegler supported **Mr. Diamond**’s proposal, but he was concerned that there must be some way to distinguish a bill of lading from a sea waybill if not by the use of the language “to order” or something similar.

The meeting adjourned for lunch at 1:05, and reconvened at 2:25.

Mr. Beare reported that the negotiability issue had not been resolved over the lunch break, so the discussion on that issue will be adjourned until after **Mr. Gombrii**’s meeting this evening. He proceeded to open the discussion of chapter 13.

Mr. Chandler suggested that all reference to rights of suit should include a reference to arbitration.

Mr. De Orchis sought some clarification that the draft covers agents of parties. He also thought that the word “or” in article 13.1 may be wrong. The consignee and the underwriter may both have rights.

Mr. Chard suggested that article 13.1 could refer to “holder or assigns,” thus making (i), (ii), and (iii) unnecessary.

Mr. Chandler noted that this suggestion would not work for non-negotiable documents.

Prof. Tetley reported that the Canadians are very interested in dealing with jurisdiction and arbitration along the lines of either the Hamburg Rules or the proposed Canadian legislation.

Mr. Beare explained that jurisdiction and arbitration provisions were not

included in the present draft because the Working Group felt that the International Sub-Committee lacked the time to deal with them. Furthermore, it would have been premature to deal with these issues before knowing the nature of the Instrument. In addition, UNCITRAL did not encourage the CMI to cover this subject now. The UNCITRAL Working Group could deal with this topic without needing the CMI's preparatory work.

Mr. Diamond proposed that in article 13.1(iv) it would be better simply to say "insurer."

Prof. Berlingieri instead suggested deleting "by legal subrogation" to permit other cases under which third parties acquire rights.

Mr. Chandler proposed adding "or subrogated" in clause (iii) and deleting clause (iv) entirely.

Prof. Si supported **Mr. Chandler's** observation. He also saw no reason to cover jurisdiction and arbitration at this point. The issue here is the right of suit, not where the suit would be pursued.

Ms. Pysden supported **Mr. Chard's** suggestion. In addition, she did not favor including agents.

Mr. Beare asked about the objection that **Mr. Chard's** suggestion would not work for non-negotiable documents. In any event, he noted that this was simply a drafting issue.

Prof. Berlingieri suggested that the reference to the "holder" in article 13.2 may not be satisfactory. There is no "holder" after delivery, and the rights under this provision may be asserted after delivery.

Mr. Chandler agreed. He suggested modifying the draft to cover the "person who took delivery."

Mr. Diamond noted that article 13.1 uses "consignee." The definition of consignee is "the person entitled to take delivery of the goods under the contract of carriage or a transport document issued pursuant to the contract of carriage," which somewhat begs the question. But for the sake of consistency, he thought that it might be appropriate to use the same term.

Prof. van der Ziel explained that the bill of lading may still play a role after delivery, passing rights of suit. In a string of contracts, the bill of lading often passes after delivery of the goods. He also noted a drafting point: Article 13.1, at the end, should say "the carrier *or the performing party* is entitled to all defenses . . ."

Prof. Berlingieri reiterated his earlier point. On delivery, the bill of lading is typically surrendered, so there can be no holder.

Prof. van der Ziel agreed with **Prof. Berlingieri** as a general rule, but observed that parties often agree to delivery without surrender of the bill of lading.

Mr. Diamond suggested that this view was contradicted by the "holder" definition in chapter 1. He suggested using the word "consignee" instead of "holder."

Mr. Chandler asked how this provision would apply in letter of indemnity cases. In such cases, the "holder" may not be the person entitled to take possession.

Mr. Beare observed that he had heard several drafting proposals on this

Report of the fifth meeting

chapter, but no fundamental issues of principle. The concept behind the draft appears to be acceptable, even if the wording could be improved.

Prof. Sturley agreed with **Mr. Beare's** summation of the discussion.

Mr. Beare suggested that chapters 14-17 would not be controversial. Although he wanted to ensure that delegates have an opportunity to raise any issues they might have with regard to these four chapters, he proposed to postpone their discussion for the time being.

Rather than proceeding through the text in order, **Mr. Beare** proposed to jump to chapter 4, and to discuss the "door-to-door" issue, which is covered in article 4.4. He invited **Prof. van der Ziel** to open this discussion.

Prof. van der Ziel explained the basis of this draft with two propositions: (1) The Instrument must deal with door-to-door coverage, as that is the basis on which maritime contracts are concluded. Furthermore, it is often unclear when the damage took place, or else the damage happened gradually. (2) The non-maritime part of the contract should continue to be governed by mandatory rules that apply under national law. The Instrument should respect national liability rules.

Mr. Chandler declared the U.S. Maritime Law Association's support for door-to-door coverage, but also recognized the need to respect national sovereignty. Unfortunately, this creates a practical problem. The parties often do not know what law will apply until litigation is well underway. This makes settlement difficult and invites litigation. Governments ratifying this convention could specify in advance what mandatory laws will apply to their inland transport.

Mr. Rasmussen expressed his pleasure with the draft. It is important to Denmark to have the network system, which this draft provides. But he questioned how the network system would work under this draft. For example, would all of the CMR apply to inland transport, or just the liability provisions? The commentary says that this is a narrow network approach, but the text of article 4.4 seems to be a broad approach. There is a need to clarify this issue. As to the U.S. suggestion, he agreed that there was a benefit to knowing in advance what rules would apply. But each contracting party should not be free to decide which rules would apply. For example, the CMR rules should apply, or not apply, uniformly. France should not be free to say that the CMR rules do not apply while Denmark said that the CMR rules do apply.

Prof. Sturley sought clarification of **Mr. Rasmussen's** final point. He had understood the U.S. proposal to be that France would specify which mandatory rules would apply to inland transport in France while Denmark would specify which mandatory rules would apply to inland transport in Denmark. Presumably all of the parties to the CMR would specify the CMR rules as mandatory to the extent they were required to do so under the CMR (unless they chose to denounce CMR, which seems unlikely). Under the U.S. proposal, France and Denmark would also specify what other mandatory rules would apply in their respective jurisdictions.

Mr. Chandler confirmed **Prof. Sturley's** understanding of the U.S. proposal. France specifies the rules within France, not within Denmark. Presumably most European countries would be bound to apply CMR. For most

of the world, CMR does not apply. Each country could specify what rules would apply in that nation. **Mr. Rasmussen** raises a good point regarding how much of CMR applies. This would allow countries to specify how much of CMR applies in each country.

Mr. Rasmussen declared that he could not support the U.S. proposal if it would allow France to say that CMR would not apply in France. Equally, France should not be allowed to decide which elements of CMR should apply. That should be decided uniformly as part of this convention.

Mr. Alcantara declared that the Instrument should prevail over national laws.

Prof. Berlingieri argued that when a country has given force to the CMR, then that convention is in force as a whole. This new convention could not limit CMR's application without creating a conflict between conventions.

Mr. Rasmussen replied that this new convention would operate on a different level than CMR. There is no doubt that CMR would apply between the multimodal transport operator and the CMR carrier. But there would be no need to apply CMR as between the shipper and the multimodal transport operator.

Ms. Pysden announced FIATA's support for freedom of contract, for the ICC/UNCTAD Rules, and for non-mandatory multimodal transport rules.

Mr. Diamond described the draft as a neat solution to a difficult problem, but he thought that it was not yet sufficiently clear to be workable. He suspected that it would be essential to take the whole of other conventions.

The discussion raises the central question whether states would be bound only by existing conventions and laws, or whether they could thereafter pass new national laws. The Vienna Convention on Treaties does not allow a state to derogate from a treaty by national law, but this draft would. This is a pragmatic solution, but not one that left him entirely happy.

In addition, **Mr. Diamond** saw three other problems: (1) the "separate contract" issue; (2) the issue of when the loss occurred (*e.g.*, whether the focus is on the loss itself or the event that eventually caused the loss, whether the draft addresses only "localized losses"); and (3) the conflict of law issue.

Mr. Beare invited delegates to focus on the issue first raised by **Mr. Rasmussen** of whether an entire convention (such as CMR) or only the liability rules should apply.

Prof. van der Ziel explained that his initial inclination as a draftsman was to incorporate entire other conventions, but in going through CMR, etc., he found a large number of potential conflicts. For example, the CMR provisions on right of control are very different from the provisions in this draft. The COTIF provisions on the responsibility of the shipper and consignee regarding loading and unloading are also very different. He did not see how the Instrument could apply these inland provisions because they were specifically suited for inland carriage. Thus he concluded that incorporating a complete convention (with a "pure" network system) is not achievable. This conclusion is consistent with **Mr. Chandler's** concerns regarding certainty. The draft should specify that the limits of liability, time limits, jurisdiction, and the like should be respected.

Report of the fifth meeting

Prof. Sturley saw this as a political problem rather than a legal problem. Clearly it would be possible for this convention to supersede earlier conventions if the nations involved choose that course. For this new convention to be successful, it will need to supersede the Hague, Hague-Visby, and Hamburg Rules. No one appears to be concerned about the possibility that those three conventions will be denounced.

He saw no reason why relevant nations could not equally denounce CMR or other regional conventions if they chose to do so. The political problem, as he understood it, was that those nations that had adopted CMR did not wish to denounce it, or even to limit its application. There is no realistic chance that France would declare that CMR does not apply in France. It thus seems that a network system of some sort is the best that can be achieved in this political climate, whatever the best system might be in the abstract. The goal here should therefore be to get as much uniformity as politically possible into a system that will, by definition, not be uniform.

The International Sub-Committee needs to know how much of CMR needs to be accommodated in order for this new convention to be politically acceptable in Europe. Similarly, it is important to know the extent to which other regional conventions or other mandatory laws in force in other parts of the world needs to be accommodated in order for this new convention to be ratified in those affected countries.

Mr. Beare invited the Secretary General to comment on the political question.

Mr. von Ziegler agreed that there was a political question here. Moreover, it was a political question that neither the CMI nor UNCITRAL is in a position to raise. There would be no point in suggesting that CMR be denounced. It is essential to find a legal solution to the problem by accommodating this new convention with the constraints of CMR's continued existence. Moreover, it must be done in a way that the inland judge will be able to apply it correctly when faced with two parties each of which is trying to apply a different convention to the facts of the case. And this brings us back to the political question. If the CMI can not solve the legal problem satisfactorily, governments will be unwilling to adopt the CMI's solution.

He concluded by asking whether it was really the case that in a shipment under a single bill of lading from Denver to a U.S. port by rail, and then by sea to a German port, and then to an inland point in Germany by road, that CMR would really apply by its own terms to the German road carriage. He suspected that it would be possible to draft around CMR in this context.

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

Mr. Beare reminded the delegates that the present discussion concerned the full network versus the limited network system.

Prof. Tetley posed a question for **Mr. von Ziegler**. **Mr. Sekolec** had reported to the effect that plans were on track at UNCITRAL. He had heard that there had been considerable opposition to this project. In particular, he had

heard the argument that this project will not work because of CMR. **Prof. Tetley** also questioned whether this aspect of the project was within the International Sub-Committee's terms of reference (which he quoted).

Mr. Beare, responding to the second point, noted that **Prof. Tetley** was referring to last year's terms of reference. These had been supplemented by the resolution of the Assembly in Singapore.

Mr. von Ziegler, responding to the first point, reported that the situation at UNCITRAL was not as **Prof. Tetley** described it. Only one delegation had problems with the project, and it argued that (1) liability need not be covered because the Hamburg Rules already existed, and (2) door-to-door issues did not require further attention. There was no support for this first argument. On the second argument, UNCITRAL agreed to proceed with the caveat regarding further study on the door-to-door issues.

Mr. Chandler added, based on his experience in attending UNCITRAL Commission meetings, that often delegates are not fully briefed. The key fact is whether UNCITRAL forms a Working Group and what restrictions are imposed on the Working Group. Here a Working Group has been formed and has received the green light to proceed without restrictions.

Mr. Diamond, returning to the issue of which aspects of other conventions should apply under a limited network system, agreed that at least liability rules and the limits of liability should be from the other convention. He reluctantly agreed that the time bar and jurisdiction issues would also need to be governed by those other conventions.

Ms. Howlett supported the door-to-door and network system, and was therefore pleased with article 4.4. Like **Mr. Rasmussen**, **Prof. van der Ziel**, and **Mr. Diamond**, she saw the need to limit the system in some way. Perhaps article 4.4(b) goes some way already. She suggested a new article 4.4(a)(iii) specifying the aspects that must be covered.

Mr. Chandler wondered what was meant by the bracketed language in article 4.4(a)(ii) ("irrespective whether the issuance of any particular document is needed in order to make such international convention or national law applicable").

Prof. van der Ziel explained that, at least for the time being, COTIF is tied to the issuance of a particular type of document (much as the Hague-Visby Rules are tied to the issuance of a bill of lading).

Mr. Chandler asked what would happen if this language were omitted. Would it mean that COTIF did not apply?

Prof. van der Ziel replied that it would. A "Railroad Consignment Note" is very different from a bill of lading.

Mr. Chandler responded with the suggestion that it would then be desirable to avoid COTIF in this fashion.

Mr. Rasmussen, like **Mr. Diamond**, was hesitant to look to other conventions for time limits and jurisdiction provisions. He explained that he did not know where to draw the line. He thought that if there were a true conflict of conventions, then there would be no line to be drawn; the entire other convention must apply. But he did not think there was a conflict here.

Mr. Gombrii agreed with **Mr. Rasmussen**. This draft offers a neat

Report of the fifth meeting

solution, but he noted that CMR provides the same neat solution for non-localized damage.

Prof. Tetley questioned the drafting. Article 4.4(a) states: “if there are any provisions....” The first question the Canadian government would ask is whether there are any such provisions. He viewed this text as an invitation to nations to opt out of the convention, either now or in the future.

Mr. Diamond recalled that it was the Canadian delegation that announced in Singapore that there was national law that the parties could not avoid by private contract. He suggested that it would be valuable to take a closer look at when and how CMR applies. The English courts apply CMR to England-France roll-on roll-off carriage, but not when the container moves road-sea-road.

Mr. Rasmussen had no doubt that the nature of the network system requires any international convention, present or future, to apply in preference to this convention.

Mr. Alcantara supported the network system with respect to international conventions but not with respect to national law.

Mr. Beare asked **Mr. Alcantara** if he was arguing to omit “or national law” in article 4.4(a).

Mr. Alcantara replied that he was. He would also omit article 4.4(a)(i), which applies only in the case of national law.

Several delegates disagreed with this assertion, claiming that article 4.4(a)(i) applies to conventions, too.

Prof. Berlingieri agreed with **Mr. Alcantara**’s basic point. If national law can apply in preference to this convention, there would be no international uniformity.

Mr. von Ziegler explained that the national law reference was included in the draft to address the possible concerns of countries that wished to preserve their current mandatory national law.

Mr. Alcantara responded that whenever an international convention has the purpose of achieving uniformity, then it should be applied more broadly.

Mr. Hooper agreed that the reference to national law should be removed. The U.S. Maritime Law Association would prefer a uniform system, and thus would rather not have the network system except when absolutely necessary.

Mr. Diamond thought that this discussion seems to show that it was necessary to maintain the “national law” exclusion.

Mr. Gombrii agreed, in principle, that the “national law” exclusion should be omitted.

Prof. Gorton agreed.

Prof. van der Ziel could not support this omission. He had great sympathy for the point of view, but it was politically impractical. Perhaps the “national law” language could be placed in square brackets

Prof. Tetley did not believe it was possible to recognize national law under the network system without undermining the convention itself.

Mr. Rasmussen predicted that if the application of national law was not recognized in the Instrument, then multimodal transport operators would still need to settle claims with subcarriers on the basis of national law. This would

undermine the basic rationale of the network system. But he also saw the benefit of deleting the reference. He proposed putting the reference to national law in square brackets.

Mr. Alcantara countered that the purpose of the CMI is to pursue uniformity.

Mr. von Ziegler agreed with the need for uniformity, so far as possible. But he also believed that if the new convention was unable to supersede national law, it was important to be practical.

Prof. Berlingieri disagreed with **Mr. von Ziegler**. The concern here is solely with the rules that contracting states will apply, not with the rules that would be applied in non-contracting states.

Prof. Sturley sympathized with the view that there should be as few exceptions as possible to the application of this convention. That would produce as much uniformity as possible. Under this view, the reference to national law should be deleted. But as soon as an exception is made for CMR, uniformity would be lost. On a shipment from the United States to Japan (two non-CMR countries), the new convention would apply door-to-door, but on a shipment from the United States to France, the new convention would be displaced by CMR for the inland carriage in France.

In Singapore, the conference was informed that some non-European countries may have mandatory national laws for inland transport, and that they may feel as strongly about retaining these current laws as the Europeans do about retaining CMR. This is unfortunate, but it may be a political constraint that needs to be accepted—just as it is necessary to accept the constraint of CMR's continued applicability. If the desires to retain these laws are as strongly held, then they should be entitled to every bit as much respect as the European desires to retain CMR.

It is also essential to recognize that disuniformity on the inland transport leg of the shipment does not go to the heart of the new convention, which is the ocean transport leg. It would be valuable to achieve as much uniformity as possible on a door-to-door basis, but it would be foolish to alienate a nation that would be willing to ratify the new convention with respect to ocean transport if it is unwilling to give up its mandatory law for inland transport—particularly when there is wide support for making that same concession with respect to CMR for European countries.

Prof. Gorton endorsed **Mr. Rasmussen's** suggestion to put the reference to national law in square brackets.

Mr. Gombrii clarified that the Europeans do not love CMR, but it does provide a degree of uniformity within Europe.

Mr. Chandler would prefer to omit national laws entirely, but thought that if national laws were to be included it was particularly important to specify exactly what it is that would be binding.

Mr. Alcantara argued that it was logical for draftsmen to object to changing their draft, but that this is the International Sub-Committee, which should make a decision here. Brackets should be used only when the International Sub-Committee is not sure what to do.

Mr. Beare would leave the language in brackets, with extensive

Report of the fifth meeting

commentary. The next meeting will decide whether to retain the language, delete it, or send alternate drafts to UNCITRAL for a policy decision.

Mr. Diamond added that the draft should recognize **Mr. Chandler's** suggestion, too.

Mr. Beare replied that this should be done in commentary.

He then summarized the discussion by saying that the drafting of article 4.4 is generally acceptable, but that there are drafting issues that must be addressed. He announced that the International Sub-Committee would try to deal with drafting issues briefly in the morning, and asked the delegates to catalogue their concerns to instruct the draftsmen.

After that, the International Sub-Committee will move to chapters 5 and 6. If any time remains, other issues could be discussed. He also reminded the International Sub-Committee that he would like approval or otherwise regarding chapters 14-17, which were thought to be non-controversial.

The meeting adjourned for the day at 5:15 p.m. on Tuesday, 17th July 2001.

Report of the Third Day

Mr. Beare reconvened the meeting at 9:40 a.m. on Wednesday, 18th July 2001, and invited **Mr. Gombrii** to report on the meeting of the small group that he had convened to discuss the negotiable transport document terminology.

Mr. Gombrii reported that time had been limited, but that some progress had been made. The group had discussed the difference between a functional (substantive) definition and a mechanical definition. It had also discussed terms of art, such as "negotiability" and "document of title." The group agreed that "transfer" was a more generic term. It also concluded that the substance of article 1.8 was satisfactory, but that perhaps some alternative to the words "negotiable transport document" would be preferable. The group had been unable to think of a suitable alternative. Furthermore, it was hard to decide on anything without knowing what the Electronic Commerce Working Group will do. He offered to continue informal work on this subject.

Mr. Diamond echoed the point that time had been limited, and encouraged the circulation of suggested drafts.

Mr. Beare noted that the CMI had received some guidance from **Mr. Sekolec** regarding the format that UNCITRAL would prefer, including the avoidance of terms of art.

Mr. Diamond appreciated that concern, but mentioned that it was often difficult to describe the forms without using technical language.

Mr. Beare asked whether the discussion should continue with article 1.8, or leave it as **Mr. Gombrii** had suggested. [No one wished to continue with article 1.8.] **Mr. Beare** resumed the discussion of article 4.4.

Prof. van der Ziel wished to clarify two issues from yesterday—localized damage and progressive damage. On the first issue, the choice is among (a) when the damage was caused, (b) when the damage occurred, and (c) when the damage appeared. When a crane drops the cargo, all three are simultaneous.

But when the cargo was not properly stowed in a container, then the damage was caused by an act before shipment, the damage occurred during the ocean voyage due to the rolling of the vessel, and the damage appeared at unloading. Ten years ago, Dutch law adopted a pure network system. The choice is made based on when the damage was caused, but this approach creates great problems. If the choice is made based on when the damage appeared, the rules for the final leg will generally apply. This is convenient, but not fair. The current draft therefore chooses when the damage occurred, which is usually possible to determine.

Progressive damage illustrates one problem with this choice. Suppose that the carrier is supposed to carry orange juice concentrate at -18° C. and frozen shrimp at -24° C., but that the engineer reverses the settings. Both cargoes will be damaged. He explained that his solution was to deal with progressive damage in the same way as cases in which it is impossible to determine when the damage occurred. The drafting team will consider further revisions.

Mr. Alcantara mentioned that the issue of localized and non-localized damage is particularly relevant for cargo underwriters.

Mr. von Ziegler observed that the network system does not identify the defendant, it simply identifies which legal regime will apply.

Mr. Diamond confessed that he was attracted by **Prof. van der Ziel's** practical suggestion, but he thought that problems remain. What if other conventions are causation-based rather than occurrence-based? This is a problem of infinite complexity, but the International Sub-Committee should adopt a practical solution.

Mr. Chandler noted that the Warsaw Convention solves this problem with a presumption that the damage occurs when the cargo is in the custody of the airline at the airport. Perhaps this Instrument should have the same presumption.

Prof. van der Ziel responded that this suggestion would mean a presumption in favor of this convention's application.

Mr. Chandler thought that a presumption might be easier for a judge to apply.

Prof. Berlingieri mentioned that Warsaw refers to "the event that causes the damage." That is a single event, which happens at one point in time. When the damage occurs is much harder to pinpoint.

Prof. Sturley highlighted some of the problems of the "causation" concept, which had been notoriously difficult to apply in a number of contexts.

Mr. De Orchis suggested that it might be necessary to go back to causation in any event because defenses were based on causation.

Prof. Tetley suggested that the U.N. Multimodal Convention, which he thought was simpler, might be a good model.

Mr. Diamond replied that the International Sub-Committee had rejected the system of the Multimodal Convention, which is not network-based.

Prof. Tetley recalled that UNCTAD had published a document describing all of the European multimodal regimes.

Mr. Beare invited further discussion on article 4.4.

Mr. Young raised a question concerning article 4.4(b). As far as he knew, there was no provision for delay under national law. Does this mean that there would be no liability for delay that occurs during inland transport?

Report of the fifth meeting

Mr. Alcantara proposed dealing with the localization of damage issue by adding a provision allocating the burden of proof. In that way, it might also be possible to broaden the application of this convention.

Mr. Diamond noted that the International Sub-Committee had not discussed the conflict of law issue. Article 4.4(a)(i) implies a choice of law. To what law does one look to determine whether a convention can be departed from by private contract? He suggested expanding clause (i) to add: “according to the terms of that convention or law.” Alternatively, there might be a separate paragraph saying that this rule applies irrespective of the proper law of the contract of carriage.

Mr. Gombrii suggested that article 4.4(a)(ii) covered this issue with the phrase “according to their own terms.”

Mr. Diamond responded that this phrase was shorthand that left the position unclear.

Prof. Berlingieri noted that article 4.4 says “that cannot be departed from.” Suppose there is a shipment from New York to Milan that is subject to London arbitration, and the compulsory provision at issue is the Italian law governing the road carriage from Genoa to Milan. Normally, an English court would not consider whether the Italian law is mandatory unless Italian law is the proper law of the contract.

Prof. Song thought that it was too much of a problem if the Instrument defers to both international conventions and national law. He asked if the CMI was waiting for another organization to draft a more forceful convention, which will prevail over national law.

Mr. von Ziegler responded that the agreement yesterday was that the CMI will go as far as it can. UNCITRAL could propose a convention that overrides national law, but some countries may resist this approach.

Mr. Beare opened the discussion on chapters 5 and 6.

Mr. Hooper observed that the bracketed language in article 5.2 would impose a continuing duty to exercise due diligence. He thought that this was unnecessary in view of the elimination of the navigational fault exception. Crew negligence would be covered in any event. He worried that imposing a continuing duty would subject a carrier to a shore-side standard that was too difficult to fulfill at sea.

He also noted that article 6.1.2 omitted some of the defenses in the current catalogue, *e.g.*, act of God, act of war. He argued that these should be restored.

Ms. Burgess agreed with **Mr. Hooper**.

Mr. Chandler, speaking from the standpoint of cargo, would be quite happy with the extension of the due diligence obligation. If unseaworthiness arises during the voyage, the owner should exercise due diligence to correct the problem. On article 6.1.1, he supported Alternative II. On article 6.1.2, he noted that he had some drafting problems.

Mr. Beare interrupted **Mr. Chandler**, encouraging him to postpone drafting problems for the time being.

Prof. Berlingieri observed that the International Sub-Committee was trying to maintain the basic structure of the Hague-Visby Rules, but that cannot be done exactly. Limiting the due diligence obligation to the start of the voyage

makes no sense today; it must be continuous. But the degree of diligence that is “due” must be determined on the basis of the circumstances. During the voyage, only the master and the crew are available to correct any unseaworthiness that arises during the voyage.

From a political standpoint, UNCITRAL would not accept the Hague-Visby approach on this issue. To preserve the Hague-Visby structure, which has worked well, it is necessary to modernize specific rules.

Prof. Gorton recalled that in charter parties a continuous obligation is generally assumed as a matter of contract. He wondered if that has really created any big problems for owners.

Prof. Tetley criticized articles 6.1.1 and 6.1.3. As drafted, these articles reject the U.S. Supreme Court’s *Vallescura* rule, which he described as a good rule. He thought it was a mistake to go to a 50-50 rule.

Mr. Alcantara declared that he always had difficulty accepting the concept of “due diligence,” which he thought was very “Saxon.” But he particularly did not think that the carrier should be bound by the due diligence requirement, which is fault-based, during the voyage. At most, it should be an obligation that binds the carrier at the beginning of the voyage.

Prof. Fujita endorsed **Mr. Hooper’s** and **Ms. Burgess’s** position on the issue of continuous obligation.

Mr. Diamond expressed his unhappiness with article 5.1, which has an old-fashioned flavor of freedom of contract. He would delete the article. At the very least, he would add “as qualified by this convention.” At the end of article 5.2, he would add “subject to article 4.2.” In article 6.1.1 in alternative I(a), he would refer back to article 5.2. And in article 6.1.3, he favored current law, which imposes the burden on the carrier.

The meeting adjourned for coffee at 10:45, and reconvened at 11:10.

Prof. Berlingieri, responding to **Mr. Alcantara**, explained that the concept of “due diligence” has been used in this context since the Harter Act. The Harter Act was copied in the Hague Rules. The French text is the same. The failure to exercise due diligence is a fault. This is all part of a fault-based regime.

Mr. Rasmussen, addressing the continuing obligation in article 5.2, had some sympathy with changing the present system. In modern shipping today, due diligence must be exercised throughout. But it is still only due diligence—a fault-based system. But he was prepared to be flexible. In article 6.1.1, he favored alternative I(a), the Hague-Visby approach. He felt that the other alternatives impose stricter liability somehow. In article 6.1.2, the catalogue of defenses, he favored retaining the Hague-Visby concept.

Mr. Young reminded the delegates that this was a multimodal convention, with the definition of the carrier being the “person who enters into a contract of carriage with the shipper.” He asked how it would be possible for an intermediary who issues a bill of lading to exercise due diligence to keep the ship seaworthy.

Prof. Gorton would retain article 5.1, which is the only place that the draft says that the carrier will carry the goods.

Report of the fifth meeting

Prof. van der Ziel, replying to **Mr. Young**, declared that if an intermediary acts as the “carrier,” then it must assume the carrier’s obligations. Whether it can fulfill its obligations is another issue.

Ms. Howlett argued that if the error in navigation and management defense is deleted, and the due diligence obligation is extended, and the catalogue of defenses become presumptions, then there would be a significant shift in risk. If that policy decision is to be taken, then it should be clear what has been done. She suggested that square brackets or commentary should emphasize this shift.

Mr. Hooper viewed this as an argument about semantics, but contended that deleting the error in navigation and management defense *and* extending the due diligence obligation are two separate things. He wondered why it was necessary to do both. He feared that the courts might feel that the extension of the due diligence obligation was intended to go beyond simple fault.

Mr. Beare asked whether anyone favored alternative I(b).

Mr. Chard favored alternative I(a).

Mr. Diamond thought that alternative I(b) imposed marginally greater liability on the carrier than alternative I(a), but that there was not much difference between the two. If positive duties are to be imposed on the carrier, the Instrument should refer back to those duties here. He would draft alternative I(a) in that way.

Prof. Berlingieri suggested that the carrier must prove the cause of the loss or damage under alternative I(b), which may be unnecessary under alternative I(a). That may be a slight difference. He fully supported alternative I(a), which he thought was well-tested and still acceptable.

Prof. Song, referring to article 5.2, noted that the carrier may be a multimodal transport operator or an intermediary. If the performing party has exercised due diligence, and the carrier can prove this, that should be enough. He suggested that the provision should be drafted to cover the “carrier or performing party.”

Capt. Lüddecke noted that the “carrier” may not be the owner of the vessel. That being so, he preferred alternative II, which gives the multimodal transport operator the opportunity to prove that it did what it could to have a seaworthy vessel.

Prof. van der Ziel suggested that, as a matter of presentation, it was premature to choose between alternatives I(a) and I(b). Both should be presented to UNCITRAL.

Mr. Hooper found alternative I(a) closer to the Hague-Visby Rules, which is what he would prefer. He thought that alternative I(b) sounded more like the Hamburg Rules.

Mr. Alcantara described this provision as the core of the convention. Alternative I(a) seems to be more international, but it does not solve the problem of contributory fault. He opposed alternative II. He found alternative I(b) more familiar to the civil law, and thought that it should be kept for UNCITRAL.

Mr. Young argued that alternative II would be impractical when the carrier does not own the ship.

Mr. Rasmussen believed that it would be unfortunate to go forward with either alternative I(b) or alternative II. He recalled that the Hamburg Conference needed to adopt an extra resolution because no one understood what had been intended.

Prof. Gorton felt that when the draft says “carrier could not avoid,” it essentially means strict liability.

Mr. Gombrii declared Norway’s support for alternative I(a), which is consistent with the Singapore resolution for a fault-based system.

Ms. Burgess favored alternative I(a). She thought it would cause confusion to put forward other alternatives.

Prof. Berlingieri noted that Article 5.1 of the Hamburg Rules caused confusion, which made the common understanding necessary. Alternative I(b) would cause the same difficulties.

Prof. Tetley favored alternative I(a).

Prof. van der Ziel explained that alternative I(b) differs from the Hamburg Rules. The Hamburg standard refers to the actual carrier (*i.e.*, a subjective standard), whereas alternative I(b) refers to a reasonable carrier (an objective standard). The Hamburg Rules refer to “all” measures, which is not the case here. There is a lower burden under alternative I(b), to show only that carrier took those measures that a reasonable carrier would have taken. As a result, alternative I(b) is more or less the same as alternative I(a). Alternative I(a) has the benefit of a wealth of experience.

Ms. Pysden found alternative I(a) preferable. The jurisprudence under provisions like alternative I(b) is inconsistent.

Prof. Fujita preferred alternative I(a). His second choice would be alternative II. He thought that alternative I(b) would cause confusion.

Mr. von Ziegler announced that the Swiss delegation favors alternative I(a), for the reasons that **Prof. Fujita** just mentioned. He promised that explanatory detail would follow in the written comments.

Mr. Chandler noted that he had not heard many defenses of alternative I(b), which he also found unacceptable. But he also had trouble with alternative I(a). It replaces the old “Q” clause, but it is narrower (*e.g.*, “fault” instead of “act or fault”). It also precedes the catalogue. More than anything, he disliked the structure of the draft. He understood why the carriers want alternative I(a), but the structure deviates from the Hague-Visby Rules.

Mr. Beare, summarizing the discussion, declared that at least one alternative would be alternative I(a), for which there has been considerable support, subject to re-drafting. He noted that there had been little support for alternative I(b), and some support for alternative II. He asked if the International Sub-Committee was content with that summary.

[There was no disagreement.]

Mr. Beare invited discussion on article 6.1.2 (the catalogue of exceptions).

Mr. Chandler criticized clause (xi), “accidents of the sea,” saying that it was too broad. This language could cover a collision. In clause (vii), “interference by or impediments created by public authorities,” he was unsure what was meant by “impediments.” In clause (v), which concerned dangerous goods, he suggested that the presumption of non-fault should not apply after the

Report of the fifth meeting

danger has passed. There should not be a blanket exception covering unrelated events.

Mr. Rasmussen recognized that there had been considerable support in Singapore for deleting the error in navigation and management defense, but he noted that there had also been some support for retaining it. He was prepared to discuss the elimination of this provision, but he did not think that it was appropriate to drop it without further negotiation.

Mr. Young proposed that, because this will be a fault-based regime that is often multimodal, with exemptions relevant to the ocean leg, there should also be land-based equivalents (*e.g.*, earthquakes, truck hijackings).

Prof. Song asked whether the carrier escaped liability if it could prove that the loss, even in part, had been due to one of the items on list.

Mr. Chard contended that once the carrier proves that it is within an exemption, it should not be a presumption of non-fault but an exoneration from liability.

Prof. Berlingieri replied that the presumption approach is based on the protocol of signature to the 1924 Hague Rules. The same approach exists under CMR.

Responding to **Mr. Young's** suggestion, he agreed that the CMR exemptions could be considered for inclusion on the list. Some of the items on the list already apply to land carriage (*e.g.*, wastage in bulk).

Mr. Rasmussen countered that the protocol of signature is not an interpretation of the Hague Rules, but an opportunity for reservation.

Mr. von Ziegler noted that, in many countries, the rules regarding burdens of proof under the Hague Rules lead to the same result.

Mr. Alcantara proposed shortening the list.

Ms. Pysden observed that the fire exemption operates differently at sea or on land.

Mr. Chandler commented that clause (vi), "fire," is very broad. In the United States, the fire exemption (COGSA § 4(2)(b)) applies only to vessel fires. He saw no need to extend that exemption to fires on land.

Prof. Fujita warned that it was important to be careful in dealing with the fire exemption. In the Hague-Visby Rules, the "actual faulty or privity" standard is much stricter. This draft reduces the scope of the Hague-Visby Rules.

Addressing the error in navigation and management defense, he noted that Japan was in the Singapore minority but wanted to stress that there had been debate regarding the elimination of this provision.

Mr. Diamond found the drafting unclear. In the opening clause of article 6.1.2, the language "to such extent" is unclear. The draft should be clarified. Moreover, he wondered how this article should be reconciled with the obligation to provide a seaworthy vessel. Finally, he found some of the exceptions to be ludicrously broad, including clause (vi) ("fire"), clause (v) (dangerous goods), and clause (xi) ("perils, dangers and accidents of the sea").

Ms. Burgess favored extending the list and also drafting the items on the list as exonerations from liability (rather than as presumptions of non-fault).

She wondered why some of the items on the Hague and Hague-Visby list

had been deleted. For example, the exceptions for war, quarantines, and latent defect were all missing.

She found clause (vii) (“interference by or impediments created by public authorities,”) to be unclear.

Lastly, regarding error in navigation, she thought that an exception for the negligence of a compulsory pilot should be retained even if the defense is otherwise eliminated.

Prof. Berlingieri recalled that **Mr. Diamond** had described an “overriding” obligation to provide a seaworthy vessel, but he did not agree with this analysis. In his view, there is no conflict between this obligation and the catalogue when drafted in the form of presumptions.

Mr. Diamond clarified his earlier comment, which related to shifting burdens of proof.

Prof. Tetley declared the Canadian Maritime Law Association’s support for the deletion of the error in navigation and management defense. This is in part because the ISM Code makes the management defense irrelevant; in part because the defense rarely succeeds; and in part because the defense is outdated.

Prof. van der Ziel, responding to the suggestion to look at the catalogues in other conventions and to compare them to the article 6.1.2 list, explained that the Working Group had done so. By and large, those exemptions are covered in article 6.1.2. Some are not included. The CMR exemption for the use of unsheeted vehicles when this use was expressly agreed, for example, did not seem worthwhile.

More generally, he explained why article 6.1.2 has been drafted as it is. The charge was to start with the Hague-Visby Rules, but to modernize the list and delete out-dated or irrelevant exemptions. He had thought that latent defects was covered in clause (iii), “wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods.”

Mr. Chandler objected that the “latent defect” exception in the Hague and Hague-Visby Rules referred to a latent defect in ship.

Prof. van der Ziel agreed to correct that error. Continuing with his explanation of the draft, he agreed that clause (v), “fire,” gives the carrier less flexibility than the current rules. The exemption no longer protects the carrier from crew member negligence. Clause (vii), “interference by or impediments created by public authorities,” includes quarantine and “public” wars. Clause (viii), “piracy, terrorism, riots, and civil commotions,” includes “private” wars. Clauses (ix), (x), and (xi) are the same as the Hague and Hague-Visby Rules. The Working Group discussed whether property salvage should remain on the list, but decided to retain the approach of the Hague and Hague-Visby Rules.

Mr. Beare invited discussion on article 6.1.3.

Mr. Chandler argued that the 50-50 division of liability between cargo and carrier interests should be a fall-back provision that applies only as a last resort. The “sufficient certainty” language in the present draft makes a 50-50 division too likely.

Prof. Berlingieri agreed with **Mr. Chandler**, but thought that the burden of proof should be solely on the carrier.

Report of the fifth meeting

Mr. Hooper explained that the U.S. position is to impose an equal burden on both parties. He did not want to make the easy way out too readily available to judges. A 50-50 division of liability should be rare.

Mr. Alcantara agreed with **Prof. Berlingieri**.

Mr. Rasmussen expressed sympathy with the 50-50 proposal, but thought that it could be improved by adopting the proposal of the U.S. Maritime Law Association.

Mr. Diamond was concerned that article 5.7 of the Hamburg Rules had not been put forward, at least as one alternative. As drafted, article 6.1.3 does not specify the burden of proof.

Mr. von Ziegler distinguished the case in which different parts of the cargo were damaged by different causes from the case in which multiple causes combined to damage each part of the cargo.

Prof. Fujita asked why the U.S. Maritime Law Association had proposed this rule. He wanted to know if it was just part of the compromise for the elimination of the defense of error in navigation and management.

Mr. Chard supported the draft U.S. approach, and offered to suggest drafting.

Mr. De Orchis agreed that the joint-burden-of-proof proposal was part of a compromise. *The Vallescura* imposes an insuperable burden of proof on the carrier. He knew of no carrier that had carried that heavy burden.

Prof. Tetley observed that article 5.3 alludes to Rule A of York-Antwerp Rules. He suggested that Rule A may soon be changed.

Mr. Beare invited delegates to propose items for inclusion on the agenda for the afternoon. In reply, various delegates asked to discuss the “performing party” definition, delay, article 8.3.5’s treatment of qualifying clauses, the conflict of law rules, the evidentiary value of transport documents, and articles 4.2 and 4.3 (deck carriage and through transport).

Mr. Alcantara invited the International Sub-Committee to hold its sixth meeting in Madrid. He noted that all of the meetings thus far had been held in common law countries, and suggested that it would be appropriate to hold the final meeting in a civil law country.

Mr. Hooper also offered to host the sixth meeting in New York.

Mr. Beare asked if the delegates agreed that the sixth meeting would be held on the 12th and 13th of November. [After discussion, this was agreed.]

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

Mr. Beare announced that the venue for the sixth meeting must be referred to the CMI executive leadership for a final decision.

Mr. von Ziegler explained that the CMI executive leadership would make a decision quickly. It would consider the total costs as well as the convenience of the delegates. [Delegates with comments regarding the venue were invited to convey them to **Mr. von Ziegler** after the meeting.]

Mr. Beare invited **Prof. Sturley** to summarize the issues for article 5.2.

Prof. Sturley noted that the principal issue under article 5.2 is whether the obligation to exercise due diligence to furnish a seaworthy vessel should be

limited to the beginning of the voyage, or should be a continuous obligation applying throughout the voyage. Several delegates spoke, and the views appeared to be fairly evenly divided between the two positions. Those who objected to the continuing obligation expressed the view that the courts would be likely to see this obligation as something higher than the duty to exercise reasonable care under the circumstances, which would presumably be the standard for negligence in the management of the vessel. Those who favored extending the obligation throughout the voyage generally took the view that the obligation to exercise due diligence was no broader than the obligation not to be negligent in the management of the vessel. There would be no practical difference between the two, and thus the draft should adopt the more modern approach with a continuous obligation.

Mr. Gatti thanked **Mr. Beare** and **Mr. Griggs** for granting the National Industrial Transportation League observer status. Representing cargo-owning interests, the League has a real stake in how this regime is to be structured. He promised to provide detailed comments by the late-September deadline, and also to work with the political leaders in Washington to update U.S. law. He looked forward to working with the CMI and UNCITRAL on this project.

Mr. Beare reminded the delegates of his statement on the first day regarding comments. Final comments will be posted on the CMI web site if the International Sub-Committee agrees.

Mr. Young asked whether national groups might also submit their views.

Mr. Beare explained that formal requests for comments had been sent to national associations, consultative members, and those with observer status. But he welcomed anyone who wished to comment to submit a reply.

He suggested that drafting comments should be sent informally to **Mr. Beare** as soon as possible for the drafting team. These would be comments that do not raise issues of substance, and that need not be circulated and posted.

Mr. Beare then turned to the “performing party” issue.

Ms. Pysden expressed FIATA’s support for the ICC/UNCTAD Rules on which the FIATA bill of lading is based. FIATA fully supports the CMI’s work. She suggested that coverage of the sea portion of the transportation should be widened, and be made mandatory, but that coverage of the inland portion of multimodal transportation should be non-mandatory. The “performing party” definition should be narrowed to cover only parties that physically handle the goods, thus deleting the phrase “undertakes to perform, or procures to be performed” in article 1.3.

Mr. Young agreed with **Ms. Pysden**. He thought that “performing party” (in the present draft) was better than “performing carrier” (as in the draft discussed in Singapore) because “carrier” implies carrying the goods, whereas “party” could include handling, storage, etc. He also supported the narrowing of the definition to cover only carriage, handling, custody, and storage. He highlighted that document preparation is not included within this definition. The idea that an agent is not liable for the fault of the principal is well-established. If the definition were further narrowed to those who handle the goods, then problems could arise. He agreed that the draft should continue to exclude those who are agents of the shipper.

Report of the fifth meeting

Prof. Sturley explained that the revised draft, which among other things changed “performing carrier” to “performing party,” was designed to accomplish several things. Most significantly, it narrowed the definition so that it no longer included those who were not involved in the physical handling or custody of the goods. In Singapore, it had been suggested that the broad definition might include the shipyard that repaired the ship because that was one of the carrier’s obligations under the contract of carriage. It had never been the goal to cover shipyards, and thus the draft was clarified.

The definition covers not only those who perform but also those who undertake to perform. A stevedore, for example, should not be allowed to escape liability by saying, “I know that I agreed to load the goods but in fact I never did. I simply left them overnight on the pier from which they were stolen.” The definition covers those who procure performance to deal with the situation when a party sub-contracts with the carrier, but intends to further sub-contract the carrier’s duties rather than to perform any of those duties itself.

The exclusion covers the situation in which the shipper, acting through its own agents rather than the carrier’s, performs any of the carrier’s duties, such as loading or unloading the vessel. The shipper and its agents should not become performing parties, which may then impose liability on the carrier. Furthermore, the shipper’s agents’ liability to the shipper should be under their agency agreement, not under the terms of this convention.

Mr. Chandler suggested that the problem is that not every case fits into neat categories any more. Overall, the intent is clear to be able to reach the people who handle the cargo. Although he understood FIATA’s points, it is essential not to permit such loopholes.

Mr. Chard objected that, despite the narrowing of the definition, Himalaya protection requires an agent to show that it acted within the scope of its employment or agency. The UK Chamber of Shipping felt that all actions should be brought against the contracting carrier.

Mr. Hurst agreed. He did not think it appropriate to look to the contract between the carrier and its agents.

Ms. Pysden observed that the CMR requires suit against the first, last, or actual carrier. She argued that this approach reduces litigation.

Mr. Young believed that **Prof. Sturley** had said that the purpose of including those who undertake to perform is to give them Himalaya protection. He agreed with that concept for people who actually perform, but extending that coverage to others is going too far—covering those who would not be liable at tort. Exempting those who actually handle the goods is wrong.

Prof. van der Ziel objected to holding the carrier liable as carrier when it was acting as the agent of the shipper.

Prof. Sturley clarified the intent of the draft. When the carrier acts as an agent of the shipper in performing some duty that is outside the scope of the contract of carriage, then it is not liable as the carrier (although it may be liable to the shipper under the agency contract). But when the carrier performs its duties under the contract of carriage, it cannot escape the application of this convention by saying that it was acting as the shipper’s agent. The carrier always

acts on the shipper's behalf in performing the carriage; it was the shipper that hired the carrier to perform the carriage.

Mr. Chandler disagreed with including shippers' agents under this convention. When the carrier delivers the goods to the consignee's trucker, this convention no longer applies. He also agreed that preparing documents is not the type of act that this convention addresses.

Mr. Schimmelfeng noted that a freight forwarder often acts as the contracting carrier, and then it should be liable for the obligations that it assumes. But a freight forwarder often acts as an agent, and then it cannot be liable (except for what it does itself).

Prof. Sturley agreed that the performing party should not be liable for the carrier's acts. If the draft could be read that way, then it would need to be revised. A performing party is liable only for its own acts or omissions, and those who work under it (sub-contractors, agents, and employees). There was no attempt here to introduce the so-called "last carrier" doctrine, whereby the last carrier in the chain is liable for the faults of prior carriers. If anyone thinks that the draft can be read in this way, they should let the drafting team know how so that the misunderstanding can be corrected.

Mr. Chandler suggested that article 6.3 should be clarified to specify that performing parties are liable only for their own acts.

Mr. Young objected that "procures to be performed" any of carrier's responsibilities can be very broad when one recalls that the carrier is not necessarily the vessel owner.

Responding to **Mr. Chandler**, he argued that what shipper's agents do after delivery is outside the scope of this convention; the subject need not be addressed here.

Mr. Hurst, referring to article 6.3.3, proposed deleting the words after "Instrument" ("if it [the performing party] proves that it acted within the scope of its contract, employment, or agency, as the case may be").

Ms. Pysden understood the desire to bring in the people that **Prof. Sturley** had mentioned, but the current definition may also bring in brokers. This is probably just a drafting point.

Mr. Chandler repeated his concern that all definitions should be in the definition section, and not scattered throughout the Instrument.

Mr. Beare opened the discussion on qualifying clauses.

Mr. Rasmussen argued that the bracketed material in article 8.3.5(b) should be deleted. Containers are very likely to be dented, and that should not deprive the carrier of the right to rely on a qualifying clause.

Prof. van der Ziel agreed.

Mr. Chandler disagreed.

The meeting adjourned at 3:35 p.m. on Wednesday, 18th July 2001.

DRAFT REPORT OF THE SIXTH MEETING OF THE INTERNATIONAL SUB-COMMITTEE ON ISSUES OF TRANSPORT LAW *

MADRID
12th to 13th NOVEMBER 2001

Present: Stuart N. Beare (Chairman of the International Sub-Committee)
Karl-Johan Gombrii (Vice Chairman)
Prof. Michael F. Sturley (Rapporteur)
Prof. Gertjan van der Ziel (The Netherlands; member of the Working Group)
Prof. Avv. Stefano Zunarelli (Italy; member of the Working Group)
Sarah Derrington (Australia and New Zealand)
Diana Jerolimov (Croatia)
Petar Kragić (Croatia)
Uffe Lind Rasmussen (Denmark)
Prof. Francesco Berlingieri (Italy)
Prof. Tomotaka Fujita (Japan)
Tulio F. Cusman (Peru)
José María Alcantara (Spain)
Francisco Goñi (Spain)

* In order to facilitate the consultation of this Report, the pages where individual articles of the Draft Instrument are discussed are indicated below:

article	page	article	page
1.4	307-308	6.2	328-329
1.8	310	6.3	329-332, 341-343
1.9	311	6.4	332-333
1.13	309-310	6.5	333
1.14	311	6.6	333-335
1.15	309	6.7	335-336, 347
1.17	308	6.8	336-337
2.1	311-312	6.9	337
2.3	312	7	338-340
2.4	310-311	8	340-341, 348-349, 350-351
3.1	312-315, 336, 349	9	351-352
3.3	315-317, 343-347	10	353
3.4	316, 343-347	11	353-354
4	317-320	12	354-355
5	320-322	14	355
6.1	322-328	17	355

Capt. C.F. Lüddecke (Switzerland)
David Martin-Clark (UK)
Prof. Francis M.B. Reynolds (UK)
George F. Chandler, III (USA)
Chester D. Hooper (USA)
Prof. Franco Ferrari (UNCITRAL; member of the Working Group)
Søren Larsen (BIMCO)
Kay Pysden (FIATA)
Kurt J. Schimmelpfeng (FIATA)
Linda Howlett (International Chamber of Shipping)
Sara Burgess (International Group of P&I Clubs)
Hugh Hurst (International Group of P&I Clubs)
Andrew J. Garger (IUMI)
Karyn Booth (National Industrial Transportation League)
Donald W. Chard (UK Chamber of Shipping)
Lars Kjaer (World Shipping Council)
Jeffrey Lawrence (World Shipping Council)
José Hernandez (Spain DGMM)

Mr. Beare called the meeting to order at 10:05 a.m. on Monday, 12th November. He particularly welcomed the delegates from the Maritime Law Associations of Peru, Croatia, and Australia & New Zealand, who were present for the first time at this meeting. He also particularly welcomed **Prof. Ferrari**, who was attending the International Sub-Committee meeting for the first time on behalf of UNCITRAL.

Prof. Ferrari reported that UNCITRAL, as of this year's session, agreed to undertake Transport Law. The Commission agreed that the project should include at least port-to-port coverage, and that the issue of door-to-door coverage should be studied.

Turning to logistical matters, he explained that the preliminary work must go to the translators by 15 December, and that it would need to be revised to conform to UNCITRAL's format. The UNCITRAL draft would then be circulated in all of the United Nations languages during February 2002, in preparation for an April 2002 UNCITRAL Working Group meeting in New York. During next year's Commission meeting in New York, there will be a report to the Commission on the progress of the work.

Mr. Beare noted that the International Sub-Committee was meeting in Madrid at the invitation of the Spanish Maritime Law Association. He thanked **Mr. Alcantara** for the Association's hospitality and invited him to speak.

Mr. Alcantara welcomed the International Sub-Committee's delegates to Madrid and discussed the logistical arrangements for the meeting. He concluded with the comment that the meeting was being held in a government building, which is part of the Labor Ministry, and that the Spanish Ministry of Transport has an observer present, **Mr. Hernandez**.

Mr. Beare conveyed apologies from Alexander von Ziegler, who is unwell and thus unable to attend, and also from Prof. Yuzhuo Si and the China Maritime Law Association. He noted that paper copies of the report of the

Report of the sixth meeting

International Sub-Committee's fifth meeting were available for those who had not received a copy by e-mail.

He expressed his hope that the present meeting would approve the bold-text articles of the Provisional Final Draft Outline Instrument, subject to any changes that are agreed by the International Sub-Committee or that the drafting team is instructed to make. He emphasized the basis on which the draft had been prepared, as explained in the third paragraph of the Introduction. Some provisions are in square brackets to reflect fundamental policy differences. These choices will need to be made by UNCITRAL or at a diplomatic conference; this meeting will not be able to eliminate those brackets. Other bracketed language reflects the drafting team's desire to obtain the International Sub-Committee's guidance. Some of these issues should be resolved at this meeting.

Mr. Beare explained that the commentary following the bold-text articles falls into three distinct categories: (1) Some of the commentary is explanatory of the draft itself, providing further clarification of how a provision is intended to apply; (2) some of the commentary explains differences of opinion on substantive matters, describing choices that need to be made and noting why some of the bold-text language is in brackets; and (3) some of the commentary explains minority views that are not reflected in alternative bold-text drafts, thus describing alternative approaches that could be taken on an issue. Although this meeting will not be in a position to approve the final commentary, particularly in the second and third categories, delegates should nevertheless feel free to discuss the commentary as appropriate.

He noted that copies were being circulated of various documents, including (1) proposed redrafts of articles 3.3 and 3.4; (2) the written comments of the Maritime Law Association of Australia & New Zealand and of the Croatian Maritime Law Association; (3) a version of the bold text only (*i.e.*, without commentary) that indicates changes from the May draft (which he hoped might be helpful but which could be ignored if not); and (4) a synopsis of the comments received as part of the consultation process, which will be published in CMI Yearbook.

He announced his preference to proceed on the basis of consensus, as at past meetings, but noted the need to reach conclusions. The International Sub-Committee no longer has the luxury of sending the draft back to the Working Group for substantial revisions. If necessary, votes will be taken in which each national association has one vote.

Mr. Beare opened the discussion of chapter 1 (the definitions), noting that it may make more sense to postpone some of this discussion until the discussion of the substantive chapter in which a particular definition is used. He observed that several new definitions had been added, primarily on electronic commerce. He referred back to Robert Howland's comments at the fifth meeting of the International Sub-Committee (CMI Yearbook 2001 at page 271), with which no one had disagreed, and explained that the drafting team had followed that approach.

Mr. Chandler proposed to eliminate "lashbarge" from article 1.4 (the "container" definition), both because (1) a lashbarge is not a container, but an

item that itself contains containers, and (2) they are disappearing from service.

Ms. Pysden referred to article 1.18, the “performing party” definition. She explained that she and **Prof. Sturley** had discussed the issue at length, and had agreed on a number of issues. The current draft had been significantly modified to reflect this agreement. She still felt that the phrase “or undertakes to perform” should be omitted. She also argued that the last sentence, which excluded those retained by the shipper or consignee from the definition, was unnecessary and should therefore be omitted.

Prof. Sturley explained that the phrase “undertakes to perform” was included in the definition to cover the situation in which a party undertook to perform a portion of the carrier’s responsibilities, but then failed to do so. If the phrase were omitted, a stevedore would not be covered by the definition if it agreed to load the cargo on the ship but instead left it on the pier.

Prof. van der Ziel asked **Ms. Pysden** whether FIATA’s position was that all intermediaries between the party who actually performs the physical duties and the contracting carrier should be excluded from draft. He added that he did not understand why the last sentence caused a problem. It covers the situation, common in the United States, in which a forwarder acts on behalf of the shipper.

Ms. Pysden replied that FIATA would cover the contracting carrier and those who physically perform, but would not cover intermediaries if they do not physically perform. They may still have contractual duties owed to the parties with which they are in privity. As a matter of principle, FIATA does not like the last sentence because it ties in with the “procures to be performed” language from the prior draft.

Prof. Zunarelli mentioned that the Guadalajara approach for air carriers covered “actual carriers” only so far as they actually performed. There is now wide agreement that intermediate carriers should have been covered.

Mr. Chandler thought that it is clear that the draft is talking about sub-contractors, not about peripheral parties. He suggested that the draft might be tightened to make this point.

Prof. Sturley asked **Ms. Pysden** why there should be a distinction between (1) the stevedore that undertakes to load the vessel but fails even to begin loading, thus allowing the goods on the pier to be stolen, and (2) the stevedore that starts to perform its contractual duties, but then abandons the task (once again allowing the goods on the pier to be stolen).

Mr. Beare asked why the term “custody” is in brackets.

Prof. van der Ziel wondered whether the term “custody” is a legal term or a physical description.

Ms. Burgess questioned whether the draft needed a “performing party” definition at all. She added that the International Group had raised this issue, but she did not see it addressed in commentary.

Mr. Beare replied that it was addressed in the commentary to article 6.3.

Ms. Burgess suggested that it would be appropriate to discuss this whole issue in conjunction with article 6.3.

Mr. Alcantara thought that the definitions should be rearranged to be in a more logical order.

Report of the sixth meeting

Mr. Beare replied that the definitions are now in alphabetical order, not in any logical order.

Mr. Chandler suggested moving the definition of “right of control” in article 11.1 to article 1.19, which now simply refers to article 11.1.

Mr. Beare invited further comments on the “performing party” definition.

Mr. Kragić asked how does the cargo claimant obtain title to sue a stevedore. Does the cargo claimant step into the shoes of the carrier? Must the carrier disclose its contract with the stevedore?

Mr. Gombrii, referring to article 1.15 (the definition of “negotiable transport document”), wondered whether deleting the brackets around the words “or ‘negotiable’” would mean that a bill of lading made out to a named party (without “order language”) could be a negotiable document if it were simply marked “negotiable.”

Mr. Chandler replied that this is exactly what it would mean. He added that this would change the law in the United States, at least, but that is clearly what the Instrument would do.

Mr. Hooper agreed with **Mr. Chandler**. He welcomed this provision as an opportunity to clarify and improve the law.

Mr. Chandler proposed removing the brackets and retaining the words “or ‘negotiable’” in the text of article 1.15.

Mr. Beare asked if the International Sub-Committee agreed with this proposal. [There was no objection.]

Ms. Derrington proposed extending the definitions of “carrier,” “consignee,” etc. to cover agents and employees.

Prof. Sturley explained that the drafting team had made a deliberate choice not to attempt to resolve questions of agency. In any event, these parties almost inevitably act only through their agents, and thus he felt that agents and employees were implicit in the use of this language when the context was appropriate. But of course when liability was imposed on the carrier, for example, it did not make sense to impose the same liability on all of the carrier’s agents and employees. He thought it would be better to address this point in the commentary if necessary than to create other problems by altering the text.

Ms. Derrington, referring to article 1.13 (the definition of “holder”), noted that section 5(2) of the British 1992 Carriage of Goods by Sea Act, the definition of “holder,” requires “good faith.” She thought that the “holder” definition here should also require that the person be in “lawful” possession.

Prof. Sturley explained that the draftsmen had been concerned about using “lawful” or a similar term without explaining what it meant, and had been even more concerned about attempting to cover all of negotiable instruments law to explain what “lawful” meant. He also felt that omitting “lawful” would not cause any practical problems because those that were not in lawful possession rarely claimed “holder” status, and if they did they would at best be holders subject to superior claims.

Mr. Kragić proposed referring to “applicable law” to avoid this problem.

Mr. Chandler objected to allowing this issue to be determined under local law, which would undermine uniformity.

Mr. Beare suggested leaving this issue to be dealt with as necessary in the commentary. In article 1.13(iii), which defines “holder” in the context of electronic records, he sought clarification that “access to” and “control of” are alternatives.

Prof. van der Ziel confirmed that “access to” and “control of” are alternatives.

Mr. Beare then asked which was the better alternative.

Mr. Chandler explained that the Electronic Commerce Working Group had disagreed on this question. He felt that it would cause problems to rely on “control of,” but suggested that the definition could use both.

Mr. Martin-Clark, speaking from the Bolero perspective and not the British Maritime Law Association perspective, would accept both.

Prof. van der Ziel countered that systems were being created in which different parties will have “access to” and “control of” the electronic record. The worst solution would be to have two parties that can both claim to be the “holder.”

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

Mr. Beare opened the discussion of electronic communication. He noted that new definitions had been drafted in articles 1.8, 1.9, and 1.10, and in aspects of other definitions. He invited **Prof. van der Ziel** or **Mr. Chandler**, both of whom were members of the Electronic Commerce Working Group, to introduce the discussion.

Prof. van der Ziel reported that the Electronic Commerce Working Group had met in Montreal under Johanne Gauthier’s chairmanship to discuss this issue. **Mr. Chandler**, Robert Howland, and **Prof. van der Ziel** attended the meeting. Although it is difficult to draft rules for a business that does not yet exist, several conclusions emerged from the meeting: (1) The outcome must be media-neutral. (2) The parties must agree before electronic commerce is used. This basic principle is reflected in article 2.1 of the current draft. (3) Anywhere that the Instrument refers to a notice in writing, the notice may be given electronically if the parties agree. This is reflected in article 2.3 of the current draft. (4) The notion of an “electronic record” has been introduced in the Instrument, with the idea that it will be consistent with the concept of negotiability, and that it will be as similar as possible to the paper equivalent.

Article 2.4 of the current draft refers to the contractual arrangements between the parties. Under article 2.4(a), these arrangements should specify how the parties will transfer the electronic record. Under article 2.4(b), these arrangements should similarly specify the identification function of the record. (For paper documents, possession of the document serves an identification function.)

Mr. Chandler added that the idea has been suggested that the project should move away from the “functional equivalent” approach, and should instead define electronic commerce on its own terms. But paper documents will be around for some time to come. Eventually it may be possible to go

Report of the sixth meeting

further than has been done here, but the project has probably gone as far as it can for the time being. In the real world, people still speak of “electronic bills of lading” and “electronic documents,” even if they exist only in electronic form. But this bothers a number of people, who feel that “bills of lading” and “documents” must be on paper. The current draft has therefore used the term “electronic record,” which has some precedents.

Although **Mr. Chandler** would have been more comfortable with less regulation, leaving some of the provisions in the current draft simply as default rules, on the whole he was still pleased with what has been done here.

Capt. Lüddecke wondered whether article 2.1 should be included in the bold text, or moved to a preamble. He did not want to stand in the way of electronic commerce by giving one party the power to refuse to agree on the use of electronic commerce. In a few years, he predicted, there would be no further need for paper documents. He argued that no one should be allowed to insist on the use of paper documents at that time.

Mr. Chandler replied that for the foreseeable future, article 2.1 needs to be part of the Instrument. If a shipment goes to Saudi Arabia without paper documents and the proper stamps, everyone will be in trouble.

Mr. Beare asked whether the Swiss Maritime Law Association would be content to record this point in the commentary.

Capt. Lüddecke agreed that this would be adequate.

Mr. Larsen asked if the draft had taken into account the CMI Rules.

Mr. Chandler answered that the Electronic Commerce Working Group had started with the CMI Rules, but had left it to the parties to define the rules of procedure.

Mr. Beare invited **Mr. Larsen** to raise this issue again when the meeting reached chapter 11 (right of control). Continuing, he asked if it would be appropriate to delete the brackets around the words “or ‘negotiable’” in article 1.14.

Mr. Chandler replied that it would be appropriate to delete these brackets. [No one disagreed.]

Mr. Beare asked if the definitions could now be accepted.

Mr. Rasmussen suggested that article 1.9 should conform to article 1.20, saying (a) *or* (b) *or both*. [This suggestion was accepted. No other changes were proposed.]

Mr. Beare proceeded to chapter 2 (electronic communication).

Prof. Fujita noted that article 2.4 should incorporate the possibility of an agreement between the carrier and the subsequent holder when the subsequent holder wishes to convert a paper transport document to an electronic record under article 2.2.1.

Ms. Burgess sought clarification of the meaning of the “issuance” of an electronic record. Does it cover notices?

Mr. Chandler said that it would cover notices.

Mr. Hurst saw a major difference between “issuing” an electronic record and “communicating” something. Issuing an electronic record means bringing it into existence.

Mr. Chandler agreed, adding that “communication” was somewhat

vague. It is not so purposeful as “issuance,” which is more commonly used in electronic commerce.

Prof. Zunarelli concluded that the current language may not be completely satisfactory, but it is the best that can be imagined for the time being. The term “issued” implies a juridical effect that may be missing from simple “communication.” The Instrument should continue to use “issuance” even though everyone realizes that the commercial practice will develop in the future. It would be dangerous to attempt to define too much at this point.

Mr. Hurst countered that “issuance” is too imprecise or vague. Perhaps “provide” could be used.

Mr. Beare asked if that proposal would be acceptable.

Prof. Berlingieri doubted that it would. It does not work in article 1.9, for example.

Prof. van der Ziel agreed fully with **Prof. Zunarelli**. “Issuance” has a legal function. The person to whom an electronic record (or a transport document) has been issued has a legal right. “Communicated” or “provided” does not convey this sense.

Ms. Burgess agreed that the issues in this chapter should all be subject to agreement between the parties, but wondered if there should also be default rules to apply when the parties do not agree.

Mr. Chandler responded that article 3.1(d) does that. Although he agreed that there may be a better term than “issuance,” he agreed with **Prof. van der Ziel** that issuance is a purposeful act. Copies of documents may be “communicated” or “provided,” but that does not have the legal effect of “issuance.”

Mr. Hurst requested that this point be included in the commentary.

Mr. Beare invited the International Group of P&I Clubs to draft suggested language that the drafting team could consider for inclusion in the commentary.

Ms. Burgess suggested that the inclusion of the words “or implied” could be dangerous in article 2.3, which permits notices to be given electronically “with the express or implied consent” of the parties.

Mr. Chandler replied that if a party accepts electronic messages for months, that should be “implied” consent that binds the party.

Prof. Berlingieri pointed out that implied consent is already part of the regime under article 2.1. Article 2.3 would cover the situation that may exist in the future when the use of electronic records is customary.

Mr. Rasmussen agreed with **Prof. Berlingieri**.

Mr. Chandler elaborated that this was not a practical concern because carriers using electronic records will require the parties to agree to the rules of procedure. Furthermore, a party has to be willing to use electronic records in order to have the ability to do so.

Mr. Beare proceeded to chapter 3. On article 3.1, he drew the delegates’ attention to some addition commentary that had been circulated.

Mr. Rasmussen, referring to article 3.1(a)-(b), observed that this project will produce not only a multimodal but also a uni-modal convention. He thought that it would be very odd if the convention did not apply to the

Report of the sixth meeting

maritime leg if the port of loading or the port of unloading was in a Contracting State. But the port of loading and the port of unloading are not mentioned.

Mr. Martin-Clark replied that this should not be a problem. In the uni-modal case, the port of loading would be in the same state as the place of receipt, and the port of unloading would be in the same state as the place of delivery.

Prof. Sturley commented that previous drafts of the Instrument had provided for the broader coverage that **Mr. Rasmussen** now suggests, but that this language had been deleted.

Mr. Schimmelfeng distinguished between a multimodal bill of lading issued by a non-vessel-operating carrier (NVO), in which the ocean leg would be subject to the Instrument as between the NVO and the ocean carrier, and an ocean carrier's multimodal bill of lading in which there would be no separate contract for the ocean leg that could be subject to the Instrument.

Mr. Chandler expressed the view that either solution would be acceptable. He commented on the U.S.-Canada situation, in which goods regularly travelled by road or rail from one country to the other before continuing their journey by sea.

Mr. Gombrii pointed out that **Mr. Rasmussen's** proposal would lead to a wider application of the convention. He accordingly had no objection to it.

Prof. van der Ziel suggested that **Mr. Rasmussen** was making a different point, which was to apply the Instrument only to the maritime leg when the port of loading or the port of unloading was in a Contracting State but neither the place of receipt nor the place of delivery was in a Contracting State.

Mr. Beare asked whether it would be adequate to discuss this issue in commentary, or whether **Mr. Rasmussen** wished the meeting to take a vote. [**Mr. Rasmussen** requested a vote.]

In favor – Croatia, Denmark, Norway

Opposed – Australia & New Zealand, Great Britain, Japan, the Netherlands, USA

Prof. Berlingieri commented that the abstentions were far more numerous than those voting, and suggested that the issue should be revisited after an opportunity for further consideration.

Mr. Beare agreed to hold another vote on the second day of the meeting.

Capt. Lüddecke raised the possibility that the Instrument might follow the CMR example and restrict its application to cases in which both the state of receipt and the state of delivery are contracting states.

Mr. Alcantara expressed the view that the parties should always be free to incorporate the Instrument into their contracts, whatever the form of the contract.

Mr. Hooper requested the clarification that article 3.1(e) would incorporate the Instrument as a contractual term, and not with the force of law in a manner that would override inconsistent charter party terms.

Prof. Berlingieri argued that **Mr. Hooper's** proposed clarification would significantly detract from the purpose of the Instrument.

Prof. Ferrari agreed that article 3.1(e) represents either a contractual choice or a choice-of-law provision. Addressing the solution of the problem,

he thought that article 3.1(e) should properly be read as a choice-of-law provision. If **Mr. Hooper's** position were accepted, then article 3.1(e) should be deleted.

Mr. Kragić saw no objection to accepting **Mr. Hooper's** position, which could be done by amending article 3.1(e) to add "except as the parties have otherwise agreed." He also proposed to omit article 3.1(d), which turns on where the contract of carriage is entered into or where the transport document or electronic record is issued. Where a document or electronic record is issued is essentially random. With modern technology, it is often difficult to know where a document is issued or where the parties entered into a contract.

Mr. Beare suggested that the delegates try to resolve the article 3.1(e) question over lunch. In the meantime, he recalled that **Mr. Kragić's** point on article 3.1(d) had already been mentioned in the commentary. The point could be strengthened in the commentary, or article 3.1(d) could be bracketed.

Mr. Martin-Clark also expressed doubts about article 3.1(d).

Prof. Fujita suggested that another solution would be to include the place of issuance in the "contract particulars" under article 8.2.

Prof. Ferrari explained that UNCITRAL would prefer not to delete the article. He added that UNCITRAL would simply restore the provision in brackets when it circulated its draft.

Mr. Beare asked if the International Sub-Committee agreed to bracket article 3.1(d) and to strengthen the commentary. [There was no dissent.]

Prof. Berlingieri proposed amending article 3.1(e) by changing "contact of carriage" to "transport document."

Mr. Beare asked whether **Prof. Berlingieri's** proposed amendment applied throughout article 3.1, or only in article 3.1(e).

Prof. Berlingieri replied that he had not thought about that wider possibility, and that his proposal was accordingly limited to article 3.1(e).

Mr. Alcantara argued that it is the contract that matters, not the transport document.

Mr. Kragić thought that it would be easier to deal with **Mr. Hooper's** problem in article 3.3.1 (the charter party exclusion).

Mr. Martin-Clark encouraged the delegates to consider this issue over lunch, as **Mr. Beare** had suggested.

The meeting adjourned for lunch at 1:05, and reconvened at 2:20.

Mr. Beare reopened the discussion of article 3.1(e).

Mr. Hooper saw no purpose for article 3.1(e), and preferred to eliminate it.

Mr. Martin-Clark disagreed with **Mr. Hooper's** preference.

Prof. Ferrari explained that UNCITRAL would feel more comfortable with bracketing the language than with deleting it.

Prof. Berlingieri preferred to retain the language without brackets. Otherwise it would be a step backwards.

Mr. Kragić favored retaining article 3.1(e) and addressing the issue in article 3.3 by adding the following language to article 3.3.1: "... unless the parties to such a contract agree that this Instrument will apply. In such case,

Report of the sixth meeting

this Instrument would form the terms of the contract, which the parties can change if they wish to do so.”

Mr. Hooper, as an alternative, proposed redrafting article 3.1(e) to read “the contract of carriage *specifically* provides that the provisions of this Instrument, or the law of any State giving effect to them, are to govern the contract *with the force of law*”.

Mr. Kragić responded that the charter party situation should be treated differently than the situation under bills of lading.

Mr. Beare invited to **Mr. Hooper** to make a specific proposal.

Mr. Hooper proposed bracketing article 3.1(e) and amending the language to read “the contract of carriage *specifically* provides that the provisions of this Instrument, or the law of any State giving effect to them, are to govern the contract with the force of law.”

Prof. Zunarelli supported the Croatian solution.

Ms. Booth added that the problem is not limited to the charter party situation. It also arises under volume contracts and other similar arrangements.

Mr. Kragić clarified that his solution would apply to these analogous cases.

Mr. Martin-Clark suggested dealing with this issue in conjunction with article 3.3.

Mr. Beare agreed to follow **Mr. Martin-Clark**’s suggestion, but only after the meeting had addressed article 3.2. [There were no comments on article 3.2.] Turning to article 3.3, **Mr. Beare** invited **Prof. van der Ziel** to introduce his draft.

Prof. van der Ziel explained that the prior draft, which had largely been based on the Hamburg Rules, had not been satisfactory for a number of people. He had accordingly tried to redraft new language in consultation with **Mr. Larsen** of BIMCO.

Capt. Lüddecke proposed deleting article 3.3.1 (the charterparty exclusion) entirely, and thus applying the Instrument to charter parties.

Mr. Beare asked if anyone else support this solution? [No one did.] The next issue is whether the charter party exclusion should extend to a broader class of similar agreements.

Ms. Derrington supported a broader exclusion.

Mr. Lawrence explained that excluding volume contracts and service contracts would exclude the majority of shipments today. He would prefer to cover service contracts unless the parties agreed to derogate from the Instrument. The parties should have freedom of contract, but the Instrument should form the default rule in the absence of a contrary agreement.

Ms. Booth supported **Mr. Lawrence**’s proposal.

Ms. Pysden noted that service contracts are common in the liner trade, whereas charter parties are not. Furthermore, she argued that shipping companies and non-vessel-operating carriers (NVOCs) should be treated equally. NVOCs cannot enter into service contracts with their customers. This would allow shipping lines a competitive advantage denied to NVOCs.

Mr. Martin-Clark asked how an increase in liability in a service contract would be incorporated into bills of lading.

Mr. Chandler replied that this could be done as under current law with charter parties.

Prof. van der Ziel objected that service contracts are not truly contracts of carriage. They focus on rates, not on the terms of specific shipments other than rates. The only reason the Instrument needs a service contract exclusion is to deal with those jurisdictions that treat service contracts as contracts of carriage.

Ms. Booth explained that she was concerned to make sure that inconsistent bill of lading terms do not override service contract terms as between the parties to the service contract. A third party that did not agree to the service contract should still be governed by the terms of the Instrument.

Mr. Martin-Clark agreed that the Instrument should not apply to a service contract, but that it should apply to transport documents issued under a service contract when they are in the hands of a third party.

Prof. van der Ziel, speaking as the Dutch delegate, was troubled that there would be no mandatory law governing the contract between the shipper and the carrier.

Prof. Zunarelli recalled that the rationale for the charter party exclusion was that there was no need to protect the parties to a the charter party. He wondered if this is also true for service contracts. He was not at all clear that it is. **Prof. van der Ziel's** proposed redraft of article 3.4 does not include service contracts in the exception to the exception. This suggests that bills of lading issued under a service contract would bind the original parties to service contracts. He thought that this was a sensible solution. He also supported the view that the Instrument should apply to service contracts, but that the parties should have the freedom to derogate from the Instrument.

Mr. Chandler stressed the need to focus on the principle: Should the parties to a service contract have the freedom to opt out of the Instrument?

Mr. Kragić wondered what the result would be if non-negotiable transport documents were issued under a service contract.

Mr. Chandler opposed any effort to distinguish liability rules based on whether negotiable or non-negotiable transport documents had been issued.

Mr. Beare expressed concern that there was too much disagreement to resolve here, and that the draft should therefore go forward to UNCITRAL as drafted, with bracketed language.

Prof. van der Ziel argued that if the position of the National Industrial Transportation League and the World Shipping Council is accepted, then the Instrument will apply only to bill of lading shipments. That was the main criticism of the Hague-Visby Rules.

Mr. Rasmussen agreed with **Mr. Chandler** that there should be no distinction between negotiable and non-negotiable transport documents. But either transport document in the hands of the shipper should be a mere receipt.

Mr. Martin-Clark advocated the preservation of freedom of contract for the original parties to a charter party, service contract, etc., but agreed that the Instrument should apply to third parties.

Mr. Kragić favored the current draft with the deletion of the word "negotiable" in article 3.3.2.

Report of the sixth meeting

Prof. Berlingieri suggested a need to define “volume contract,” “service contract,” and “contract of affreightment.” He also argued that a charter party was not a contract but a document.

Mr. Hurst supported **Mr. Martin-Clark**’s suggestion.

Mr. Larsen believed that it was safer to say what *is* governed by the Instrument than to say what is not. The draft should specify bills of lading, waybills, and transport documents issued under charter parties, service contracts, etc.

Mr. Kragić noted that going to great effort to define charter parties, etc., only to exclude them from the Instrument seems like a great deal of work for very little benefit.

Mr. Gombrii announced that he would be happy with the pragmatic approach, excluding charter parties without a definition. But a more intellectual approach would define the term.

Mr. Beare, seeing that over an hour had already been spent on this subject, proposed to put it over until 9:00 o’clock the following morning.

Prof. van der Ziel, speaking as a draftsman, recommended that the delegates consider the alternative draft as well as the original language.

Mr. Beare, noting that article 3.4 is part of the same issue, proceeded to discuss chapter 4.

Prof. Berlingieri observed that in article 4.1.2 and article 4.1.3, reference was made to “customs ... in the trade or at the place of receipt.” He wondered what would happen if there were different customs “in the trade” than existed “at the place of receipt.”

Mr. Martin-Clark commented that in article 4.1.4, reference was made to the “discharge port.” He wondered if that were correct, or whether reference should be made to the “place of delivery.”

Prof. Berlingieri would refer just to “in the trade.”

Prof. van der Ziel argued for retaining some flexibility on this question.

Prof. Sturley suggested that the custom of a particular port would be part of the custom of the trade to or from that port.

Mr. Martin-Clark suggested that the draft might be amended to clarify which custom applied in the case of a conflict.

Prof. van der Ziel repeated his plea for flexibility. Sometimes the custom of a port should override a more general custom of the trade; sometimes the custom of the trade should override a more general custom of a port.

Mr. Chandler preferred to provide certainty if possible, and thus supported **Mr. Martin-Clark**’s suggestion.

Mr. Gombrii agreed with **Prof. Sturley**’s suggestion that the custom of the trade would cover these problems.

Prof. Sturley suggested deleting “custom of a port” with an addition to the commentary explaining that the custom of the trade would include individual port customs.

Mr. Beare asked if there was any objection to this suggestion. [No one objected.] He then called the delegates’ attention to the fact that article 4.2.1 was substantially redrafted following the International Sub-Committee’s discussion in July. The redraft generally follows the majority views expressed

in the consultation process. The drafting team also deleted the national law reference, which was thought to give too much scope to states to evade the Instrument.

Mr. Rasmussen proposed expanding the provision to include the law that would have applied if the shipper had entered into a separate contract with the inland carrier. He also favored restoring the national law exception. Otherwise, it would reduce the value of the network system. Many states did not ratify the Hague or Hague-Visby Rules, but enacted substantially the same provisions. Thirdly, he thought it would be illogical to include “jurisdiction” here when the draft does not yet include its own jurisdiction provision.

Mr. Beare noted that it would be possible to delete some text and add a marker to the commentary to cover the jurisdiction issue.

Mr. Rasmussen saw problems with permitting different aspects of what is essentially a single action to proceed in different courts. Inconsistent results would be likely.

Mr. Martin-Clark proposed making a distinction between national laws that implement international conventions and “normal” national laws.

Mr. Rasmussen replied that this would be a difficult distinction to implement in practice. Germany, for example, implemented the Hague-Visby Rules with some changes. How would that be treated?

Mr. Chandler argued that it would be dangerous to bring in national law. This could include, for example, U.S. tort law.

Prof. Berlingieri contended that the national law reference would destroy uniformity (although he accepted the exception for an international convention).

Prof. van der Ziel, referring to **Mr. Rasmussen**’s first point, explained that the drafting team had made a deliberate choice to avoid basing the draft on the assumption of a hypothetical contract that the parties might have concluded with respect to inland carriage. On the second point, he explained that the choice to delete the “national law” reference had been made for the reason explained by **Prof. Berlingieri**. Finally, he admitted that article 4.2.1(ii) was the weakest part of the draft. It is very difficult to specify in the abstract what is directly related to liability. Personally, he would favor deleting jurisdiction but retaining time for suit.

Mr. Rasmussen accepted **Prof. van der Ziel**’s explanation on his first point, but he adhered to his views concerning the “national law” reference, at least when the national law implemented an international convention.

Prof. Berlingieri disagreed. He found it too difficult to say when a national law actually gives effect to a convention in the absence of ratification.

Prof. Zunarelli posed the possibility that the European Union might regulate road carriage by regulation. He suggested that this illustrates how hard it would be to address all of the possibilities. He wanted to leave the draft as it is.

Mr. Beare asked **Mr. Rasmussen** if he would be content to deal with the “national law” issue in the commentary.

Mr. Rasmussen agreed.

Prof. Fujita suggested that “delay” relates to the entire contract, thus

Report of the sixth meeting

making it impossible to localize when delay occurs. Delay should not be included in article 4.2.1, or at least it should be bracketed.

Prof. van der Ziel replied that sometimes delay can be localized. For example, a road that is blocked may force a trucker to wait two days, and thus delay the delivery by two days.

Prof. Fujita accepted this hypothetical, but added that it was exceptional. It is not generally possible to localize when delay occurs.

Mr. Martin-Clark concluded that if there is any trouble localizing the delay, then this Instrument should apply.

Prof. Sturley asked whether it would be possible to deal with this issue in the commentary.

Prof. Fujita agreed that would be fine.

Mr. Beare asked whether it would be permissible to deal with article 4.2.1(ii) by deleting the brackets on “time for suit,” deleting the reference to “jurisdiction” from the draft, and mentioning jurisdiction in the commentary. [There was no dissent.]

Mr. Chandler mentioned that the article 4.2 commentary should not mention New York law but U.S. law.

Mr. Beare agreed that the example should be changed to avoid this problem. He proceeded to open the discussion on article 4.3 (mixed contracts of carriage and forwarding).

Mr. Chandler sought some clarification on what was meant by “expressly agree.” “Express agreement” should be more than a printed term in a form contract.

Mr. Lawrence, commenting on article 4.3.2, contended that the carrier should not have a duty of care with respect to an inland carrier selected by the shipper. The carrier’s duties in that situation should be defined by local law or the parties’ agreement. The carrier in that situation is not acting as a “carrier” but as an agent, and thus its obligations should not be within the scope of this Instrument.

Mr. Chandler countered that it be a great mistake to accept **Mr. Lawrence’s** contention. If the carrier makes the arrangements, then it should exercise due diligence.

Mr. Rasmussen agreed that the article should not be deleted entirely. The current draft is a major improvement over the previous draft, but it would be unwise to eliminate the carrier’s liability entirely. He did question the meaning of “desirable.” The term “due diligence” is well understood, but what does “desirable” mean?

Mr. Beare commented that eight maritime law associations had supported this alternative during the consultation process.

Mr. Martin-Clark asked whether the term “customary” meant “usual or normal,” or whether it had a stricter meaning as in English law.

Mr. Gombrii was also unhappy with the phrase “reasonably necessary.” Responding to **Mr. Lawrence**, he expressed the view that if the carrier selects the inland carrier named by the shipper then it has exercised due diligence.

Mr. Beare asked the International Sub-Committee if it was content to let **Mr. Gombrii** and **Prof. van der Ziel** agree on some new drafting for the

phrase “reasonably necessary or desirable” in article 4.3.2. [There was no objection.] He asked **Mr. Martin-Clark** if his concern about the term “customary” was with some peculiarity of English law.

Mr. Martin-Clark explained that he did not want the use of the term “customary” to bring in the English law on what was necessary to establish a “custom of the trade.”

Mr. Beare proposed to let the drafting team redraft the provision to avoid this problem. [There was no objection.]

The meeting adjourned for coffee at 4:15, and reconvened at 4:30.

Mr. Beare opened the discussion of chapter 5 (obligations of the carrier). He highlighted some changes to the draft since the International Sub-Committee’s July meeting. Article 5.3.2 had been in chapter 4, but chapter 5 seemed to be a more logical place for it. The primary debate concerned the bracketed language in article 5.2 and article 5.2(a), which would impose on the carrier a continuing due diligence obligation. There is substantive disagreement on this issue.

Prof. Berlingieri argued that chapter 5 seems too maritime in its presentation. He would prefer to have those provisions that could apply throughout the transport be treated first. The Instrument should then make clear that the remaining provisions apply only during the sea voyage. The Italian Maritime Law Association has proposed a revised presentation in the draft that has been circulated. Most of the changes simply represent a reordering of the articles, but there has also been some clarification.

Mr. Beare noted that Italian draft article 5.2 seemed to be the first change, and it clarifies that the duties apply to inland carriage. He asked if that clarification was acceptable. [There was no objection.] The next change seemed to be in Italian draft article 5.4, which imposes the due diligence obligation on the carrier “before and at the beginning of the voyage by sea.”

Mr. Hooper explained that carriers often have one consignee strip a container and deliver it to the next shipper without an inspection. In such a case, the carrier should not be responsible for the condition of the container.

Mr. Chandler replied that this practice would violate the Safe Container Convention.

Prof. van der Ziel agreed that the carrier should at least have the trucker inspect the container.

Mr. Chard contrasted article 5.3.1 of the Working Group’s October draft, which makes the carrier liable only during the period of responsibility, with article 5.2 of the Italian draft, which recognizes this limit only in the second sentence.

Mr. Beare asked if the International Sub-Committee agreed with the principle that article 5.2 of the Italian draft should be subject to the same period of responsibility limitation. [There was no objection.]

Mr. Chandler suggested that the draft should clarify that the “goods” might be a packed container rather than the contents of the container.

Report of the sixth meeting

Otherwise, the carrier might be responsible for how the container was stuffed when the shipper in fact stuffed the container and delivered a stuffed container to the carrier.

Mr. Beare asked if the International Sub-Committee agreed that article 5.3.1 should apply throughout the shipment, and not just to the sea voyage. [There was no disagreement.]

Mr. Martin-Clark, referring to article 5.3 of the Italian draft, asked whether “while in its custody” meant “during its period of responsibility.” If so, the provision should say that. Otherwise, it may mean that the carrier (as opposed to a performing party) must have custody.

Mr. Kragić proposed to delete “while in its custody.”

Prof. van der Ziel objected that all the Italian draft does is to move article 5.2 to end of the list and split it into two parts.

Mr. Beare requested the delegates to focus on the substance of the draft for the time being, and returned to the question of how to handle the drafting of the “while in its custody” limitation.

Prof. Zunarelli supported **Mr. Martin-Clark**’s suggestion to change the phrase to “during its period of responsibility.”

Mr. Hooper agreed with **Mr. Martin-Clark** and **Prof. Zunarelli**.

Mr. Beare asked if the International Sub-Committee agreed with this suggestion. [There was no dissent.] He continued with articles 5.4 and 5.5 of the Italian draft, which breaks article 5.2 of the October draft into two articles. [There was no discussion of article 5.4 of the Italian draft.] It appears that article 5.5 of the Italian draft should be in brackets because it corresponds to the bracketed language in article 5.2 of the October draft.

Mr. Gombrii observed that the general provisions already require the carrier to exercise due diligence, so articles 5.4 and 5.5 of the Italian draft are unnecessary – although he had no substantive objection to them. The carrier has the same obligations with respect to a truck being “road-worthy.”

Mr. Kragić preferred the drafting of article 5.2 of the October draft. He would also delete the bracketed language.

Mr. Rasmussen disagreed. He would delete the brackets, retain the language, and make the carrier’s obligation continuous.

Prof. Berlingieri would also retain the language without the brackets, but he accepted that views on the issue are divided. The commentary should clearly reflect why some want to retain the Hague-Visby approach and why some want to change it.

Mr. Beare recalled that he had invited the International Group of P&I Clubs to propose language expressing the view that the Hague-Visby approach should be continued. Delegations on the other side are welcome to do likewise.

Mr. Kragić reminded the delegates that the Croatian Maritime Law Association had already proposed language on this point.

Mr. Beare clarified that the Croatian language supported the same point of view as the International Group of P&I Clubs. He encouraged delegations on the other side to propose language expressing their views.

Prof. van der Ziel explained that part of the reason for retaining the due diligence provision was to preserve the existing case law. If that is the case,

then it should not be changed by extending it to inland carriers. He also wondered why the Italian draft excluded the cross-reference to article 5.4(b) in article 5.5, instead saying “always properly manned, equipped, and supplied.”

Mr. Hooper suggested that the final clause of article 5.4(c) of the Italian draft should be placed in brackets.

Mr. Martin-Clark contended that the language should not be bracketed.

Mr. Beare asked whether there was any support for **Mr. Hooper’s** suggestion. [There was no support for it.] He asked whether it would be sufficient to mention this point in the commentary.

Mr. Hooper agreed that this would be sufficient.

Prof. van der Ziel suggested that article 5.6 of the Italian draft, which is limited to the sea voyage, should also apply to inland waterways.

Prof. Berlingieri replied that he thought that the October draft was also limited to the sea voyage on this point. There had been no intention to change the meaning here.

Mr. Beare wondered whether anyone wanted to extend this provision inland.

Prof. van der Ziel asked if the draft should say “or by inland waters.”

Ms. Derrington reminded the delegates that the Maritime Law Association of Australia and New Zealand had proposed additional language to address a concern regarding the recording of temperatures in containers.

Mr. Beare asked whether the delegates would like some time to consider this point, having just seen the Australian and New Zealand paper this morning. Seeing that most delegates would welcome some more time, he adjourned the discussion of this point until the second day of the meeting. He proceeded to open the discussion of chapter 6 (liability of the carrier). He pointed out that the primary change is in article 6.1.1, which reduces the three prior alternatives to one.

Prof. Berlingieri proposed adding the language “contributed to,” from article 4(2)(q) of the Hague and Hague-Visby Rules, after the word “caused” in article 6.1.1. The article would then refer to “the occurrence that caused or contributed to the loss, damage, or delay.”

Prof. van der Ziel explained that article 6.1.1 only needed the word “caused.” When multiple causes contribute to a loss, then article 6.1.3 applies.

Prof. Reynolds confessed that he had deleted the phrase “contributed to.” but that he could not recall why. He agreed with **Prof. Berlingieri** that the Hague and Hague-Visby language should be restored.

Mr. Kragić agreed that “contributed to” should be included in article 6.1.1, but he would delete it in article 6.1.2.

Mr. Beare asked if anyone opposed including “contributed to” in article 6.1.1. [There was no opposition.]

Prof. Zunarelli added that “delay” should be included at the end of article 6.1.1.

Capt. Lüddecke suggested bracketing the language referring to delay. He also favored substituting “servants or agents” for “any person referred to in article 6.3.2(a).”

Report of the sixth meeting

Prof. Reynolds thought that this would cause major drafting complications.

Mr. Beare asked if there was any support for **Capt. Lüddecke**'s proposal? [There was no support for it.] **Mr. Beare** proceeded to open the discussion of article 6.1.2, and invited **Prof. Reynolds** to introduce the subject.

Prof. Reynolds explained that article 6.1.2 illustrates how the Instrument would look if the traditional catalogue of defenses was drafted on the basis of presumptions rather than exonerations.

Mr. Gombrii suggested that "delay" should be included in the opening paragraph.

Mr. Beare asked if there was any objection to **Mr. Gombrii**'s suggestion. [There was no opposition.]

Mr. Chandler argued that the presumption should apply only if the loss, damage, or delay had been caused "solely" by one of the items on the list.

Mr. Hooper wanted to ensure that the full catalogue of defenses in the Hague and Hague-Visby Rules, except for article 4(2)(a), would be included in the Instrument, whether the individual items were called presumptions, exemptions, or exonerations. He would also restore the privity requirement for the fire exemption.

Mr. Lawrence announced that the World Shipping Council preferred "exemptions" rather than "presumptions."

Mr. Rasmussen, Mr. Chard, Ms. Burgess, Ms. Howlett, and Mr. Larsen all agreed with **Mr. Lawrence**.

Prof. Berlingieri explained that the carrier has two alternatives under the current draft: Article 6.1.1 applies if the carrier can prove that its fault did not contribute to loss. If this fails, and article 6.1.1 does not apply, then the carrier has a much lighter burden under article 6.1.2 to prove one of the so-called "excepted perils." This is in fact the rule that is already applied today in most jurisdictions under the Hague and Hague-Visby Rules.

Mr. Beare assumed that **Prof. Berlingieri** thus supported the presumption-based approach.

Prof. Berlingieri confirmed that he did.

Capt. Lüddecke agreed.

Ms. Booth expressed a preference for exonerations.

Prof. Fujita preferred exonerations because that was consistent with his preference to retain the nautical fault defense.

Mr. Kragić observed that the list could generally be drafted with presumptions, but with nautical fault included in a separate exoneration provision (if it is retained at all).

Mr. Chandler strongly opposed the resurrection of the nautical fault defense, which had been soundly rejected in Singapore. He added that it makes no difference for the United States whether article 6.1.2 is based on presumptions or exonerations. The practical result is the same under either approach.

Ms. Pysden expressed a preference for exceptions.

Mr. Gombrii expressed a preference for presumptions.

Mr. Beare proposed leaving the draft in its current format, based on presumptions, but indicating the alternate view in commentary.

Mr. Hooper reminded the delegates of his earlier suggestion to restore the privity requirement for the fire exception. He would also limit the fire exception to vessel fires.

Mr. Rasmussen agreed with **Mr. Hooper**.

Mr. Beare asked if everyone agreed with **Mr. Hooper's** suggestions.

Mr. Martin-Clark favored bracketing the fire exception without changing the language. It will eventually be subject to commercial compromise in any event.

Prof. Reynolds wondered whether the exception should be limited to a fire on any ship, or on the carrying vessel.

Capt. Lüddecke favored eliminating the fire exception completely.

Prof. Fujita wondered whether the U.S. proposal would work with presumptions, or would it require exonerations.

Mr. Beare asked if there was any support for the complete elimination of the fire exception. [There was no support.] He then asked if there was support for the U.S. proposal. [Denmark and Japan supported the proposal.] Finally, he asked if there was support for the current draft. [Several delegates expressed support.]

Ms. Pysden, noting that the CMR does not recognize a fire exception, expressed support for limiting the fire exception to the sea leg of the transport.

Mr. Beare took a vote on the U.S. proposal.

In favor – Denmark, Japan, USA

Opposed – Australia & New Zealand, Croatia, Great Britain, Italy, Norway
Abstaining – Switzerland

Mr. Beare, noting the close vote, asked if those who opposed the U.S. proposal would object to including the language in square brackets.

Mr. Martin-Clark replied that he saw no objection to including the point in the commentary.

Mr. Beare suggested that the drafting team would decide how to handle the U.S. proposal. [There was no objection.] He then invited comments on other items in article 6.1.2, which generally corresponds to the catalogue of defenses in the Hague and Hague-Visby Rules.

Mr. Chandler proposed that the commentary on article 6.1.2(ii) (“perils, dangers, and accidents of the sea or other navigable waters”) should clarify that a collision is not a peril or accident of the sea.

Prof. Reynolds replied that English law would treat a collision caused by another vessel’s negligence as a peril of the sea.

Mr. Beare added that this language has been interpreted for many years.

Mr. Chandler responded that the interpretation may be reconsidered as part of an entirety of new convention.

Prof. Zunarelli agreed with **Mr. Chandler**. When navigational fault is excluded from the Instrument, this clause may be construed very differently.

Mr. Kragić noted that a similar approach should be adopted for groundings.

Mr. Beare invited comments on other items in article 6.1.2.

Report of the sixth meeting

Mr. Chandler wondered what was meant by “impediments” in article 6.1.2(iv) (“quarantine restrictions; interference by or impediments created by governments or other public authorities (including interference pursuant to legal process)”). He felt that it could mean almost anything.

Ms. Derrington proposed that article 6.1.2(iv) be deleted entirely. Most of the perils in the catalogue refer to things for which the carrier cannot be at fault, but this is not true for article 6.1.2(iv).

Mr. Beare asked if there was any support for this proposal. [There was no support.] He suggested that “impediments” be left to the drafting team. [There was no objection.]

Mr. Chandler, referring to article 6.1.2(v) (“act or omission of the shipper, the controlling party, or the consignee”), thought that “act or omission” is too vague. He would add “causing the loss.”

Prof. van der Ziel observed that this objection would be applicable for every peril in the catalogue. The limitation that **Mr. Chandler** proposes is already in the article 6.1.2 preamble.

Prof. Berlingieri wondered where the “latent defect” in article 6.1.2(x) needs to be, and whether the issue should be addressed explicitly.

Mr. Beare explained that the latent defect peril was generally understood to refer to the ship or its appurtenances.

Ms. Pysden asked whether article 6.1.2(x) should correspond to CMR article 17.2. The idea is to cover things that the carrier can not control.

Prof. van der Ziel expressed his preference for the language of the Hague and Hague-Visby Rules in order to preserve the existing case law.

Mr. Lawrence and **Capt. Lüddecke** agreed with **Prof. van der Ziel**.

Mr. Kragić noted that the Hague and Hague-Visby Rules apply only to the sea leg. Now that the Instrument will be broader, he thought that article 6.1.2(x) should be limited to the sea leg.

Mr. Beare focused the discussion on two distinct points. **Prof. Berlingieri** suggests clarifying the hallowed Hague Rules language. **Ms. Pysden** proposes broader language to cover inland carriage.

Prof. Zunarelli thought that it was necessary to consider whether a road carrier can rely on the latent defect presumption. He was hesitant to support **Ms. Pysden**’s suggestion for adding a new presumption. The draft already has broad language in article 6.1.1. He saw no need for another broad presumption in article 6.1.2.

Mr. Beare asked whether the drafting team could leave the text as it is and reflect the debate on clause (x) in the commentary. [There was no objection.]

Mr. Chandler, referring to article 6.1.2(xi) (“handling, loading, stowage, or unloading of the goods by or on behalf of the shipper, the controlling party, or the consignee”), argued that the carrier should not be allowed to escape liability for dangerous stowage. This is a safety issue. He would eliminate clause (xi) entirely.

Prof. Reynolds wondered if the deletion of “stowage” would meet the objection.

Prof. van der Ziel objected that article 6.1.2(xi) simply gives effect to article 5.3.2, which gives the parties the freedom to agree that certain functions

generally performed by the carrier shall instead be performed by or on behalf of the shipper, the controlling party, or the consignee.

Mr. Chandler agreed that this rationale makes sense in the context of an action by the party that mis-stowed cargo, but article 6.1.2(xi) allows the carrier to escape its liability to third parties.

Ms. Pysden considered this to be similar to the corresponding CMR provision.

Ms. Booth wondered whether the broad language in article 6.1.2(v) (“act or omission of the shipper, the controlling party, or the consignee”) covers this problem.

Prof. van der Ziel insisted that the Instrument needed both provisions.

Prof. Sturley asked if article 6.1.2(xi), as drafted, would protect the carrier if a third party’s cargo was destroyed when a shipper’s bad stowage caused the loss of the ship.

Prof. van der Ziel replied that clause (xi) would not protect the carrier in this situation.

Mr. Martin-Clark added that the consignee would be on notice that the shipper, not the carrier, was responsible for the loading.

Mr. Beare asked if there was any support for **Mr. Chandler**’s suggestion to eliminate article 6.1.2(xi). [There was no support.] Continuing the discussion, **Mr. Beare** explained that nautical fault was included in the draft as article 6.1.2(xiii), in square brackets, because the consultation paper showed that carrier interests still favored its retention. The topic has already been heavily debated, most recently in Singapore. The present question is whether the draft should retain the language in brackets or delete it entirely.

Mr. Rasmussen would retain the nautical fault exception, but it cannot be drafted as a presumption.

Mr. Chandler would delete the nautical fault exception entirely. The question was decided in Singapore, where the vote to delete nautical fault was overwhelming.

Mr. Rasmussen countered that the Singapore Conference did not resolve this issue finally, despite the strong views expressed to delete the nautical fault exception.

Ms. Booth would delete the nautical fault exception entirely.

Mr. Kragić would retain the nautical fault exception.

Ms. Howlett would retain the nautical fault exception in square brackets. This is a policy decision that should be made in UNCITRAL.

Prof. Ferrari advised the delegates that the nautical fault exception will go forward to the UNCITRAL Working Group in any event.

Mr. Beare asked if anyone wished to have a vote on the issue in light of this advice. [No one wished to have a vote.]

Mr. Martin-Clark reminded the delegates that he had proposed some language on this issue to address compulsory pilotage.

Mr. Beare suggested that this could be left to the commentary. [There was no objection.]

Prof. Zunarelli added that the commentary should reflect the difficulty that would be created.

Report of the sixth meeting

Ms. Burgess, referring to article 6.1.2(iii) (“[Act of God], war, piracy, terrorism, riots and civil commotions”), suggested the addition of “hostilities, armed conflict,” after “war.”

Mr. Beare asked if there was any objection to this suggestion. [There was no objection.]

Ms. Burgess, referring to article 6.1.2(iv) (“quarantine restrictions; interference by or impediments created by governments or other public authorities (including interference pursuant to legal process)”), suggested the addition of “rulers, peoples,” after “governments,” to take into account people who are in power in fact but who lack legitimate authority. The language is taken from the Hague and Hague-Visby Rules, article 4(2)(g). She noted that she did not suggest adding “princes,” which is also in article 4(2)(g), but that she would be happy to include that language, too.

Mr. Beare asked if there was any objection to adding “rulers, peoples.” [Ms. Derrington commented that the language did not sit well with “other public,” but there was no objection to the addition.]

Ms. Burgess, referring to article 6.1.2(v) (“act or omission of the shipper, the controlling party or the consignee”), suggested the addition of “holders” and “servants, agents.”

Prof. Sturley explained that the drafting team had deliberately avoided any inclusion of agency concepts throughout the draft. Not only would it complicate the drafting, it would be unnecessary because it is already implicit in the draft. Most carriers, shippers, consignees, and performing parties will be corporations or other business entities that can act only through their agents in any event.

Prof. van der Ziel added that “holder” would also be superfluous. There could not be a holder under article 6.1.2(v) that is not also a shipper, controlling party, or consignee.

Mr. Hooper suggested that the commentary could solve this problem and others by stressing that the catalogue from the Hague and Hague-Visby Rules has been retained.

Ms. Pysden mentioned that the International Sub-Committee should also consider the extent to which the catalogue, and each item in it, should apply beyond the sea leg.

Mr. Beare asked **Prof. Sturley** whether the International Sub-Committee had resolved the question of whether the catalogue should be limited to the sea leg.

Prof. Sturley replied that the issue had been raised but not yet resolved.

Mr. Martin-Clark announced that the British Maritime Law Association would object to such a limitation. Many of the items in the catalogue apply to the land portion of the transport.

Mr. Beare suggested that the issue should be addressed in the commentary. It could say that the exceptions are taken from the Hague and Hague-Visby Rules and that the entire catalogue is intended to be included. The draft does not restrict these exceptions to the sea voyage, although the Hague and Hague-Visby Rules are sea conventions. It remains to be decided whether some of these exceptions should be restricted, and whether others

should be introduced specifically to cover land carriage. [There was no objection.]

The meeting adjourned for the day at 7:10 p.m. on Monday, 12th November 2001.

Report of the Second Day

Mr. Beare reconvened the meeting at 9:00 a.m. on Tuesday, 13th November 2001. He turned to article 6.1.3, which addresses the allocation of damages in cases of multiple causation.

Mr. Hooper proposed revising article 6.1.3 to impose an equal burden on each side. Current law imposes an insuperable burden on the carrier to segregate the damage. If two events combine to cause the damage, then the trier of fact should apportion the damage between those two causes. In the highly unusual case when the trier of fact is completely unable to apportion the damage, then it can be divided 50-50 between the cargo and carrier interests.

Mr. Rasmussen agreed. The present draft puts too heavy a burden on the carrier. The U.S. proposal makes it more equitable.

Prof. Berlingieri disagreed. In his view, the burden *should* be on the carrier.

Ms. Burgess agreed with **Mr. Hooper**.

Mr. Lawrence and **Mr. Garger** agreed with **Mr. Hooper**.

Mr. Martin-Clark was unhappy with the present drafting, but supported placing the burden on the carrier. He suggested following article 5.7 of the Hamburg Rules.

Mr. Beare asked if the draft could include both alternatives.

Prof. Sturley reminded the delegates that both alternatives had been included in the draft that was before the conference in Singapore. [See CMI Yearbook 2000 at page 133.] He confessed that he did not understand why the alternative represented by the U.S. proposal had been dropped from the present draft.

Mr. Beare asked if that solution was acceptable. [There was no objection.] He proceeded to article 6.2 (calculation of compensation).

Prof. van der Ziel called attention to article 6.2.3, which is new and limits liability for consequential loss or damage.

Capt. Lüddecke proposed that the Instrument should specify that the market value of the goods is only *prima facie* evidence, and that the cargo claimant may prove a higher amount. He also proposed that the Instrument should specify the currency in which the damages are payable.

Mr. Beare asked if there was any support for **Capt. Lüddecke's** proposal regarding currency. [There was no support.] He then asked if there was any support for **Capt. Lüddecke's** proposal on the *prima facie* evidence point.

Mr. Martin-Clark reported that the British Maritime Law Association would delete article 6.2.3 entirely and leave the issue to national law. "Consequential loss" is difficult to define accurately under English law.

Mr. Gombrii thought that article 6.2.3 was simply a clarification of articles 6.2.1 and 6.2.2.

Prof. van der Ziel explained that this was not true. Article 6.2.3 goes beyond articles 6.2.1 and 6.2.2.

Prof. Berlingieri felt that there should be an objective standard for calculating damages. The carrier should be protected from subjective values. Damages should be for the market value of the goods and no more.

Mr. Chandler, referring to article 6.2.2, did not see what “normal” adds.

Mr. Beare noted that “normal” was included in the Hague-Visby language.

Mr. Chandler still did not see how it helped.

Mr. Beare recalled that there was a proposal to delete article 6.2.3 entirely.

Prof. Berlingieri replied that it would be dangerous to delete article 6.2.3 without explaining the situation more fully in articles 6.2.1 and 6.2.2.

Mr. Beare asked if it would be acceptable for the drafting team to replace article 6.2.3 with changes in articles 6.2.1 and 6.2.2 to make the point that damages were limited to the market value of the goods. [There was no objection.] He proceeded to article 6.3 (liability of performing parties).

Mr. Rasmussen reported that he had difficulties with this provision. Danish law has performing party liability, but only in the maritime context. This provision is too broad. It would give the shipper the right to sue the CMR carrier on the basis of this Convention.

Mr. Beare asked **Mr. Rasmussen** if he had a specific proposal.

Mr. Rasmussen replied that the draft could have a specific provision applicable in the maritime context. But limiting a cargo claimant’s cause of action to a suit against the contracting carrier would also be acceptable.

Prof. Sturley sought clarification of **Mr. Rasmussen’s** proposal.

Mr. Rasmussen explained that the Instrument creates only a limited network system. An action against the CMR carrier would generally be completely on a CMR basis.

Ms. Pysden thought that it would be possible to deal with this problem. She reported that FIATA would be happy with article 6.3.1 as it stands if an acceptable definition of “performing party” in article 1.18 could be agreed.

Mr. Lawrence supported **Mr. Rasmussen’s** second alternative that all actions must be against the contracting carrier.

Mr. Chandler announced that the U.S. Maritime Law Association does not agree with that approach. It would mean that cargo’s sole recourse would be against a contracting carrier that may be hard to reach. It would force actions against third parties who actually cause damage into tort law. The current draft of the Instrument would instead bring every cause of action under a uniform system.

Mr. Beare asked **Mr. Chandler** about his reaction to the first limb of the Danish proposal.

Mr. Chandler replied that the U.S. Maritime Law Association does not agree with that approach either.

Ms. Pysden reiterated that FIATA could live with article 6.3.1 as drafted.

Mr. Chard agreed with the World Shipping Council. He felt that it would be much cleaner to have all actions channelled through the carrier.

Mr. Gombrii agreed with the U.S. position for the reasons that **Mr. Chandler** had stated.

Prof. van der Ziel concluded that **Mr. Rasmussen's** proposal only makes sense if all claims are channeled through the contractual carrier. Otherwise performing parties would be subject to all kinds of tort claims.

Mr. Martin-Clark reported that the British Maritime Law Association did not focus on this issue at its last meeting.

Ms. Burgess agreed with **Mr. Chard**.

Capt. Lüddeke agreed with **Prof. van der Ziel**.

Ms. Booth agreed with the **Mr. Lawrence**.

Ms. Pysden argued that if the definition were limited to those that are physically involved in performing the carrier's responsibilities, there would not be a multiplicity of suits.

Prof. Berlingieri understood that the purpose of this provision was to avoid tort suits against performing parties. The issue in his view should be how to do that fairly, without imposing on performing parties a regime about which they know nothing. But if nothing were to be said here, there would be an even greater danger.

Mr. Beare asked if the U.S. Maritime Law Association supported the text as drafted.

Mr. Chandler confirmed that it did. The present draft avoids a multiplicity of suits, it would not encourage them.

Prof. Berlingieri agreed that this is the simplest way to solve the problem. Perhaps the performing party would have a recourse action against the contracting carrier if the performing party is subject to greater liability than would otherwise be the case.

Mr. Kragić supported the U.S. view. It would lead to greater uniformity. But he also agreed that the definition of "performing party" should be limited to those that physically perform the carrier's responsibilities.

Prof. Zunarelli commented that, so far as he knew, every regime that provides for the channelling of liability also includes mandatory insurance, which does not exist in this context. The Italian Maritime Law Association would oppose any proposal that called for channelling.

Mr. Rasmussen did not insist on considering the proposal to limit this provision to the maritime context. The choice was accordingly between the current draft and his proposal that would require channelling all actions through the carrier.

Mr. Gombrii suggested that **Mr. Rasmussen's** concerns were not justified.

Mr. Beare asked **Mr. Rasmussen** if his proposal was to delete article 6.3.1 entirely.

Mr. Rasmussen confirmed that this was his proposal.

Mr. Beare proposed to postpone the vote on **Mr. Rasmussen's** proposal until the International Sub-Committee had discussed the proposed language

Report of the sixth meeting

for the “performing party” definition. [There was no objection.] He then opened the discussion of article 6.3.2.

Mr. Kragić, still addressing article 6.3.1, would delete “[or impliedly]” in article 6.3.1(b).

Prof. van der Ziel agreed with **Mr. Kragić**.

Mr. Beare asked **Mr. Kragić** to raise this point again after the vote on **Mr. Rasmussen’s** proposal to delete article 6.3.1 entirely.

Ms. Pysden, referring to article 6.3.2(a)(ii), suggested the deletion of “or undertakes to perform” to conform to FIATA’s view on the “performing party” definition.

Prof. Sturley pointed out that the concerns motivating article 6.3.2 are very different than those under the “performing party” definition. The entire point of article 6.3.2 is to make the carrier liable for the misdeeds of all those working on the carrier’s behalf. If FIATA does not want the party that “undertakes to perform” to be liable itself, then it should support this provision, which facilitates actions against the carrier for the misdeeds of a party that “undertakes to perform” on the carrier’s behalf.

Mr. Beare asked about the bracketed language in article 6.3.2(a)(ii), which limits the carrier’s liability by requiring that the person for which the carrier is liable must act, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

Mr. Chandler would delete the bracketed language or replace it with the language from article 6.3.3 that focuses on the scope of employment.

Prof. van der Ziel supported **Mr. Chandler’s** suggestion to use article 6.3.3 language.

Mr. Martin-Clark opposed the suggestion. The bracketed language protects the carrier when being asked to assume liability for another’s acts.

Ms. Derrington agreed with **Mr. Martin-Clark**.

Prof. Zunarelli felt that some clarification along the lines of the bracketed language is needed, and he was comfortable with the current language. The purpose of article 6.3.2(a)(ii) is completely different than article 6.3.3.

Mr. Kragić agreed with **Prof. Zunarelli**.

Mr. Chandler recognized **Prof. Zunarelli’s** point, and responded with the suggestion that article 6.3.2(a)(ii) should say “to the extent that the person acts ...” (as it presently does), and continue “within the scope ...” (from article 6.3.3).

Mr. Gombrii observed that the scope of employment point is already in article 6.3.2(a), in the final sentence (after clauses (i) and (ii)), so that if the bracketed language were deleted there would be no need to add any scope of employment language to article 6.3.2(a)(ii).

Mr. Chandler recalled that simply deleting the bracketed language had been his original proposal.

Prof. Sturley explained that the bracketed language had been included in article 6.3.2(a)(ii) to ensure that the carrier would not be liable when a shipper’s agent performed any of the tasks that would otherwise have been part of the carrier’s responsibilities under the contract of carriage. In his view, this was an appropriate limitation on the carrier’s liability and the brackets should be deleted.

Mr. Chandler withdrew his proposal.

Mr. Beare asked if the International Sub-Committee agreed with **Prof. Sturley's** suggestion to delete the brackets. [There was no objection.] He then asked **Prof. Sturley** what he recommended with respect to the bracketed scope of employment language in article 6.3.3.

Prof. Sturley replied that he would once again delete the brackets.

Mr. Beare asked if this would be acceptable. [There was no objection.] He proceeded to article 6.4, which addresses the carrier's liability for delay.

Ms. Derrington proposed revising the final clause of article 6.4.1 so that regard is had not only "to the characteristics of the transport and the circumstances of the voyage" but also to the goods in question and the intentions of the parties.

Prof. Fujita argued that if the "reasonable time" test is retained at all, then the parties should have the freedom to contract out of this liability. He suggested adding, "unless otherwise agreed."

Mr. Beare wondered if this could be dealt with in the commentary.

Mr. Rasmussen would include in the commentary that liability for delay is linked to the resolution of the navigational fault issue.

Mr. Kragić felt that it was important to be aware that if the Instrument does not say anything about the time during which the carriage must be performed then national law would come into play. He requested that the commentary reflect the views expressed in the Croatian paper (which had been circulated).

Mr. Beare wondered whether the mention of "consequential loss" in article 6.4.2 would cause any problems.

Mr. Martin-Clark was concerned about the use of "consequential loss." He are also concerned about the drafting. What does "includes" mean? He would apply article 6.4.2 to delay under article 6.4.1.

Mr. Kragić stressed the need to deal with the consequential loss issue here. The point is that there is no physical loss when cargo is only delayed.

Mr. Martin-Clark added that the issue being discussed here is any loss other than physical loss.

Ms. Derrington agreed with **Mr. Martin-Clark** and proposed that the limit should be the lesser of "the actual amount of the loss, or 2 ^{1/2} times the sea freight payable for the goods delayed, or the total amount payable as sea freight for all of the goods shipped by the shipper concerned under the contract of carriage concerned."

Prof. Berlingieri wondered why there should be any special limit here. The carrier is at fault, and may be more at fault than in a cargo damage case because the fault is more likely to have been deliberate.

Mr. Beare observed that there is a clear disagreement on this issue, which will not be resolved in the International Sub-Committee.

Mr. Hooper argued that the current law in the United States, following the classic English case of *Hadley v. Baxendale*, 9 Exch. 341 (1854), was satisfactory. He proposed allowing the parties to agree on what the damages should be.

Mr. Beare asked **Prof. Reynolds** if he could revise the draft to reflect these views.

Report of the sixth meeting

Prof. van der Ziel did not think that it would be possible in light of what had been said thus far. Either there should be a full discussion in this meeting to provide enough guidance for the drafting team to express the conclusions of the International Sub-Committee or the Draft Instrument should set out the alternatives in the commentary.

Prof. Reynolds volunteered that there were some improvements that could be made in the drafting even if the drafting team could not resolve the policy problems.

Mr. Beare asked if it could be left that the draft will be improved, and the commentary expanded. [There was no objection.]

Prof. Fujita wondered if a performing party could be responsible for delay, and if so, upon which freight should the limitation amount be based – the freight paid to the overall carrier or the freight paid to the responsible performing party.

Prof. Sturley replied that a performing party could well be liable for delay if the cargo claimant could carry the burden of “localizing” the delay with that performing party (and thus showing that the performing party was at fault). Otherwise, only the contracting carrier would be liable for delay.

Prof. van der Ziel added that the limit of liability should in any event be based on the full freight for the entire transport.

Mr. Beare turned to article 6.5 (deviation). He highlighted that article 6.5(b) had been redrafted but there had not been any change in substance.

Mr. Lawrence sought clarification on whether article 6.5 is limited to the ocean voyage, and whether a limitation of liability could be broken by deviation.

Prof. Reynolds replied that the limitation of liability cannot be broken by deviation.

Prof. Sturley clarified that the limitation of liability under the Instrument cannot be broken simply because a deviation had occurred (as is sometimes the case now under U.S. law and has in the past been the case under English and commonwealth law), but elaborated that the limitation of liability could be broken by a deviation if the deviation at issue rose to the level of misconduct addressed in article 6.8. He added that the deviation concept is limited to the ocean voyage.

Mr. Lawrence requested that the commentary clarify the two points that he had raised.

Mr. Beare proceeded to the discussion of article 6.6 (deck cargo), on which there was no substantive change in the current draft.

Mr. Chandler, referring to article 6.6.1, suggested that “carried on deck” should be “carried on or above deck.” He explained that many containers are carried several tiers above the deck, and that some modern container ships do not even have a deck.

Mr. Beare asked if there was any objection to **Mr. Chandler’s** suggestion. [There was no objection.]

Mr. Chandler expressed his concern that some containers offer no protection to the goods they carry.

Mr. Martin-Clark cautioned against proceeding too quickly, and

imposing obligations that the trade could not yet accommodate.

Mr. Hooper suggested that the U.S. concern could be met by narrowing article 6.6.1(ii), and putting any remaining cases into article 6.6.1(iii).

Prof. van der Ziel clarified the purpose of article 6.6. In particular, article 6.6.1(ii) did not provide the carrier with special protection against the risks of deck carriage. On the contrary, if containers are carried on deck under article 6.6.1(ii) then the carrier is liable under the terms of the Instrument without the protection of article 6.6.2.

Prof. Sturley feared that the U.S. delegation may be misreading this provision. Article 6.6 is somewhat counter-intuitive for lawyers familiar with the deck carriage issues that commonly arise under U.S. law.

Mr. Martin-Clark, referring to article 6.6.1(ii), wondered whether it should be “decks” or “ships” that are fitted to carry containers.

Prof. van der Ziel replied that “decks” was correct. If the decks are fitted to carry containers, so is ship.

Prof. Berlingieri feared that article 6.6.1(ii) is too wide and vague in view of the broad definition of “container” in article 1.4.

Mr. Beare asked if it would be satisfactory to leave these issues to the drafting team.

Mr. Rasmussen replied that the drafting team should be careful not to amend the text, just the commentary.

Mr. Beare asked if it would be satisfactory to leave the revision of the commentary to the drafting team.

Prof. Berlingieri, referring to article 6.6.2, noted that the text referred to article 6.6.1(i) and (iii), but not to article 6.6.1(ii). He wondered if this was intentional.

Prof. van der Ziel replied that it was intentional. Article 6.6.2 covers the rules for carriage under article 6.6.1(i) and (iii). The normal liability rules apply for carriage under article 6.6.1(ii).

Mr. Chandler objected that article 6.6.2 does not say that the normal liability rules apply for carriage under article 6.6.1(ii).

Prof. van der Ziel responded that it was not necessary for article 6.6.2 to say that the normal liability rules apply for carriage under article 6.6.1(ii). Article 6.6.2 does not create a special rule for carriage under article 6.6.1(ii) – as it did for carriage under article 6.6.1(i) and (iii) – and in the absence of a special rule the normal liability rules must apply.

Mr. Chandler argued that it would still be helpful, particularly in the United States, for article 6.6.2 to say explicitly that the normal liability rules apply for carriage under article 6.6.1(ii).

Mr. Beare asked if there was any objection to amending article 6.6.2 to alleviate **Mr. Chandler**’s concerns. [There was no objection.] Continuing with article 6.7 (limits of liability), **Mr. Beare** noted that it was unchanged from the previous draft except for the electronic commerce amendments.

Mr. Chandler wondered if SDRs will survive the pending introduction of the Euro. Perhaps some alternatives should be mentioned in the commentary.

Mr. Beare did not think it was the International Sub-Committee’s place

Report of the sixth meeting

to speculate on this subject. If there is a problem here, UNCITRAL will be able to address it without the CMI's input.

Mr. Rasmussen advocated setting the limitation amounts at the Hague-Visby levels, including a procedure for adjustment in light of inflation. If the Instrument were to start with higher limits, however, then he might not support an amendment procedure.

Capt. Lüddecke suggested including a provision to recalculate the limitation amounts on the model of the Montreal Convention of 1999.

Mr. Beare invited **Prof. Ferrari** to comment on this issue from UNCITRAL's perspective.

Prof. Ferrari offered to add **Capt. Lüddecke's** suggestion in UNCITRAL's commentary, quoting the relevant provision of the Montreal Convention. He had no comment on the appropriate level of limitation.

Mr. Kragić proposed adding "and included in the contract particulars" at the end of article 6.7.1, to clarify that any higher limitation amount agreed upon between the carrier and the shipper must be included in the contract particulars to be binding. This would avoid subsequent disagreements.

Prof. Sturley distinguished two routes to a higher limitation amount. In situation (1), the shipper declared a higher value and it was inserted in the contract particulars. In situation (2), which is addressed in the portion of article 6.7.1 to which **Mr. Kragić** refers, there is a separate agreement between the parties and it may not be reflected in the contract particulars.

Mr. Kragić proposed that the carrier should agree to the higher limitation amount even in situation (1).

Prof. van der Ziel explained that under current law the shipper's declaration of value is a unilateral act to which the carrier need not agree. Of course, the carrier is entitled to charge more freight in that case.

Mr. Kragić preferred to give the carrier the option to decline the carriage if the shipper declared a higher value.

Prof. van der Ziel reported that this already happens in practice.

Prof. Zunarelli thought that some clarification would be helpful. Under the article 1.6 definition of "contract particulars," an agreement is already implied. If this is not the case, then the draft should be revised to clarify the rule.

Prof. van der Ziel suggests that the shipper has a unilateral right to declare a higher value, subject only to the carrier's setting the freight.

Capt. Lüddecke discussed the current practice. At the moment, a shipper that seeks to declare a higher value is told what it will cost, the value is inserted on the bill of lading, and the freight charges reflect the declaration. If the cargo is then damaged, the shipper recovers the declared value or an appropriate portion thereof. He did not see any problem with this current practice.

Mr. Kragić replied that the carrier should have the option of rejecting the carriage if it does not want to take the risk of carrying cargo that is too valuable.

Mr. Hooper suggested that if the concern is that the value declaration might be too high, the Instrument should limit the recovery to the actual value of the goods.

Ms. Howlett raised a different proposal. The draft could add the phrase, "except when *ad valorem* freight has been agreed and the nature and value ..."

Prof. Berlingieri suggested that “the nature” of the goods was ambiguous.

Prof. van der Ziel responded that this language has been in the conventions since 1924 without causing any problems.

Mr. Gombrii voiced his assumption that the commentary in response to **Mr. Rasmussen**’s suggestion will say that some delegations thought that the starting point for the limitation amount would be values given in the Hague-Visby Rules. He did not object to including such a statement in the commentary, even if he does not agree that the Hague-Visby limits are appropriate any longer.

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

Mr. Beare circulated the draft attendance list for review and correction. He announced that the International Sub-Committee would now have another vote on the Danish Maritime Law Association’s proposal regarding the Instrument’s scope of application.

Mr. Rasmussen clarified that his proposal was to adopt the text considered in Singapore. *See* CMI Yearbook 2000 at page 127. Under his proposal, article 3.1(a) would cover “the place of receipt or port of loading specified ...” In article 3.1(b), “port of unloading” would similarly be added to the current draft. The port of loading or unloading would need to be specified in the contract particulars, so there would be no surprises. It would also give broader scope to the convention.

Mr. Beare explained that if the proposal is accepted by a large majority, then the drafting team will revise the text. If it is a close vote, then alternatives will be given in square brackets. If the proposal is defeated by a large majority, then the concept will be mentioned in the commentary.

Mr. Martin-Clark recalled that his concern had been that the carrier could impose the convention on an unsuspecting shipper or consignee simply by changing the routing. This proposal avoids that problem.

In favor – Australia & New Zealand, Denmark, Italy, Switzerland

Opposed – Japan, the Netherlands

Mr. Martin-Clark suggested that this vote would justify alternatives in square brackets.

Mr. Beare asked if this suggestion was acceptable. [There was no opposition.] He announced that he proposed to take votes on the other open questions after lunch. Continuing with article 6.8 (loss of the right to limit liability), **Mr. Beare** noted that the text was unchanged from the previous draft in May.

Prof. Berlingieri suggested that if the references to article 6.4.2 are to remain in brackets, the commentary should be expanded to explain why these references are bracketed. In any event, he saw no reason why liability for delay under article 6.4.2 should not be subject to being broken.

Ms. Derrington, recognizing that this may be simply a drafting point, mentioned that article 6.8 seems to permit a corporate defendant to lose its limitation rights if an employee acts recklessly.

Report of the sixth meeting

Mr. Chandler suggested that the commentary should explain what is meant by “personal” when the text speaks of a “personal act or omission of the person claiming a right to limit.”

Mr. Kragić suspected that this concept had been taken from the 1976 Convention. He thought it would be preferable to retain the same wording.

Prof. van der Ziel agreed that the same language had been used in a number of conventions.

Prof. Berlingieri identified the real problem as whether the behavior of servants or agents is relevant. This draft goes beyond prior conventions to clarify that the behavior of servants and agents is not relevant. The International Sub-Committee should determine whether this approach is satisfactory.

Prof. van der Ziel recalled that the conference in Singapore addressed the issue and decided that this approach is satisfactory.

Mr. Rasmussen stressed that this is a particularly important issue under maritime conventions. Without such a provision, insurance becomes difficult. Servants, agents, and the ship’s captain should not be covered.

Mr. Beare understood this statement to support the text of article 6.8 as drafted.

Mr. Hurst agreed with **Mr. Rasmussen**.

Mr. Beare asked if there were any proposed amendments. [There were no amendments.] Under the circumstances, the only issue is the need for any commentary.

Mr. Chandler reiterated his desire for a short commentary that “personal” implies a high level of management.

Mr. Beare turned to article 6.9 (notice of loss, damage, or delay).

Mr. Chandler suggested that “working” days should be “business” days in article 6.9.1. It is too difficult to predict what “working” days would include because there is so much local variation.

Mr. Martin-Clark confessed that he did not know what a “business day” is either. Just “days” would be preferable.

Prof. van der Ziel pointed out that using just “days” immediately raises the question of whether “calendar” or “business” days are intended.

Mr. Chandler responded that “calendar” days should be specified.

Prof. Berlingieri suggested that the Instrument should specify “calendar” or “consecutive” days in both articles 6.9.1 and 6.9.2.

Capt. Lüddeke was concerned that different time limits might apply under the rules for land carriage and under this Instrument.

Mr. Rasmussen reminded the International Sub-Committee that it had decided for good reason to use “working” days in article 6.9.1. Returning to “consecutive” days would severely restrict a consignee’s ability to give timely notice.

Mr. Hooper withdrew the U.S. proposal to specify “calendar” days.

Mr. Beare proceeded to article 6.9.2, which establishes a 21-day notice period in order to obtain compensation for economic loss resulting from a delay in delivery.

Mr. Martin-Clark questioned the use of the “economic loss” language.

He felt that the drafting here should conform to the article 6.4.2 solution.

Mr. Beare invited further comments on chapter 6. [There were no further comments.] He proceeded to chapter 7 (obligations of the shipper).

Mr. Chandler recalled that the conference agreed in Singapore to have fault-based shipper's liability, but he thought that chapter 7 was drafted on a strict liability basis.

Mr. Rasmussen expressed his preference for strict liability for dangerous goods, but thought that this draft was consistent with Singapore. The strict liability rule of article 7.5 applies to breaches of the specific obligations under articles 7.2, 7.3, and 7.4. But a breach of the general obligation under article 7.1 is governed by the article 7.6 liability rule.

Mr. Martin-Clark agreed with **Mr. Rasmussen**.

Mr. Beare asked **Mr. Chandler** if he would be satisfied with that explanation if the draft were corrected to reflect it.

Mr. Chandler accepted **Mr. Beare's** solution.

Mr. Rasmussen reiterated his preference to impose strict liability for dangerous goods.

Mr. Beare suggested that such a provision should be in bracketed text rather than in commentary.

Mr. Martin-Clark admitted that he had no brief from the British Maritime Law Association on this issue, but he felt that there was enough controversy to justify square brackets.

Mr. Chandler accepted strict liability for goods that were explicitly listed on the dangerous goods list, but he strongly objected to strict liability for a cargo such as ground nuts.

Mr. Beare wondered if it would be possible to add bracketed language that could avoid the problems created by the House of Lords decision in *The Giannis NK (Effort Shipping Co. v. Linden Management SA, [1998] A.C. 605, [1998] 1 Lloyd's Rep. 337)*.

Prof. van der Ziel objected that this approach would not only change course completely from the conclusions agreed in Singapore, it would also require the complete redrafting of several chapters.

Prof. Zunarelli agreed with **Prof. van der Ziel**. This would reopen a long discussion.

Mr. Beare concluded that the issue should be addressed in commentary. [There was no objection.]

Prof. van der Ziel advocated returning to the May draft's expanded text of article 7.4, which addresses the information, instructions, and documents that the shipper and the carrier must provide to each other.

Mr. Martin-Clark opposed that change.

Prof. van der Ziel added that there is also a safety concern in favor of his suggestion.

Mr. Beare asked if there was any support for **Prof. van der Ziel's** suggestion. [There was no support.] **Mr. Beare** concluded that the issue should be addressed in commentary. [There was no objection.]

Mr. Larsen proposed deleting "unless the carrier or the performing party already knows or ought to know such information or instructions" in article

Report of the sixth meeting

7.3(a), which requires the shipper to furnish handling information to the carrier.

Ms. Howlett suggested the complete deletion of article 7.2, which requires the carrier to furnish information to the shipper.

Mr. Rasmussen suggested that article 7.2 should instead be bracketed.

Mr. Martin-Clark shared the concerns that had been expressed about how parties can know what the other party knows or ought to know. Perhaps the amount of language bracketed in article 7.2 should be expanded, and the final clause in article 7.3(a) should be bracketed.

Ms. Burgess agreed with **Ms. Howlett**.

Mr. Martin-Clark formally proposed **Mr. Rasmussen's** suggestion to bracket article 7.2.

Mr. Beare asked if there was any dissent.

Prof. Berlingieri saw no need to bracket article 7.2, which only applies when the shipper explicitly requests the carrier to provide the relevant information.

Mr. Martin-Clark explained that the reason to bracket the article is to signal the industry's concerns to UNCITRAL.

Mr. Beare reminded the delegates that this objective could also be achieved through the commentary.

Prof. van der Ziel fully supported **Prof. Berlingieri**. He thought it would be a serious mistake to dilute the obligation to exchange information. Furthermore, article 7.2 as drafted also reflects the actual practice today.

Mr. Rasmussen complained that article 7.2 would allow a shipper to shift its article 7.1 duties to the carrier. He saw this as a matter of principle.

Mr. Beare called for a vote on the proposal to bracket article 7.2.

In favor – Denmark, Great Britain

Opposed – Italy, the Netherlands, Switzerland, USA

Mr. Beare then called for a vote on the proposal to delete the phrase “unless the carrier or the performing party already knows or ought to know such information or instructions” in article 7.3(a).

In favor – Australia & New Zealand, Denmark, Great Britain, Italy, Switzerland

Opposed – Japan, the Netherlands

Finally, he asked how the bracketed language in articles 7.2 and 7.3 should be handled.

Mr. Chandler replied that this language was unnecessary, and that it added nothing to the meaning.

Mr. Martin-Clark added that article 7.4 covered the concern by requiring the information to be “complete.”

Mr. Beare asked if everyone agreed to delete the bracketed language in articles 7.2 and 7.3. [There was no objection.] He then proceeded to article 7.7, which specifies when a party will be treated as the “shipper.” The provision is new, but it is explained in the commentary. He invited comments on it.

Mr. Chandler feared that the draft does not use the terms “immunities” and “defenses” consistently.

Prof. Berlingieri asked if it would be possible to expand the commentary

on article 7.5. Civil law countries do not generally recognize the term “strict liability,” but instead use the term “objective liability.”

Ms. Pysden expressed her fear that an agent might be required to assume liability for its principal under article 7.7.

Prof. van der Ziel asked whether the commentary to article 7.7 adequately covered this concern.

Ms. Pysden agreed that it did.

Mr. Beare invited comments on article 7.8. [There were no comments.] He then proceeded to chapter 8 (transport documents and electronic records).

Mr. Martin-Clark wondered if article 8.1(ii), addressing the shipper’s entitlement to a negotiable transport document, should also mention electronic records.

Prof. Sturley explained that this was unnecessary. If the parties had already agreed to use electronic records, their agreement covered the situation. If the parties had not agreed to use electronic records, then article 8.1(ii) could not force the carrier to issue one.

Prof. Berlingieri wondered about the FOB seller that cannot get a negotiable transport document (because it is not the “shipper”) but needs a negotiable transport document to be paid.

Prof. van der Ziel felt that article 7.7 already covers the problem case. Otherwise, only the shipper is entitled to a negotiable transport document. If the seller needs a negotiable transport document, the shipper should authorize the carrier to issue a negotiable transport document to the seller. He admitted that this authority is always given by implication, and that it is not given expressly. But it is an effective solution, and it is how the industry operates in practice.

Prof. Berlingieri foresaw problems if the FOB buyer were acting dishonestly.

Mr. Schimmelpfeng did not think that article 7.7 provided a practical solution to the problem.

Mr. Chandler mentioned that an FOB sale could also be done with dock receipts.

Prof. Zunarelli agreed that **Prof. Berlingieri** had pointed out a real problem. One possible solution would be to say that if the consignor gets a transport document under article 8.1(i), then the shipper gets the negotiable transport document under article 8.1(ii) only upon surrender of the consignor’s transport document.

Prof. Sturley objected that this solution would make the article 8.1(i) receipt into something far more than it was intended to be. It would in effect become a quasi-negotiable instrument. If a negotiable transport document is the “key to the warehouse,” **Prof. Zunarelli**’s proposed solution would make the article 8.1(i) receipt the “key” to the “key to the warehouse.”

The meeting adjourned for lunch at 1:05, and reconvened at 2:10.

Report of the sixth meeting

Mr. Beare resumed the meeting with the consideration of some unfinished business. He first called for a vote on the proposal of the Maritime Law Association of Australia and New Zealand, explained on pages 3-4 of their paper, to impose an obligation on the carrier to furnish available evidence of the temperatures to which goods carried under controlled temperatures had been subject.

In favor – Australia & New Zealand

Opposed – Denmark, Great Britain, Italy

Mr. Beare concluded that the issue should be addressed in commentary. [There was no objection.] He then turned to article 6.3.1, which addresses the liability of performing parties. There were proposals to delete the provision, and to retain it with a modified definition of “performing party.”

Ms. Pysden explained that her proposal was to modify the “performing party” definition by (1) changing “a person other than the carrier that performs *or undertakes to perform* any of the carrier’s responsibilities” to read “a person other than the carrier that *physically performs [or does not perform in whole or in part]* any of the carrier’s responsibilities” and (2) deleting the brackets around “custody.” FIATA would also prefer to delete the final sentence of the definition (“The term ‘performing party’ does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.”), but that is not central to the proposal.

Under this proposal, a cargo claimant is always able to sue the carrier for any damage, and thus the shipper can protect its interests by ensuring that the carrier is responsible. In addition, a cargo claimant will be able to sue the party that physically damages the goods. The proposal excludes the “paper carriers,” such as freight forwarders, that agree to perform part of the carriage but then subcontract with another party who will physically perform that part of the carriage.

The bracketed language “or does not perform in whole or in part” is included to cover the situation mentioned by **Prof. Sturley** in which a party agrees to physically perform part of the carriage but then does not perform in whole or in part. It is included in brackets because FIATA feels that it is unnecessary. In FIATA’s view, “a person other than the carrier that physically performs any of the carrier’s responsibilities” includes a person that is supposed to physically perform any of the carrier’s responsibilities but does not do so in whole or in part.

Mr. Chandler, referring to the bracketed language, suggested that “fails to perform” would be better drafting than “does not perform.” If a party “fails to perform” there is an implication that the party had an obligation to perform, whereas a party that “does not perform” may have been under no obligation to do so.

Ms. Pysden accepted this modification of the proposal.

Prof. Sturley sought to clarify the effect of the proposal as **Ms. Pysden** understands it. Suppose that a shipper wishes to transport containerized cargo from Berlin to Chicago, and that a non-vessel-operating carrier (NVO) in Berlin issues a negotiable transport document covering the entire shipment. The

NVOC then subcontracts with a CMR carrier to move the container from Berlin to Rotterdam, with an ocean carrier to move the container from Rotterdam to Baltimore, and with a large U.S. trucking company to move the container from Baltimore to Chicago. The container arrives in Baltimore without incident. In Baltimore, the U.S. trucking company subcontracts with a truck driver who owns his own rig to move the container from Baltimore to Chicago. En route, the owner-driver of the truck negligently damages the cargo.

Under any view, the cargo claimant, who is likely to be the consignee, has a cause of action against the NVOC as the carrier under the contract of carriage. If the consignee recovers from the NVOC, then the U.S. trucking company will be liable to the NVOC under the contract between those two parties (because the damage would have occurred during the trucking company's period of responsibility). But as **Prof. Sturley** understood **Ms. Pysden's** intent in making this proposal, the consignee would be denied a cause of action under this Instrument against the trucking company. The consignee's only choices would be an action against the distant NVOC, that may or may not have any assets, or an action against the owner-driver of the truck, who almost certainly has no assets.

Ms. Pysden confirmed that the consignee's only causes of action would be against the "carrier" and the party that physically damages the goods. It would not have a cause of action against a "paper carrier" that agreed to perform part of the carriage but then subcontracted with the party that physically performed the carriage.

Mr. Beare first called for a vote on the Danish proposal to delete article 6.3 entirely.

In favor – Denmark

Opposed – Australia & New Zealand, Croatia, Great Britain, Italy, Japan, the Netherlands, Switzerland, USA

He then called for a vote on the FIATA proposal to restrict the article 1.18 definition of "performing party" to those that physically perform and to exclude from the definition purely contractual undertakers other than the contracting carrier.

In favor – Croatia, Denmark, Great Britain, the Netherlands, Switzerland

Opposed – Italy, Japan, USA

Mr. Beare announced that the proposal had carried, but that the commentary would reflect the earlier views.

Mr. Alcantara asked what was the point of a definition.

Mr. Beare explained that definitions give meaning to the terms that are used in substantive provisions.

Prof. Sturley elaborated that the effect of the last vote was to cut back on performing parties' liability under article 6.3.1.

Mr. Alcantara declared that this was not the civil law approach, and that he would not vote on definitions.

Mr. Beare returned to the issue of the bracketed language in article 6.3.1(b). In view of the discussion on damages for delay, he thought it was now appropriate to remove the brackets on "the delay in delivery of" and "6.4.2." [There was no objection.]

Mr. Martin-Clark proposed striking the bracketed words “or implied” in article 6.3.1(b). A performing party should not be subject to greater responsibility or higher limits unless it expressly agrees to accept them.

Mr. Alcantara wondered what was the difference between “express” and “implied” in this context.

Mr. Beare asked if there was any objection to deleting “or implied” in article 6.3.1(b). [There was no objection.]

He then proceeded to consider the proposal of the World Shipping Council and the National Industrial Transportation League.

Ms. Booth called the International Sub-Committee’s attention to the agreement reached in September between the World Shipping Council and the National Industrial Transportation League, whereby the two groups – one representing carriers and the other representing shippers – had reached a commercial compromise and agreed to work together to achieve a much-needed reform of the cargo liability rules on terms that were acceptable to both halves of the industry.

She then explained the proposal that they were jointly making to the International Sub-Committee. They believed that service contracts are fundamentally different from charter parties, and should receive different treatment. Service contracts are the primary mechanism used today in major liner trades. Unlike traditional liner shipments, service contracts are subject to negotiation between the carrier and shipper.

The World Shipping Council and the National Industrial Transportation League propose:

- (1) deleting references to service contracts and volume contracts in articles 3.3.1 and 3.3.2, both of which were drafted with the thought of extending traditional charter party rules;
- (2) amending article 3.4 to read as follows:

The provisions of this Instrument apply to ocean transportation contracts [as defined below] and to transport documents issued pursuant thereto; provided that an ocean transportation contract may contain terms which derogate from the terms of the Instrument as provided for in Article 17.3.
- (3) defining “ocean transportation contract” as “a written contract between one or more shippers and one or more carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed period of time, and the carrier commits to a certain rate or rate schedule and service level”; and
- (4) adding a new article 17.3, in chapter 17, recognizing the principle of freedom of contract under ocean transportation contracts, including the principles that (a) an ocean transportation contract may derogate from the terms of this Instrument, (b) that the ocean transportation contract’s terms shall be binding on the parties to the ocean transportation contract and any person that consents to be bound by it, and (c) that the ocean transportation contract’s terms shall be deemed to be incorporated in any transport document issued pursuant to the ocean transportation contract.

Mr. Kragić could accept this package if article 3.3.2 applied to transport documents as between the consignee and the carrier.

Ms. Booth confirmed that this was intent, but the proposal included it in article 3.4 rather than in article 3.3.2.

Mr. Beare asked if the intent had been to include electronic records.

Ms. Booth agreed that it was.

Mr. Rasmussen was worried that the consignee would automatically be bound by the terms of the ocean transportation contract simply by becoming a holder of the transport document. A consignee should not be allowed to consent to derogate from a mandatory regime.

Mr. Hooper wanted to ensure that the consignee's consent was very clear. He would favor stronger language, such as "expressly agrees to be bound thereby."

Capt. Lüddecke had a problem with the semantics of "ocean transportation contract." It may not be the right language. In any event, the subject was too complex to be dealt with in five paragraphs, and it was too late in the process to try to deal with it now.

Prof. Berlingieri agreed with **Mr. Rasmussen** and **Mr. Kragić**. This approach is much clearer than the current draft. But the term "ocean transportation contract" does not make sense to Mediterranean countries (because the Mediterranean Sea is not an "ocean").

Mr. Beare asked if **Ms. Booth** accepted **Mr. Rasmussen's** and **Prof. Berlingieri's** objections.

Ms. Booth replied that she accepted **Mr. Hooper's** point, but did not accept **Mr. Rasmussen's** and **Prof. Berlingieri's**.

Mr. Kragić reiterated that he could easily accept everything in the proposal except the idea that third-party consignees would be bound if the ocean transportation contract derogated from the Instrument. Allowing this would undermine the entire purpose of the Instrument.

Mr. Chandler suggested that a solution might be to allow consignees to be bound if they become parties to ocean transportation contract.

Mr. Larsen asked what was the fundamental difference between a charter party and a service contract.

Ms. Booth explained that charter parties deal with private carriage arrangements while service contracts apply in the liner trade.

Mr. Lawrence added that the term "charter party" is not defined. The case law that has developed over the years does not cover service contracts. Service contracts are a new phenomenon, but they now cover the majority of shipments to and from the United States (and probably in other trades as well).

Ms. Booth added that charter parties are not subject to regulation at all, whereas service contracts are heavily regulated.

Mr. Martin-Clark found this proposal helpful. There was clearly an advantage to making special arrangements for "ocean transportation contracts," or whatever term the Instrument might use to describe them. They have a commercial life. Their terms should be freely negotiable between the parties to the extent that third parties were not disadvantaged. His problem would be in binding third parties. He would support a solution that protected third parties.

Report of the sixth meeting

Prof. Zunarelli agreed with **Mr. Martin-Clark**. He also had a problem with the provisions of an ocean transportation contract being “deemed” to be a part of the transport document.

Mr. Rasmussen understood the need for a special regime, but did not understand why independent third parties could not have the protection of the Instrument. He was not concerned with consignees that are subsidiaries of the shipper. But true third parties cannot consent to waive a mandatory Instrument.

Prof. van der Ziel was worried by the proposal to put “ocean transportation contracts” on the same level as a charter party in terms of freedom of contract, that is to say that a bill of lading issued under an ocean transportation contract has no force until it is in the hands of a third party. If freedom of contract prevails here, then most shipments will not be subject to the Instrument. There will be no uniformity. This is particularly troublesome in part because there is no minimum amount for an ocean transportation contract. It could be for as little as two containers.

Mr. Lawrence pointed out that the essence of the proposal was freedom of contract. He argued that the principle of uniformity has never existed because the carrier can always increase its liability. This proposal allows two sophisticated parties to customize their liability arrangements.

Under current law, every bill of lading already incorporates tariffs by reference so it would not be a major change to incorporate ocean transportation contracts by reference. Furthermore, under the proposal every bill of lading would be subject to the Instrument unless the parties expressly agree otherwise. It was important to accommodate the developing commercial reality.

Mr. Alcantara expressed sympathy with the need to accommodate commercial practice.

Mr. Kragić asked if all bills of lading issued under service contracts are subject to the U.S. Carriage of Goods by Sea Act under current law.

Ms. Booth agreed that they were.

Mr. Kragić concluded that the same approach should be followed here.

Mr. Hooper clarified that the U.S. COGSA would not govern bills of lading issued under service contracts under current law until the bill of lading had been negotiated to a third party. Until then, the bill of lading would not evidence a contract of carriage.

Mr. Larsen argued that the International Sub-Committee’s mandate is to look at bill of lading rules, not at service contracts.

Mr. Alcantara countered that the mandate was to examine the contract of carriage.

Mr. Beare called for a vote on the proposal of the World Shipping Council and the National Industrial Transportation League, considered as a complete package.

In favor – USA

Opposed – Australia & New Zealand, Croatia, Denmark, Great Britain, Italy, Japan, the Netherlands, Spain, Switzerland

He then proceeded to call for a vote on the World Shipping Council and National Industrial Transportation League’s proposal with the modification

suggested by Croatia to protect third parties by amending article 3.3.2.

Mr. Lawrence commented that article 3.3.2 would need to be redrafted to expand the reference to “charterer” if this approach were accepted.

In favor – Australia & New Zealand, Croatia, Great Britain, Switzerland, USA

Opposed – the Netherlands

The meeting adjourned for coffee at 3:45, and reconvened at 4:05.

Mr. Beare, recognizing the confusion that some delegates had expressed about the vote that had been taken immediately before coffee, summarized the Croatian proposal point by point:

- (1) There would be a new definition of “volume contract,” broadly as in item (3) of the World Shipping Council and National Industrial Transportation League’s proposal. The commentary would mention that a service contract is an example of a volume contract under this definition.
- (2) Article 3.3.1 (but not article 3.3.2) would be amended to delete references to service contracts and volume contracts.
- (3) Article 3.3.2 would be amended to add “volume contract” (without brackets).
- (4) Article 3.4 would be deleted, and replaced with the amended text of the World Shipping Council and National Industrial Transportation League:
The provisions of this Instrument apply to volume contracts; provided that a volume contract may contain terms that derogate from the terms of the Instrument as provided in Article 17.3.
- (5) A new article 17.3 would be added recognizing the principle of freedom of contract for volume contracts as between the parties to the volume contract, but excluding the provisions that would have bound third parties to the terms of the volume contract.

Prof. Berlingieri sought clarification of each point of this proposal.

Prof. van der Ziel argued that this represented a major deviation from prior law, and that he could not vote for it without consultation with the Dutch Maritime Law Association.

Prof. Berlingieri summarized the gist of the proposal as giving special treatment to volume contracts that is the opposite of charter parties. He proposed leaving the text as it is and noting this proposal in the commentary.

Mr. Rasmussen agreed that this proposal may look complicated, but the only real change is in the default rule. Parties would still have freedom of contract. He saw some merit in having different default rules because service contracts and charter parties serve very different purposes.

Prof. van der Ziel insisted that there was a major change because the Instrument would no longer be mandatory between the shipper and the carrier in most liner shipments.

Prof. Sturley saw two distinct issues here. One has long been before the International Sub-Committee, and that is the question of whether the treatment accorded to charter parties under the Hague, Hague-Visby, and Hamburg Rules should be extended to modern arrangements that are in some

Report of the sixth meeting

ways similar to charter parties. The suggestion that the parties to a service contract should have “freedom of contract,” including the freedom to derogate from the terms of the Instrument, has been on the table for a long time.

The other distinct issue here is the default rule. Whereas charter parties are not subject to any of the mandatory regimes unless the parties incorporate them by contract, the World Shipping Council and National Industrial Transportation League proposal (now before the International Sub-Committee as part of the Croatian proposal) would make this Instrument the default rule for service contracts unless the parties explicitly contract out of the Instrument.

In other words, the new suggestion here would extend the application of the Instrument as compared to the long-standing suggestion that service contracts and similar arrangements be treated in the same way as charter parties.

Ms. Derrington asked why there should be a different default rule for service contracts and charter parties.

Mr. Kragić argued that it would be foolish to ignore what is happening in the commercial practice of one of the world’s largest economies.

Mr. Beare called for a second vote on the Croatian proposal.

In favor – Croatia, Denmark, USA

Opposed – Australia & New Zealand, Great Britain, Italy, Japan, the Netherlands, Spain, Switzerland

Mr. Beare then turned to the Croatian proposal that article 6.7.1 be amended to require the carrier to consent to the shipper’s declaration of a higher value, thus giving the carrier the option of declining to carry high-value shipments. He asked if there was any support for this proposal. [Only **Mr. Kragić** supported the proposal.]

Mr. Beare then turned to the International Chamber of Shipping’s proposal to amend article 6.7.1 by adding the phrase “except when *ad valorem* freight has been agreed and the nature and value” He asked if there was any support for this proposal. [No delegation supported the proposal.]

Mr. Beare then returned to the discussion of article 8.1, which had been started before lunch but had been postponed to address the various items of unfinished business.

Prof. Sturley summarized the issue that had been the subject of discussion at the end of the morning. When a consignor who is not the shipper delivers cargo to the carrier, it has a logical claim to a transport document. If nothing else, it should be entitled to a receipt proving that it has in fact delivered the goods to the carrier. In many cases, the carrier will routinely issue the negotiable transport document to the consignor because that is the only party with which the carrier deals. The carrier may not even realize that the consignor is not the shipper. The shipper, on the other hand, also has a compelling claim to the negotiable transport document. By definition, the shipper is the carrier’s contractual counterpart. If anyone is entitled to anything from the carrier, it seems logical to conclude that it would be the other party to the contract that is entitled.

If everything proceeds normally, there will be no problem. The consignor

and the shipper (generally the FOB buyer) are cooperating under the sales contract, and there is no reason for them to have a dispute over their respective entitlements to the negotiable transport document. The problem arises when the transaction is not proceeding normally, and both the consignor and the shipper claim to be entitled to the negotiable transport document. The carrier is now in a difficult situation. Should it deliver the negotiable transport document to the party with which it has been dealing all along or to the party with which it has technically entered into the contract of carriage?

Bracketed language in previous drafts called attention to this problem, but the International Sub-Committee never satisfactorily resolved it. The drafting team therefore attempted a solution with the new article 7.7, which helps the carrier to deal with the case in which it is unsure who is the “shipper.” But it does not deal with the precise problem just identified, when the carrier knows the identity of the shipper but also faces a consignor that needs a negotiable transport document in order to be paid.

Prof. Berlingieri suggested, as an alternative, amending article 8.1(ii) by adding the words “against the surrender of the transport document mentioned in article 8.1(i), if such transport document has been issued” after the words “negotiable transport document.” This concept could also be reflected in the commentary.

Prof. van der Ziel reiterated the objection that this proposal would make the article 8.1(i) transport document into a quasi-negotiable transport document. It does not solve the problem. It simply advances the problem to the article 8.1(i) stage instead of the article 8.1(ii) stage. He recognized that this may not be a problem that can be fully solved in the context of a transport convention.

Mr. Beare asked if there was any objection to addressing **Prof. Berlingieri**’s proposal in the commentary.

Mr. Kragić supported **Prof. Berlingieri**’s proposal, and would put it in the text.

Prof. van der Ziel objected that **Prof. Berlingieri**’s proposal would be highly impractical.

Mr. Beare concluded that the issue would need to be covered in commentary. He then proceeded to article 8.2 (contract particulars), calling particular attention to article 8.2.1(a), which is a new provision but simply requires the carrier to include a description of the goods in the contract particulars. He asked if there was any objection to deleting the brackets, which had been included not because the provision was controversial but only to call attention to a new provision. [There was no objection.]

Mr. Rasmussen, referring to article 8.2.1(c), asked why the carrier should have to give *both* the number of the packages and the weight. Current law requires the carrier to give only one.

Prof. Sturley explained that this issue had been fully discussed at a prior meeting of the International Sub-Committee. It was agreed that the carrier should give the shipper whatever the shipper needs for its commercial purposes. Article 8.2.1(c) requires the carrier only to repeat the information that has been furnished by the shipper.

Report of the sixth meeting

Mr. Alcantara questioned the meaning of “apparent” in article 8.2.1(d).

Mr. Beare referred **Mr. Alcantara** to the next article, article 8.2.2, which explicitly addressed the question.

Prof. Sturley elaborated slightly on article 8.2.2, explaining that it did not require the carrier to do any more than was commercially reasonable, but that the carrier would be bound by anything that it learned as the result of a more detailed inspection.

Mr. Beare invited the delegates to address the proposal of the Maritime Law Association of Australia and New Zealand to amend article 8.2.1(e) to require the carrier not simply to give its identity but also to identify its place of incorporation and its address.

Mr. Chandler agreed that if the carrier might be the only party against which suit will lie, then the cargo claimant should at least know its address.

Mr. Rasmussen wondered what the “place of incorporation” would mean for a non-corporate carrier.

Prof. van der Ziel thought that it would be simple enough for the carrier to give its name and address.

Prof. Ferrari expressed a preference for requiring just the name and address, and not requiring the place of incorporation.

Mr. Beare asked if this solution was satisfactory. [There was no objection.]

Prof. Fujita proposed including the transport document’s place of issuance in the contract particulars. He pointed out that some jurisdictions already require this for bills of lading.

Mr. Rasmussen reported that this was already part of the Danish law for paper documents, but he wondered how it would work for electronic documents.

Mr. Chandler predicted that the carrier would simply designate a place of issuance.

Mr. Rasmussen wondered what would be gained by this requirement. It seemed to unnecessarily complicate the practice.

Prof. van der Ziel replied that the application of the convention could turn on this issue. It would be particularly important for electronic documents.

Mr. Rasmussen noted that article 3.1(d) refers to the place where “the contract of carriage is entered into.”

Prof. Ferrari agreed that the first half of article 3.1(d) refers to the place where “the contract of carriage is entered into,” but the second half of article 3.1(d) refers to the place where “the transport document or electronic record is issued.”

Prof. van der Ziel explained that the decision was originally made to limit the article 8.2.1 list to the bare minimum that was necessary for commercial practice. But he saw no problem with including the transport document’s place of issuance.

Mr. Rasmussen responded that article 3.1(d) leaves it to the parties to decide whether to name the place of issuance, and thus whether to bring it into the Instrument.

Mr. Beare suggested that this point could be addressed in the

commentary. [There was no objection.] He then continued with the discussion of article 8.2. He called particular attention to article 8.2.3(b), which is new. It contains the only reference to “electronic signature.”

Prof. van der Ziel reported that the Electronic Commerce Working Group would be providing a new definition of “electronic signature” to insert in article 8.2.3(b). That new definition would replace the current article 1.10.

Prof. Ferrari mentioned that UNCITRAL already has a definition of “electronic signature” in the U.N. Model Law.

Prof. van der Ziel explained that the change that the Electronic Commerce Working Group had in mind would take the U.N. Model Law definition and adapt it to this context.

Mr. Beare continued, inviting comments on article 8.2.4, then on article 8.3.1.

Prof. van der Ziel wondered how a tallying dispute would be handled.

Prof. Sturley referred to article 8.3.1(a)(ii). The draft could be amended, however, to cover more clearly *any* information furnished by the shipper, and not just the description of the goods.

Mr. Kragić asked if a carrier would need to explain why it considered the shipper’s information to be inaccurate.

Prof. Sturley replied that article 8.3.1(a)(ii) would apply whenever there was a dispute.

Mr. Rasmussen, referring to article 8.3.1(a)(ii), wondered if “may” should be “shall.” He thought that perhaps the carrier should be required to clause the transport document when it considers the shipper’s information to be inaccurate.

Prof. Sturley felt that the carrier may need to retain some discretion to deal with inaccuracies that would not justify clausing the transport document.

Prof. van der Ziel, referring to article 8.3.1(c), asked which party has the burden of proof regarding whether a container has been weighed.

Prof. Sturley confirmed that the burden was on the carrier.

Mr. Chard, referring to article 8.3.1(c), asked what was meant by an “explicit statement.”

Prof. Sturley explained that it could not be a general statement, such as “shipper’s weight, load, and count.” It must explicitly state that the carrier has not weighed the container. For example, the carrier may wish to use a stamp saying something along these lines: “The carrier has not weighed the goods or the container(s) described in this transport document. If a weight is listed, that weight has been furnished by the shipper.”

Mr. Chard then asked whether an “explicit statement” could be included in a printed form.

Prof. van der Ziel responded that it could.

Mr. Beare, noting the lateness of the hour, invited each delegation to address its three most important points. This would ensure that every delegation had time to cover the issues that were most important to it.

Prof. Berlingieri, referring to article 8.3.2(b)(i), wondered what the position would be if the carrier does have actual knowledge that a material statement in the transport document is materially false or misleading.

Report of the sixth meeting

Prof. van der Ziel explained that then the carrier could not rely on the protection of article 8.3.1.

Prof. Berlingieri requested that this be explained in the commentary. He also wondered if article 8.4.3 should be moved up to the position following article 8.2.2.

Mr. Kjaer, referring to article 8.3.5(b)(i), noted that much of the provision was in square brackets. He asked how that would be handled.

Mr. Lawrence contended that the brackets should be removed.

Mr. Rasmussen declared that he would agree to remove article 8.3.5(b)(i), but might still oppose the overall provision, even with the amendment.

Prof. van der Ziel would delete all of article 8.3.5, and would change the final words of article 8.3.4 to say “is permitted under article 8.3.1.” A broken seal should shift the burden of proof, but it should have nothing to do with qualifying clauses. This entire approach should be dealt with in the commentary.

Prof. Reynolds announced that the British Maritime Law Association agreed with **Prof. van der Ziel**.

Prof. Fujita was prepared to support the deletion of article 8.3.5(b). In theory, there is no relationship between a qualifying clause and article 8.3.5. In practice, article 8.3.5(b) could operate unfairly. At the very least, he would put article 8.3.5(b) in brackets after “according to its terms.”

Prof. Ferrari expressed the hope that at least some trace of article 8.3.5(b) would remain in the final draft submitted to UNCITRAL so that the governments would be alerted to the issue.

Ms. Booth strongly favored the retention of article 8.3.5(b).

Mr. Kjaer agreed with **Ms. Booth**.

Mr. Chard also expressed support for the retention of article 8.3.5.

Mr. Beare called for a vote on the motion to delete article 8.3.5.

In favor - Denmark, Great Britain, Italy, Japan, the Netherlands, Switzerland
Opposed – USA

He concluded that the current approach would be moved to the commentary.

Mr. Chandler questioned the need to delete the provision completely rather than simply place it in square brackets, particularly in view of how few delegates remained at the meeting.

Prof. Reynolds suggested that article 8.4.2 should refer only to the sea leg.

Mr. Beare asked if this would be satisfactory.

Prof. van der Ziel asked how article 8.4.2 could be restricted to only the sea leg when the contract of carriage covers the entire carriage, and “carrier” is defined as the party that assumes responsibility for the entire carriage.

Mr. Beare suggested that **Prof. Reynolds** and **Prof. van der Ziel** should see if they could resolve this issue.

Prof. Berlingieri, referring to article 9.4(b), suggested that the consignee should not be liable for the freight but that instead the consignee should not be entitled to obtain delivery of the goods without paying the freight.

Prof. van der Ziel objected that this would be a substantive change in the meaning.

Prof. Berlingieri acknowledged that there would be a substantive change. He was making a substantive point.

Prof. van der Ziel indicated his preference to delete article 9.4(b) entirely rather than accept **Prof. Berlingieri's** amendment. The point of article 9.4(b) is not to impose liability on the consignee, but to mirror article 9.4(a) – to clarify that a “freight collect” transport document puts the consignee on notice of possible liability.

Mr. Rasmussen would also retain article 9.4(b) as drafted.

Prof. van der Ziel added that article 9.5(a) already makes **Prof. Berlingieri's** point.

Prof. Berlingieri disagreed. He argued that article 9.5(a) simply allows the carrier to retain the goods if the consignee is liable.

Mr. Chandler called for deleting the word “negotiable” in article 9.4(a) and (b). This rule should apply to all transport documents, not just negotiable transport documents. The consignee of a non-negotiable transport document would also rely on the statement.

Mr. Beare asked if there was any reason to retain the word “negotiable.”

Prof. van der Ziel supposed that there should be greater freedom of contract for non-negotiable transport documents.

Prof. Sturley recalled that article 9.4 was non-mandatory anyway.

Mr. Rasmussen argued that there was no need for this rule except for negotiable transport documents.

Prof. van der Ziel disagreed with **Mr. Rasmussen**. A non-negotiable transport document could say that freight was pre-paid. He thus had no objection to **Mr. Chandler's** suggestion.

Mr. Beare asked if **Mr. Chandler's** suggestion was accepted. [There was no objection.]

Prof. Berlingieri recalled that he had suggested the benefit of specifying which provisions are non-mandatory. It should be done in a provision of the Instrument, not simply in the commentary.

Prof. Ferrari agreed that it needed to be a provision of the Instrument.

Mr. Chandler asked whether article 9.4(a) should say “holder” or “consignee” for consistency with article 9.4(b).

Mr. Beare agreed that the drafting team would look at that question. Furthermore, he proposed to e-mail the final draft to all of the delegates in attendance, thus giving the delegates a chance to correct any mistakes or to raise major objections concerning chapters 8-17. He asked if that approach would be acceptable.

Prof. Berlingieri suggested that, for provisions that have not yet been discussed, national maritime law associations should have the right to make objections. The responses to the consultation exercise have already been circulated, and they will raise most of the issues.

Mr. Chandler asked what had happened to his proposed language for dealing with the meaning of “expressly agreed.”

Mr. Beare doubted that it would work as a definition.

Mr. Chandler accepted that his proposal did not need to be a definition, but there were at least three places already in the draft in which the issue

Report of the sixth meeting

needed to be addressed. He predicted that there would be others when the project gets to UNCITRAL.

Mr. Chard admitted that article 10.3.2 was very helpful, but complained that it does not address the case of a carrier with the goods on the ship and the consignee on the dock without the bill of lading.

Mr. Beare recognized that this is a very difficult problem, but the drafting team has done its best.

Prof. Reynolds objected that article 10.3.2(ii) and (iii) was not acceptable to the British Maritime Law Association. He argued that it would reduce the value of the security to a bank. At the very least, the text should be bracketed and the commentary should discuss the problems of fraud and reducing the value of transport documents.

Mr. Rasmussen found these provisions very useful for the trade. He would not even use square brackets because it would reduce the value of the provision. He did share concerns about article 10.3.2(iv), which he found to be a little vague.

Mr. Beare concluded that the text should be retained and the two positions should be set out in the commentary.

Ms. Burgess agreed with **Mr. Rasmussen** that these provisions would be helpful.

Mr. Beare recalled the suggested redraft of article 10.4.1 submitted by the Maritime Law Association of Australia and New Zealand, and suggested that the drafting team should consider it.

Prof. Berlingieri, referring to article 11.2(b)(ii), asked if *all* originals should be delivered (if more than one was issued).

Capt. Lüddeke objected that this could take weeks.

Prof. Berlingieri countered that article 11.2(b)(iii) covers all originals.

Prof. van der Ziel explained that all of the originals are needed to exercise the right of control.

Mr. Rasmussen complained that article 11.1(ii) grants an absolute right to demand delivery before the ship's arrival if certain weak conditions are met under article 11.3. He found this to be unworkable. Although he accepted the right of stoppage in transit as between the buyer and seller, that right is extinguished when the bill of lading is negotiated to a third party. He would delete article 11.1(ii). Carriers may permit customers to exercise these rights by agreement, but a mandatory right would be too strong.

Prof. van der Ziel explained that article 11.3 had been reinforced to avoid any interference with the carrier's normal operations, and to protect the carrier's interests. Inland conventions have much weaker protection. Also, the new article 11.6 gives the carrier the right to set its own rules. Furthermore, article 11.1 is non-mandatory.

Mr. Hurst agreed with **Mr. Rasmussen**. Article 11.1(ii), despite its safeguards, gives the shipper a unilateral right to alter the contract.

Mr. Chard agreed with **Mr. Rasmussen** and **Mr. Hurst**.

Mr. Beare asked if other views were held.

Prof. Reynolds generally agreed with **Mr. Rasmussen**, but explained that article 11.6 makes the problem less serious.

Prof. van der Ziel announced that the Dutch Maritime Law Association favored the retention of article 11.1(ii), especially to facilitate electronic commerce. Electronic commerce systems will not work unless clear rules exist to address the right of control. Diluting the right of control would be very short-sighted.

Mr. Beare asked if these objections could be recorded in the commentary.

Mr. Rasmussen did not see the need for article 11.1(ii) despite **Prof. van der Ziel**'s explanation of the drafting.

Mr. Chandler predicted that the old ways of dealing with bills of lading will not survive. There is a chance here to deal with the issue logically. If the CMI does not seize the opportunity, then someone else will need to deal with it.

Prof. Berlingieri declared that the current text was acceptable. Italian law has had such provisions since 1942 without problems.

Mr. Beare asked **Mr. Rasmussen** if he wanted to put his proposal to a vote.

Mr. Rasmussen replied that he did not think it right to take a vote on the issue when so few delegates were left. But he felt that the commentary should be strong.

Mr. Schimmelpfeng, referring to article 11.5, thought it should be stressed that the provision applies in the event that the issues dealt with therein are not already dealt with in the contract of carriage by agreement.

Prof. Berlingieri, referring to article 12.2.2 (which imposes liabilities on a holder "that exercises any right under the contract of carriage"), argued that the reference to "any right" is too broad. Section 3.1 of the British 1992 Carriage of Goods by Sea Act, which is limited to taking or demanding delivery, illustrates a better rule. Exercising marginal rights should not be enough.

Mr. Chandler echoed **Prof. Berlingieri**'s concern. He wondered whether transferring a bill of lading would constitute exercising "any right."

Prof. van der Ziel replied that transferring a bill of lading would not trigger article 12.2.2.

Mr. Chandler worried that judges may disagree with **Prof. van der Ziel**'s interpretation.

Prof. Berlingieri suggested that the commentary should at least mention the narrower view. For example, a holder's asking to sample the goods should not be enough to trigger article 12.2.2.

Prof. van der Ziel disagreed, arguing that sampling should be enough to obligate a consignee. The carrier should not be saddled with the problem of resolving the dispute between the parties to the sales contract.

Prof. Fujita asked whether article 12.2.2 would apply if a holder asks the carrier to replace a paper transport document with an electronic record.

Prof. van der Ziel replied that this would not trigger article 12.2.2, and agreed that the draft should clarify that this would not be enough.

Prof. Berlingieri disagreed with **Prof. van der Ziel**'s earlier argument, and contended that sampling should not be enough to trigger article 12.2.2.

Mr. Chandler agreed with **Prof. Berlingieri**.

Report of the sixth meeting

Mr. Beare announced that the drafting team would redraft the bold text or reflect **Prof. Berlingieri**'s views in the commentary.

Mr. Chandler suggested that article 12.4 (which could impose liabilities on a transferee of rights) was unnecessary. As drafted, it may impose liabilities on an unsuspecting transferee. At the very least, the transferee should consent before being subjected to liabilities.

Prof. van der Ziel explained that article 12.4 only covers liabilities that are tied to the rights that are being transferred. For example, a consignee that takes delivery of containerized cargo must return the container. If it fails to return the container, the shipper will also be liable under article 12.4.

Mr. Beare announced that the commentary will address this concern.

Prof. Berlingieri suggested that article 14.4 should give the claimant any longer period allowed by national law, subject to the caveat that it must be at least 90 days after the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against itself.

Mr. Chard recalled that he had also submitted some proposed language that he would like to have considered.

Mr. Beare noted that article 14.5 should be in brackets. It stands or falls with article 8.4.2 (which is already bracketed).

Prof. Fujita pointed out that article 16.3(a) should reflect the existence of a new protocol to the Paris Convention.

Prof. van der Ziel explained that this provision had been copied directly from the Hamburg Rules, and thus did not include the post-Hamburg protocol. He readily agreed that article 16.3(a) should reflect the current state of affairs.

Ms. Booth reminded the drafting team that the commentary to chapter 17 should reflect the proposal of the World Shipping Council and the National Industrial Transportation League with regard to volume contracts.

Prof. Fujita recalled that article 17.1 should address the possibility of decreasing the liability of the shipper.

Prof. Ferrari asked **Mr. Beare** to discuss the procedure and timetable that would be followed after the present meeting.

Mr. Beare explained that the Working Group hoped to have a draft out by end of the following week, *i.e.*, by 23 November. The delegates would need to send him any comments on this draft before the Executive Council meeting on 7 December. Immediately after the Executive Council meeting, the approved draft can go forward to UNCITRAL unless the Executive Council gives the Working Group other instructions. For example, the Executive Council may ask the drafting team to redraft parts of the commentary.

Prof. Ferrari reminded the delegates that UNCITRAL needed to have the final draft in hand by 15 December.

Mr. Beare announced that the draft report of the fifth meeting will be taken as approved except to the extent that delegates send the Rapporteur corrections of their own comments by the end of next week (*i.e.*, by 23 November). A draft report of the present meeting will be published as a draft. This procedure was followed for the draft report of the International Sub-Committee's fourth meeting, which was published as a draft in the Singapore Yearbook.

Mr. Beare concluded by expressing his thanks to all of the delegates who have attended meetings of the International Sub-Committee; to the national Maritime Law Associations and industry organizations that had replied to the questionnaires and had carefully reviewed and commented on the various drafts that have been circulated; and to his colleagues on the Working Group (particularly on the drafting team), all of whom have worked extraordinarily hard on this project.

Prof. Berlingieri replied on behalf of the meeting by thanking **Mr. Beare** for his ability and patience in presiding over the work of the International Sub-Committee. [Applause]

The meeting adjourned at 7:00 p.m. on Tuesday, 13th November 2001.

DRAFT OUTLINE INSTRUMENT**31st May 2001****TABLE OF CONTENTS**

Chapter 1	Definitions	Page	357
Chapter 2	E-Commerce	“	358
Chapter 3	Scope of Application	“	359
Chapter 4	Period of Responsibility	“	359
Chapter 5	Obligations of the Carrier	“	361
Chapter 6	Liability of the Carrier	“	362
Chapter 7	Obligations of the Shipper	“	366
Chapter 8	Transport Documents and Electronic Records	“	368
Chapter 9	Freight	“	371
Chapter 10	Delivery to the Consignee	“	372
Chapter 11	Right of Control	“	374
Chapter 12	Transfer of Rights	“	376
Chapter 13	Rights of Suit	“	376
Chapter 14	Time for Suit	“	377
Chapter 15	General Average	“	377
Chapter 16	Other Conventions	“	378
Chapter 17	Limits of Contractual Freedom	“	378

1 DEFINITIONS

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

1.2 Carrier means a person who enters into a contract of carriage with the shipper.

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

1.4 Shipper means a person who enters into the contract of carriage with a carrier.

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

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

1.7 Transport document means a document issued pursuant to the contract of carriage by the carrier or a performing party that

- (a) evidences or contains the contract of carriage, or
- (b) evidences the carrier's or a performing party's receipt of goods under the contract of carriage.

1.8 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."

1.9 Non-negotiable transport document means a transport document that

- (a) is prominently marked "non-negotiable" or "not negotiable", or
- (b) states that the goods are to be delivered to a person named in the document, or
- (c) otherwise fails to qualify as a negotiable transport document.

1.10 Freight means the remuneration payable to the carrier for the carriage of goods under the contract of carriage.

1.11 Goods means the whole or any part of the wares, merchandise and articles of every kind whatsoever that the carrier or a performing party received for carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier or a performing party.

1.12 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.

1.13 Right of control has the meaning given in article 11.1.

1.14 Controlling party means the person who is entitled to exercise the right of control.

2 E-COMMERCE

Parties involved in the contract of carriage may agree that they communicate electronically. In such event, if there is an applicable legal requirement

- (i) either expressly or by implication that certain information should be in writing, or that certain consequences should follow if it is not, such requirement is satisfied by the transmission, generation or storage of such information by electronic, optical or similar means, provided

that such information is accessible so as to be usable for subsequent reference;

- (ii) for a signature, or that certain consequences should follow if there is no signature, such requirement of a signature is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

3 SCOPE OF APPLICATION

3.1 The provisions of this Instrument apply to all contracts of carriage in which the place of receipt and the place of delivery are in different States if:

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

3.2 The provisions of this Instrument apply without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

3.3

3.3.1 The provisions of this Instrument do not apply to charter parties.

3.3.2 Notwithstanding article 3.3.1, if a negotiable transport document is issued 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 or contained in that document from the time when and to the extent that the document governs the relations between the carrier and a holder other than the charterer.

3.4 [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 articles 3.1, 3.2, and 3.3 so specify.]

4 PERIOD OF RESPONSIBILITY

4.1.1 Subject to the provisions of articles 4.2 and 4.3, the responsibility of the carrier for the goods under this Instrument covers the period from the time when the carrier or a performing party has received the goods from the shipper in the place of receipt until the time when the goods are delivered by the carrier or a performing party to the consignee in the place of delivery.

4.1.2 The time and location of receipt of the goods is the time and location as agreed in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and location that is in accordance with the customs or usages in the trade or at the place of receipt. In the absence of any such provisions in the contract of carriage or of such customs or usages, the time and location of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.

4.1.3 The time and location of delivery of the goods is the time and location as agreed in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and location that is 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, the time and location of delivery shall be the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.

4.1.4 If the carrier is required 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 from whom the consignee may collect them, such handing over will be regarded as a delivery of the goods by the carrier to the consignee under article 4.1.3.

4.2 The parties may agree in the contract of carriage that

- (a) particular activities that pursuant to the contract of carriage are to be performed during the period referred to in article 4.1.1, such as loading, stowage, discharging, or temporary storage of the goods, shall be carried out by or on behalf of the shipper or the consignee;
- (b) the carrier acting as an agent of the shipper may contract out specified parts of the carriage to a third party, thereby limiting the scope of the contract of carriage.

In the event that a negotiable transport document is issued, such document shall on its face reflect any agreement made in accordance with this article.

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

Alternative I

- (a) [conclude a contract with such third party on the terms that are customary for the particular mode of transport or are compulsorily applicable to the part of the carriage that is contracted out;
- (b) take care that parties to such contract shall be the shipper and such third party, while the consignee under such contract shall be a subsequent carrier or the consignee under the contract of carriage, as the case may be;
- (c) exercise reasonable care, having regard to the specific factors that locally apply, in the selection of the third party;
- (d) provide such third party with all information and instructions that are necessary for a proper carrying out of his tasks, including, as the case may be, information on any loss of or damage sustained by 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;

- (e) take care that any information that the shipper, the controlling party, or the consignee may reasonably request in respect of the part of the carriage contracted out to the third party, such as the name of the third party and the intended or actual place or date of transfer of the goods to the third party, is provided to any of these persons with reasonable despatch;
- (f) provide the consignee under the contract with the third party with all the information and documents that may be required for such consignee to obtain delivery of the goods from the third party;
- (g) effect payment of the remuneration due under such contract, unless otherwise agreed.]

Alternative II

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

4.4 If during any of the periods (1) from the time when the carrier or a performing party has received the goods from the shipper until their loading on to the vessel and (2) from the discharge of the goods from the vessel until the time when the goods are delivered by the carrier or a performing party to the consignee,

- (a) there are any provisions contained in any international convention or national law that
 - (i) cannot be departed from by private contract to the detriment of the shipper; and
 - (ii) apply according to their own terms to any or all of the carrier's activities under the contract of carriage during any such periods, [irrespective whether the issuance of any particular document is needed in order to make such international convention or national law applicable]; and
- (b) a claim or dispute arises out of loss of or damage to the goods, or delay, that occurred during any such period,

then such provisions, to the extent that they are (1) of such mandatory nature, and (2) in terms of nature and structure suitable to be applied within the scope of the provisions of this Instrument, shall be applied to such claim or dispute and shall prevail over the provisions of this Instrument. Otherwise, this Instrument shall apply according to its terms.

5 OBLIGATIONS OF THE CARRIER

5.1 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.

5.2 [The carrier shall be bound, before and during the voyage, to exercise due diligence to:

- (a) make and keep the ship seaworthy;
- (b) properly man, equip and supply the ship;
- (c) make the holds, refrigerating and cool chambers and all other parts of the ship, including containers, if supplied by the carrier, in which the goods are carried fit and safe for their reception, carriage and preservation.

The carrier shall during the period of its responsibility as referred to in article 4.1 properly and carefully keep and care for the goods. He shall also properly and carefully load, stow, carry and discharge the goods.]

5.3 Notwithstanding article 5.2, the carrier may

- (i) sacrifice the goods when the sacrifice is extraordinary, and reasonably made for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.
- (ii) shut out, unload, destroy or render the goods innocuous if they become an actual danger to persons, property, or to the environment.

6 LIABILITY OF THE CARRIER

6.1 Basis of Liability

Alternative I(a)

6.1.1 [The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage, or delay took place during the period of its responsibility as referred to in article 4.1, unless the carrier proves that neither its fault nor that of a performing party caused the loss or damage.]

Alternative I(b)

[The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage, or delay took place during the period of its responsibility as referred to in article 4.1, unless the carrier proves that such loss or damage was caused by events or through circumstances that a diligent carrier could not avoid or the consequences of which a diligent carrier was unable to prevent.]

Alternative II

[The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage, or delay took place during the period of its responsibility as referred to in article 4.1, unless the carrier proves that neither its fault nor that of a performing party caused the loss or damage. In order to prove the absence of fault the carrier must provide evidence that it has taken such reasonable measures as the characteristics of the transport and the circumstances of the voyage require and, in particular, that it has taken the measures described in article 5.2.]

6.1.2 [When the carrier proves that the loss or damage has been caused by one of the following circumstances, it shall be presumed that to such extent neither its fault nor that of a performing party [contributed to] [caused] the loss or damage:

- (i) an act or omission of the shipper, the holder, or the consignee,
- (ii) insufficiency of or defective condition of packing or marking,
- (iii) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods,
- (iv) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party, or the consignee,
- (v) any act, neglect or default of the carrier or a performing party subsequent to the time when the goods become an actual danger to persons, property, or to the environment, and any measure taken in order to prevent the goods from becoming such an actual danger,
- (vi) fire,
- (vii) interference by or impediments created by public authorities,
- (viii) piracy, terrorism, riots, and civil commotions,
- (ix) strike, lock-out, stoppage, or restraint of labour,
- (x) saving or attempting to save life or property at sea,
- (xi) perils, dangers and accidents of the sea or other navigable waters,]

6.1.3 If the loss or damage is caused in part by a breach of the carrier's obligations and in part by a cause for which the carrier is not liable, then the carrier is liable for such loss or damage to the extent that such loss or damage is attributable to that breach, and is not liable for such loss or damage to the extent that such loss or damage is attributable to such other cause. [To the extent that the apportionment cannot be established with sufficient certainty, having regard to the circumstances, then the liability of the carrier shall be one-half of the loss or damage.]

6.2 Calculation of compensation

If the carrier is liable for loss or damage to the goods, the compensation payable shall be calculated by reference to the value of such goods at the place and time of delivery according to the contract of carriage.

The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

Except in respect of loss or damage due to delay in delivery, no consequential loss or damage shall be compensated.

6.3 Liability of Performing Parties

6.3.1

- (a) A performing party is subject to the responsibilities and liabilities imposed on the carrier under this Instrument, and entitled to the carrier's rights and immunities provided by this Instrument (i) during the period it has custody of the goods; and (ii) 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.
- (b) If the carrier agrees to assume responsibilities other than those imposed on the carrier under this Instrument, or agrees that its liability for [the delay in delivery of,] loss of, or damage to or in connection with the goods shall be higher than the limits imposed

under articles [6.4.2,] 6.6.4, and 6.7, a performing party shall not be bound by this agreement unless the performing party expressly or impliedly agrees to accept such responsibilities or such limits.

6.3.2

(a) Subject to article 6.3.3, the carrier shall be responsible for the acts and omissions of

(i) any performing party, and

(ii) any other person, including a performing party's sub-contractors, employees, servants, and agents, who performs, undertakes to perform, or procures to be performed any of the carrier's responsibilities under the contract of carriage, [to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control,]

as if such acts or omissions were its own. Responsibility is imposed on the carrier under this provision only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency, as the case may be.

(b) Subject to article 6.3.3, a performing party shall be responsible for the acts and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its sub-contractors, employees, servants and agents, as if such acts or omissions were its own. Responsibility is imposed on a performing party under this provision only when the act or omission of the person concerned is within the scope of its contract, employment, or agency, as the case may be.

6.3.3 If an action is brought against any person, other than the carrier, mentioned in article 6.3.2, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Instrument if it proves that it acted within the scope of its contract, employment, or agency, as the case may be.

6.3.4 If more than one person is liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for in articles [6.4], 6.6 and 6.7.

6.3.5 Without prejudice to the provisions of article 6.8, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Instrument

6.4 Delay

6.4.1 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 [or, in the absence of such agreement, within the time it would be reasonable to require from a diligent carrier, having regard to the characteristics of the transport and the circumstances of the voyage].

6.4.2 If the loss or damage caused by delay in delivery includes consequential loss or damage, the amount payable as compensation for such consequential loss or damage shall be limited to an amount equivalent to [...]

times the freight payable for the goods being delayed]. In addition, the aggregate liability under article 6.7.1 and the first sentence of this article shall not exceed the limit that would be established under article 6.7.1 for the total loss of the goods in respect of which such liability was incurred.

6.5 Deviation

- (a) The carrier is not liable for loss, damage 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) Where under national law a deviation of itself constitutes a breach of the carrier's obligations, the consequences of such breach shall be determined exclusively in accordance with this Instrument.

6.6 Deck cargo

6.6.1 Goods may be carried on deck only if

- (i) such carriage is required by applicable laws or administrative rules or regulations, or
- (ii) they are carried in or on containers on decks that are specially fitted to carry containers, or,
- (iii) in cases not covered by paragraphs (i) or (ii) of this article, 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.

6.6.2 When the goods have been shipped in accordance with article 6.6.1(i) and (iii), the carrier shall not be liable for loss of 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 article 6.6.1, the carrier shall be liable, irrespective of the provisions of article 6.1, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.

6.6.3 When the goods have been shipped in accordance with article 6.6.1(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 article 6.6.1(iii) and, where a negotiable transport document is issued, is not entitled to invoke that provision against a third party that has acquired such negotiable transport document in good faith.

6.6.4 If the carrier under this article 6.6 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 the articles 6.4 and 6.7; however, if it was expressly agreed to carry the goods under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods which exclusively resulted from their carriage on deck.

6.7 Limits of liability

6.7.1 The carrier's liability for 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 has 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 carrier and the shipper.]

6.7.2 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.

6.7.3 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 that 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 that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

6.8 Loss of the right to limit liability

Neither the carrier nor any of the persons mentioned in article 6.3.2 shall be entitled to limit their liability as provided in articles [6.4.2,] 6.6.4, and 6.7 of this Instrument, or as provided in the contract of carriage, if the person seeking to recover in excess of the limitation amount proves that [the delay in delivery of,] the loss of, or the damage to or in connection with the goods resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with the knowledge that such loss or damage would probably result.

6.9 Notice of loss, damage or delay

6.9.1 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 or the performing party who delivered the goods 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 that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.

6.9.2 No compensation shall be payable for economic loss resulting from delay in delivery unless written notice of such loss was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.

6.9.3 When the notice in writing referred to in this chapter is given to the

performing party that delivered the goods, it shall have the same effect as if that notice had been given to the carrier, and notice given to the carrier shall have the same effect as notice given to the performing party that delivered the goods.

6.9.4 In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods.

6.10 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 or a performing party 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.

7 OBLIGATIONS OF THE SHIPPER

7.1 A shipper shall, in accordance with the provisions of the contract of carriage, deliver the goods ready for carriage and in such condition that they will withstand 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.

7.2 The carrier shall provide to the shipper, on its request, all the information, including instructions, that it knows or ought to know and that is reasonably necessary or of importance to the shipper in order to comply with its obligations under article 7.1.

7.3 The shipper shall provide to the carrier all the information, instructions and documents that are reasonably necessary for:

- (a) the handling and carriage of the goods, including precautions to be taken by the carrier or a performing party, unless the carrier or the performing party already knows or ought to know such information or instructions;
- (b) 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 issuance of the transport documents, including the data referred to in article 8.2.1(a) and (b), the name of the party to be identified as the shipper in the transport document and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the carrier.

7.4 The information, instructions and documents that the shipper and the carrier provide to each other under articles 7.2. and 7.3 must be accurate and complete, so as to enable the other party fully to rely on such information,

instructions and documents for the purpose for which it is requested or intended within the scope of the contract of carriage. Each party, however, is entitled, but never obliged, to examine whether the information, instructions and documents provided by the other party are accurate and complete.

7.5 The shipper and the carrier are liable to each other, the consignee, and the controlling party for any loss or damage that is caused by either party's failure to comply with their respective obligations under the articles 7.2, 7.3, and 7.4.

7.6 The shipper is liable to the carrier for any loss, damage, or injury caused by the goods, unless the shipper proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent.

7.7 If a person is identified as the shipper in the transport document and accepts that document, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 14.

7.8 The shipper shall be responsible for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, servants, agents, and any other persons who act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Responsibility is imposed on the shipper under this provision only when the act or omission of the person concerned is within the scope of its contract, employment, or agency, as the case may be.

8 TRANSPORT DOCUMENTS

8.1 Issuance of the Transport Document

8.1.1 Requirement to Issue a Transport Document

After the carrier or a performing party receives the goods, the carrier must issue an appropriate transport document if the shipper [or the person who delivered the goods to the carrier or a performing party] requests one.

8.1.2 Shipper's Entitlement to a Negotiable Transport Document

The shipper and the carrier may agree that the carrier will not issue a negotiable transport document. Such an agreement may be express or implied. In the absence of such an agreement, the shipper is entitled to a negotiable bill of lading or other negotiable transport document.

8.2 The Contents of the Transport Document

8.2.1 Required Contents of the Transport Document

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

- (a) show the leading marks necessary for identification of the goods as furnished in writing by the shipper before the carrier or a performing party receives the goods;
- (b) show the number of packages, the number of pieces, the quantity, and the weight as furnished in writing by the shipper before the carrier or a performing party receives the goods;

- (c) describe the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper;
- (d) state the date
 - (i) on which the carrier or a performing party received the goods, or
 - (ii) on which the goods were loaded on board the vessel, or
 - (iii) on which the transport document was issued.
- (e) adequately identify the carrier; and
- (f) be signed by the carrier in accordance with Article 8.2.3.

8.2.2 The phrase “apparent order and condition of the goods” in this chapter 8 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 shipper delivers them to the carrier or a performing party and (b) any additional inspection that the carrier or a performing party actually performs before issuing the transport document.

8.2.3 Signature

- (a) The transport document shall be signed by or for the carrier or a person having authority from the carrier. [A transport document signed by or for the master of a ship carrying the goods is deemed to have been signed on behalf of the registered owner or the bareboat charterer of the ship.]
- (b) Unless this is inconsistent with the law of the country where the transport document is issued, the signature on the transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, made by any other mechanical means, or done electronically in accordance with chapter 2.

8.2.4 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 article 8.2.1, or the inaccuracy of one or more of those particulars, does not affect the legal character or validity of the transport document.
- (b) If a transport document fails to describe the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper, the transport document is *prima facie* or conclusive evidence under article 8.3.3 that the goods were in apparent good order and condition at the time the shipper delivered them to the carrier or a performing party.

8.3 Qualifying the Description of the Goods in the Transport Document

8.3.1 Circumstances Under Which the Carrier May Qualify the Description of the Goods in the Transport Document.

Under the following circumstances, the carrier, if acting in good faith when issuing a transport document, may qualify the information mentioned in article 8.2.1(a) or 8.2.1(b) 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 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 or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container.
- (c) For goods delivered to the carrier or a performing party in a closed 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 neither the carrier nor a performing party weighed the container, and (ii) the shipper and the 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.

8.3.2 Reasonable Means of Checking

For purposes of article 8.3.1, a “reasonable means of checking” must be not only physically practical but also commercially reasonable.

8.3.3 Prima Facie and Conclusive Evidence

Except as otherwise provided in article 8.3.4, a transport document is

- (a) prima facie evidence of the carrier’s receipt of the goods as described in the transport document; and
- (b) conclusive evidence of the 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].

8.3.4 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 article 8.3.3, to the extent that the description of the goods is qualified by the clause, when the clause is “effective” under article 8.3.5.

8.3.5 When Qualifying Clauses Are Effective

Subject to article 8.3.6, a qualifying clause in a transport document is “effective” for the purposes of article 8.3.4 under the following circumstances:

- (a) For non-containerised goods, a qualifying clause that complies with

the requirements of article 8.3.1 will be effective according to its terms.

- (b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of article 8.3.1 will be effective according to its terms [if the carrier or a performing party delivers the container intact and undamaged and there is no evidence that the container has been opened after the carrier or a performing party received it].

8.4 Deficiencies in the Transport Document

8.4.1 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 the carrier or a performing party 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.

8.4.2 Failure to Identify the Carrier

If the transport document fails to identify the 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 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.

9 FREIGHT

9.1 For the purpose of this article 9, “freight” shall include dead freight.

9.2

- (a) Freight is deemed to be earned upon delivery of the goods to the consignee at the time and location mentioned in article 4.1.3, unless the parties have agreed that the freight shall be earned, wholly or partly, at an earlier point in time.
- (b) Unless otherwise agreed, no freight will become due for any goods that are lost before the freight for these goods is earned.

9.3

- (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 are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery.

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

9.4

- (a) Unless otherwise agreed, the 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 or any other person identified in the transport document as the shipper will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid:
 - (i) with respect to any liability under chapter 7 of the shipper or a person mentioned in article 7.7; or
 - (ii) with respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 9.6 or otherwise for the payment of such amounts.

9.5

- (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 shipper, 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 a statement puts the consignee on notice that it may be liable for the payment of the freight.

9.6

- (a) Notwithstanding any agreement to the contrary, if and to the extent that under national law or otherwise the consignee is liable for the payments referred to below, the 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 due 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 paragraph (a) of this article is not, or is not fully, 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.

10 DELIVERY TO THE CONSIGNEE

10.1 The consignee, who claims the goods from the carrier, shall accept

their delivery at the time and location mentioned in article 4.1.3. If during a period after such delivery the goods remain in the custody of the carrier or a performing party, and no express or implied contract has been concluded between the carrier or the performing party 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.

10.2 On request of the carrier or the performing party that delivers the goods, the consignee shall provide written confirmation of delivery of the goods by the carrier or the performing party in the manner that is customary at the place of destination.

10.3

10.3.1 If no negotiable transport document has been issued:

- (i) The shipper or the controlling party shall advise the carrier, prior to or upon the arrival of the goods at the place of destination, of the name of the consignee.
- (ii) The carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to the consignee upon the consignee's production of proper identification.
- (iii) If the shipper or the controlling party has not advised the carrier of the name of the consignee pursuant to paragraph (i) of this article, or if the consignee named by the shipper or the controlling party does not take delivery of the goods at the place of destination, then the carrier shall advise the shipper or the controlling party accordingly, whereupon the shipper or the controlling party shall take delivery of the goods itself. If the carrier is unable, after reasonable effort, to identify and find the shipper or controlling party, then the person mentioned in article 7.7 shall be deemed to be the shipper for purposes of this article.

10.3.2 If a negotiable transport document has been issued, the following shall apply:

- (i) The holder is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to such holder upon production of the negotiable document. In the event more than one original of the negotiable document has been issued, the production of one original will suffice.
- (ii) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall advise the shipper or the controlling party accordingly. In such event the latter shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the shipper or the controlling party, then the person mentioned in article 7.7 shall be deemed to be the shipper for purposes of this article.

- (iii) If 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, who becomes a holder after the carrier has delivered the goods to the consignee, or to a person entitled to these goods pursuant to any contractual or other arrangement other than the contract of carriage, 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 did not have or could not reasonably have had knowledge of such delivery.
- (iv) If the shipper does not give the carrier adequate instructions as to the delivery of the goods, the carrier is entitled to use its rights under article 10.4.

10.4

10.4.1 When the goods have arrived at the place of destination and the goods are not actually taken over by the consignee at the time and location mentioned in article 4.1.3 and no contract has been concluded between the carrier or the performing party and the consignee that succeeds the contract of carriage, or the carrier is under 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 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 at the time. After deduction of any costs incurred in respect of the goods and, as the case may be, other amounts as referred to in article 9.6(a) and due to the carrier, the proceeds of sale must be held for the person entitled to the goods.

10.4.2 The carrier is only allowed to exercise his right referred to in article 10.4 after it has given 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 or the controlling party that the goods have arrived at the place of destination.

11 RIGHT OF CONTROL

11.1 The right of control of the goods means the right under the contract of carriage to give the carrier instructions in respect of these goods during the period of its responsibility as stated in article 4.1. Such right to give the carrier instructions comprises a right to:

- (i) give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
- (ii) demand delivery of the goods before their arrival at the place of destination;
- (iii) replace the consignee by any other person including the controlling party;

- (iv) give any other instruction that constitutes a variation of the contract of carriage.

11.2

- (a) When no negotiable transport document is issued, the following rules apply:
 - (i) The shipper is the controlling party unless the shipper and consignee agreed that another person would be the controlling party and the shipper so notified the carrier. The shipper and consignee may agree that the consignee is the controlling party.
 - (ii) The controlling party is entitled to transfer the right of control to another person. The transferor or the transferee shall notify the carrier of such transfer.
 - (iii) When the controlling party exercises the right of control in accordance with article 11.1, it shall produce proper identification to the carrier.
- (b) When a negotiable transport document is issued, the following rules apply:
 - (i) The holder of that document or, in the event that more than one original of that document is issued, the holder of all the originals is the sole controlling party.
 - (ii) The holder of that document is entitled to transfer the right of control by passing it to another person in accordance with article 12.1.
 - (iii) In order to exercise the right of control, the holder of that document shall produce it to the carrier. If more than one original of that document was issued, all originals shall be produced.
 - (iv) Any instructions as referred to in article 11.1(ii), (iii), and (iv) given by the holder of that document upon becoming effective in accordance with article 11.3 shall be stated thereon.
- (c) Upon transfer of the right of control the person who transferred that right shall be discharged of his obligation under article 11.5.

11.3

- (a) The carrier shall execute any instruction as referred to in article 11.1(i), (ii), and (iii), 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 a performing party, and does not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage. The person giving any instruction to the carrier shall indemnify the carrier or such other person against any such additional expense, loss or damage, if they nevertheless occur.
- (b) The execution of an instruction as referred to in article 11.1(iv) is subject to the agreement of the parties to the contract of carriage.

11.4 Goods that are delivered pursuant to an instruction in accordance with article 11.1(ii) are deemed to be delivered at the place of destination and

the provisions relating to such delivery, as laid down in article 10, are applicable to such goods.

11.5 During the period that the carrier holds the goods in its custody, one of the following persons shall give instructions to the carrier upon the carrier's reasonable request:

- (a) the controlling party,
- (b) the shipper,
- (c) the person referred to in article 7.7, or
- (d) the person who delivered the goods to the carrier or to a performing party.

In case of necessity the carrier shall seek and accept instructions from the highest person on this list that it is able, after reasonable effort, to identify and find. The carrier may not seek or accept instructions from a person on the list unless the carrier after reasonable effort is unable to identify or find a person who is higher on the list.

12 TRANSFER OF RIGHTS UNDER NEGOTIABLE TRANSPORT DOCUMENTS

12.1 If a negotiable transport document has been issued, the holder may transfer the right of delivery, the right of control and any other rights embodied in such 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.

12.2 Without prejudice to the provisions of article 11.6, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder.

13 RIGHTS OF SUIT

13.1 Without prejudice to articles 13.2 and 13.3, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

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

depending on which of the above persons suffered the loss or damage in consequence of a breach of the contract of carriage, or

- (iv) any third party that 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 limitations of liability that are available to

it under the contract of carriage and under this Instrument towards such third party.

13.2 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 or a performing party, without having to prove that it is the party that suffered loss or damage in consequence of a breach of the contract of carriage. If such holder did not suffer the loss or damage itself, it shall be deemed to act on behalf of the party that suffered such loss or damage.

13.3 In the event that a negotiable transport document is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage.

14 TIME FOR SUIT

14.1 The carrier shall in any event be discharged from all liability whatsoever in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of one year. The shipper shall in any event be discharged from all liability under chapter 6 of this Instrument if judicial or arbitral proceedings have not been instituted within a period of one year.

14.2 The limitation period commences on the day on which the carrier has completed delivery of the goods concerned or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered. The day on which the limitation period commences is not included in the period.

14.3 The person against whom a claim is made at any time during the running of the limitation period may extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

14.4 An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in this chapter if it is instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against itself.

15 GENERAL AVERAGE

15.1 Nothing in this Instrument shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

15.2 With the exception of the provision on time for suit, the provisions of this Instrument relating to the liability of the carrier for loss or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

16 OTHER CONVENTIONS

16.1 This Instrument does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of [seagoing] ships.

16.2 No liability shall arise under the provisions of this Instrument for any loss or damage to or delay in delivery of luggage for which the carrier is responsible under any convention or national law relating to the carriage of passengers and their luggage by sea.

16.3 No liability shall arise under the provisions of this Instrument for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

- (a) under either the Paris Convention of July 29, 1960, on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of Jan. 28, 1964, or the Vienna Convention of May 21, 1963, on Civil Liability for Nuclear Damage, or
- (b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

17 LIMITS OF CONTRACTUAL FREEDOM

17.1 Unless it is specified otherwise in this Instrument, any contractual stipulation that derogates from the provisions of this Instrument shall be null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, the performing party, the shipper, the controlling party, or the consignee under the provisions of this Instrument. [However, the carrier or a performing party may increase its responsibilities and its obligations under this Instrument.] Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.

17.2 Notwithstanding the provisions of chapters 5 and 6 of this Instrument, the carrier as well as the performing party are allowed by the terms of the contract of carriage to exclude or limit its liability for loss or damage to the goods if

- (a) the goods are live animals;
- (b) the character or condition of those goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable document is or is to be issued for the carriage of these goods.

CONSULTATION PAPER

National Associations and international organizations are particularly asked to comment on the following issues. Reference should also be made to the commentary on the specific provisions of the Revised Draft Outline Instrument which are referred to. Replies are requested as soon as conveniently possible and in any event by 28 September 2001.

1. Scope of Application – Chapter 3.

Article 3.1 is based on Article 2 of the Hamburg Rules and applies the Instrument widely to international carriage. Thus the Instrument will apply to both inward and outward carriage (as recommended by the Uniformity Sub Committee) and if the contract of carriage is entered into, or the transport document is issued, in a contracting state. References to the port of loading or port of discharge have been omitted since the Instrument is drafted to apply to door to door transport (see Articles 4.1 and 4.4). The Instrument will apply if either the place of receipt or the place of delivery, which may be inland and in another jurisdiction from the port of loading or discharge, is in a contracting state. Views are requested as to whether these provisions are acceptable.

2. Charterparties – Article 3.3.1.

Article 3.3.1, as drafted excludes charterparties from the application of the Instrument. The Hague, Hague-Visby and Hamburg Rules also exclude charterparties, but do not define a “charterparty.” It is not believed that absence of a definition has caused problems in practice, but other forms of contract, such as contracts of affreightment, volume contracts, service contracts and slot charters, have been developed in more recent years.

Views are requested as to:

- (i) whether the exclusion of charterparties should be maintained, and, if so,
- (ii) whether, and how, a charterparty should be defined, and
- (iii) whether the exclusion should be expanded to include such other forms of contract. Such an expansion would give rise to problems of definition and views are invited as to how the expanded exclusion should be limited.

3. Through Transport – Articles 4.2 and 4.3.

The draft Outline Instrument which was printed in CMI Yearbook 2000 (“the Yearbook 2000 Draft”) included a provision dealing with through transport (3.2 and 3.3). The commentary on those provisions and the accompanying “Door to Door Transport” paper explained what was meant by “through transport.” The Singapore Conference concluded that through transport should not be outlawed, but that safeguards should be included in the Instrument.

Article 4.3 sets out two alternative ways in which this could be done (Alternatives I and II). Either specific duties should be imposed on a carrier who arranges through transport, as in Alternative I, or a general duty should be imposed as in Alternative II.

Comments are invited as to how these safeguards should be drafted.

4. Obligations of the Carrier and Basis of Liability - Chapter 5 and Article 6.1

Article 6.1.1 has been drafted on an alternative basis - Alternative I(a) and (b) and Alternative II - and the wording of these alternative provisions is explained in the commentary. These alternatives have been drafted not to offer a straight choice between one provision or the other, but to illustrate the various policy choices which must be made in order to arrive at a coherent and acceptable liability regime.

Views are therefore invited on the following issues:-

(i) Whether the fault based regime, which was the regime preferred at Singapore, should be a regime based on presumed fault.

(ii) If so, whether the wording of the provisions setting out the carrier's core liability should be based on Alternative I(a) or (b).

(iii) Whether the exemptions should be drafted as presumptions of absence of fault, as in Article 6.1.2 as drafted, or whether some, or all, of them should be drafted as exceptions which would exonerate the carrier from liability.

It should be noted that (i), (ii), (iii) and (iv) correspond with similar provisions in other transport conventions, e.g. CMR where the provisions corresponding to (i) and (iii) are exonerations.

If they are to be drafted, as in Article 6.1.2, as presumptions, it may be thought that some, or all, of the circumstances fall within the general words of Alternatives I(a) and (b) and that it is therefore strictly unnecessary to specify them.

(iv) Whether the obligations as set out in Article 5.2 should be included.

(v) If so, whether the words in brackets in Alternative II should be included.

(vi) Whether an article should be included to provide for an allocation of loss, and, if so, whether an article along the lines of Article 6.1.3 is satisfactory.

5. Delay – Article 6.4.

(i) There was widespread support at Singapore for the unbracketed words in Article 6.4.1. Views were divided as to whether or not any liability for delay should be imposed on the carrier where no specific time for delivery is provided for in the contract of carriage.

Views are sought as to whether a provision imposing such liability should be imposed. The words in brackets in Article 6.4.1 impose a liability based on "reasonableness."

(ii) Article 6.4.2 provides that the carrier's liability for consequential loss arising from delay should be limited by reference to the freight payable in respect of the goods delayed.

The Singapore Conference did not necessarily support a separate limit based on freight for consequential loss arising from delay; some delegates were of the view that the limits in Article 6.7 should apply.

Views are sought on this question.

6. Conclusive Evidence – Article 8.3.3.

This Article as drafted provides that a transport document is conclusive evidence of the receipt of the goods as described therein when it is in the hands of a third party acting in good faith (cf. Hague-Visby Rules Article III Rule 4, Hamburg Rules Article 16.3.)

Views are sought as to whether in the case of non negotiable transport documents there is any scope for a conclusive evidence rule.

7. Containers – Article 8.3.5.

Article 8.3.5 (b), provides that it is a prerequisite of the qualifying clause being effective that the container is delivered intact, closed and undamaged.

Views are sought as to whether this provision is acceptable.

8. Identification of the Carrier – Article 8.4.2.

This Article sets out a presumption as to the identity of the carrier, if the transport document “fails to identify” the carrier. If this Article were omitted, the Instrument would not deal with the consequences of the transport document failing to identify the carrier. The provisions of Article 8.2.3(a), which deals with the effect of a transport document signed by the Master, should be read together with this Article.

This issue was discussed at length by the Uniformity Sub Committee and reference should be made to the reports of its meetings published in the CMI Yearbooks. Views were very much divided on this issue at Singapore.

Views are therefore sought as to whether

- (i) a presumption along the lines of Article 8.4.2 should be included
- (ii) if so, what should constitute failure to identify the carrier.
- (iii) whether Article 8.4.2 should apply generally, or only to transport documents signed by the Master.

9. Mandatory Provisions

(i) A clear majority at Singapore considered that the Instrument should take the form of a convention and that the “core provisions”, including the carrier’s liability for loss or damage occurring on the sea leg, should be mandatory. What other provisions should be included in such mandatory core provisions remains open for further consideration.

Such a convention should supersede the Hague, Hague-Visby and Hamburg Rules. There are other provisions contained in the Instrument which correspond with provisions in these Rules. It would therefore be logical for such provisions to be mandatory in addition to the provisions dealing with the carrier’s obligations and liabilities in Chapters 5 and 6. Such provisions are contained in Chapters 4, 7, 8, 14, 15, 16 and 17.

As drafted Chapter 9 contains a number of provisions which are non mandatory inasmuch as they will only apply if the parties do not agree otherwise. Chapters 10, 11, 12 and 13, as drafted, are mandatory.

Views are sought on the extent to which the provisions of the Instrument should be mandatory. Special considerations may apply to E-Commerce (Chapter 2) and to door to door transport (Article 4.4).

(ii) Article 17.1 contains a general provision that, unless it is specified otherwise, it is not permitted to derogate from the provisions of the Instrument. Article III Rule 8 of the Hague Rules and Article 23.1 of the Hamburg Rules contain similar provisions in respect of the carrier's liability. Article 17.1, as drafted, extends this to the shipper. It leaves open whether or not it should be permissible for either party to increase its respective liabilities.

Views are also sought on this issue.

**SYNOPSIS OF THE RESPONSES OF
NATIONAL ASSOCIATIONS,
CONSULTATIVE MEMBERS AND
OBSERVERS TO THE CONSULTATION PAPER
AND OTHER COMMENTS ON THE
DRAFT OUTLINE INSTRUMENT**

TABLE OF CONTENTS

Introduction	Page	384
General Comments	"	385
Art. 1 Definitions	"	396
Art. 2 E-Commerce	"	403
Art. 3 Scope of Application	"	404
Art. 4 Period of Responsibility	"	416
Art. 5. Obligations of the Carrier	"	431
Art. 6. Liability of the Carrier		
Art. 6.1 – Basis of Liability	"	432
Art. 6.3 – Liability of Performing Parties	"	457
Art. 6.4 – Delay	"	460
Art. 6.5 – Deviation	"	467
Art. 6.6 – Deck cargo	"	468
Art. 6.7 – Limits of liability	"	470
Art. 6.8 – Loss of the right to limit liability	"	474
Art. 6.9 – Notice of loss, damage or delay	"	476
Art. 7 Obligations of the Shipper	"	477
Art. 8 Transport Documents		
Art. 8.1 – Issuance of the Transport Document	"	481
Art. 8.2 – The Contents of the Transport Document	"	483
Art. 8.3 – Qualifying the Description of the Goods in the Transport Document	"	486
Art. 8.4.2 – Failure to Identify the Carrier	"	496
Art. 9 Freight	"	503
Art. 10 Delivery to the Consignee	"	506
Art. 11 Right of Control	"	510
Art. 12 Transfer of Rights under Negotiable Transport Documents	"	515
Art. 13 Rights of Suit	"	516
Art. 14 Time for Suit	"	517
Art. 15 General Average	"	519
Art. 17 Limits of Contractual Freedom	"	519
Mandatory Provisions	"	521
Additional Provisions - Jurisdiction and Arbitration	"	530

INTRODUCTION

On 31 May 2001, following a meeting of the International Sub-Committee held in New York on 30 April and 1 May 2001, the Chairman of the I-SC circulated a Draft Outline Instrument and a Consultation Paper with which comments were requested on a number of issues.

As of 30 October 2001 comments had been received from the following National Associations and the following Consultative Members and Observers of the CMI:

National Maritime Law Associations

Australia and New Zealand	Netherlands
Canada	Norway
China	Peru
Croatia	Spain
Denmark	Sweden
France	Switzerland
Germany	United Kingdom
Italy	United States
Japan	

Consultative Members and Observers

Baltic and International Marine Conference (BIMCO)
British Chamber of Shipping
International Federation of Freight Forwarders' Association (FIATA)
International Chamber of Commerce (ICC)
International Chamber of Shipping (ICS)
The Institute of Chartered Shipbrokers
The International Group of P&I Clubs (IG)
International Union of Marine Insurance (IUMI)
National Industrial Transportation League and World Shipping Council (NITL and WSC)

A synopsis of all such comments has been prepared and is published hereafter.

GENERAL COMMENTS

MEMBER ASSOCIATIONS

Canada

At Singapore the CMLA applauded the CMI, the International Sub-Committee, and the International Working Group for the yeomen work done in an effort to again harmonize liability regimes dealing with the Carriage of Goods by Sea and for dealing with related issues which have not been the subject of International Conventions. If anything, that work has accelerated.

The CMLA expressed concern at Singapore and again expresses concern now that the broad scope of the draft Outline Instrument may defeat our own common goal, uniformity of private international law dealing with the Carriage of Goods by Sea.

May we again suggest that a two-stage approach may bring better results.

There appears to be, not only within our own association but others as well, a fairly general acceptance of a core ocean carriage liability regime based on presumed fault as set forth in the Hague-Visby Rules, with an extension thereof from tackle to tackle to port to port, and the elimination of the defences of error of navigation and management. The Instrument would deal with the vexing problems of actual and performing carriers, would give greater Himalaya Clause protection to sub-contractors, would revisit container shipments and revise package limitation and would contain arbitral and jurisdiction provisions based on Articles 21 and 22 of the Hamburg Rules.

Through transport and other issues require more study, and could form part of subsequent Instruments.

Spain

1. The Draft, so far available, is in no complete form of syllabus. Provisions relating to "Jurisdiction" and "Arbitration" are missing. To the extent that it purports to cover "the contract" of carriage, and not merely the rights relating to transportation of goods, there should be a rule on "demurrage" if there is one on "freight".

From our perspective the chapter relating to "freight", "general average" and the conflictive "transfer of rights under negotiable transport documents" are not necessary.

The chapter relating to "other Conventions" does not identify the specific Conventions.

2. Although aimed at being a "door-to-door" instrument, this is not clearly achieved yet. It is not, in our view, a project suitable for Multimodal Transport as it presently stands, as it does not deal appropriately with land risks and situations involving containers' logistics. It remains, as it now stands, in

the form of a project for regulating Sea Transport but with additions from CMR and CIM-COTIF, so to constitute a kind of “mix” product. We believe that it does not reach the level of suitability to Multimodal Transport as does the Hamburg Convention 1980.

3. The instrument allows for “opting out” or “contracting out” entire segments or obligations, giving way to national laws, which all of it would not play in support of uniformity of law among nations.

4. Our Association does not adhere to the “network liability system”, which leads to controversies over localization of the damage and choice of laws.

5. The draft – as we see it – must improve considerably its language and construction, terminology let alone. Some provisions are not easily understood.

6. There is an enormous job to be done ahead in the field of E-Commerce, so in the ambit of the “right of control” as terms such as “holder”, “to the bearer”, “negotiable document”, etc., would be inadequate.

7. The Spanish MLA is positively determined to contribute to the CMI’s objective of achieving a uniform regulation of maritime and multimodal transportation for the future. To that aim, it is felt that a policy as to scope and contents of the foreseen Convention must be defined and agreed. Several issues envisaged under the instrument are conceived differently in Civil Law and Common Law, e.g. the transmission of rights under negotiable documents, the right to lien on the goods, liability for delay in delivery, breach of the right to limitation, the evidentiary value of the transport documents, delivery to the Consignee and removal of the goods, right of control and novation of the contract and, certainly, definitions.

We live in a Civil Law system in Spain, and therefore, are particularly sensitive over the need for narrowing the gap between the Common Law proposals and ours. The case is often present along the lines of the instrument.

Switzerland

The Swiss Maritime Law Association (CHMLA) welcomes and supports the efforts of CMI to draft a regime which eventually would supersede the current maritime conventions and add issues of transport law which so far have not yet been sufficiently harmonised in international instruments.

Although a land-locked country, Switzerland has a well developed transport industry, especially railways, road hauliers and freight forwarders, as well as shipping companies and air carriers. Switzerland is also well known for its export-oriented industry, insurance companies, and banks. Therefore, it is of utmost importance for the country to have rules and regulations, both at national and international level, that take care of the balance of interests between transport users and transport providers, and that facilitate the processes in international trade.

Synopsis of the responses to the Consultation Paper

CONSULTATIVE MEMBERS AND OBSERVERS***British Chamber of Shipping***

As one of the organisations consulted by CMI, the Chamber of Shipping has been reviewing the content of the Draft Outline Instrument circulated in June and discussed at the International Sub-Committee in July. At the same time, we have been liaising with other shipowner organisations through the International Chamber of Shipping (ICS). In this connection we have seen, and support, the general line of approach, set out in the ICS submission sent to you on 14 September.

Some further comment would, perhaps, be helpful to underline the importance of ensuring that the eventual Instrument achieves a proper balance between the respective interests of commercial parties. In particular, proposals being put forward would have implications for traditional carrier defences together with other provisions which are likely to introduce a new allocation of risk and responsibility. Development of these ideas should not be dismissed but seen as part of an overall package embracing elements from among those suggested in the ICS submission.

Of course, we recognise that the Instrument will undergo considerable refinement during future inter-governmental discussions but the question of balance should be kept in mind. Accordingly, we would urge CMI to include a reference to this concept when presenting the draft Instrument to UNCITRAL later this year.

On a matter of detail, there is a small, but significant, drafting point in Article 10.3.2(i) where the phrase “The holder is entitled to claim delivery of the goods...” should be changed to “The holder is required ...”. This would underline cargo’s obligation to ensure collection of goods and go some way to eliminating the situation where a carrier is left with all the attendant problems of unwanted cargo.

ICC

The International Chamber of Commerce represents over 7000 companies worldwide. It is the only organization that speaks on behalf of business from all sectors in every part of the world. ICC’s aim is to promote an open international trade and investment system and the market economy worldwide. ICC has historically held the view that global trade and transport are best served by competition and by rules ensuring predictability and clarity.

As the main voice of international business, ICC looks forward to contributing to the UNCITRAL/CMI project “Issues of Transport Law”. ICC commends the expertise and effort that is being brought to the initiative, which is driven by a desire for greater uniformity.

ICC welcomes CMI’s efforts to modernize existing maritime cargo liability regimes by providing for modern means of transport documentation and by facilitating electronic commerce.

Of course ICC is a global organization and is therefore interested in globally accepted solutions. The question of cargo liability regimes for

maritime transport is by its very nature an international issue, which is why any new standard in the area should entail substantive consultations with all industry representatives. ICC takes note in this respect of an agreement recently reached between certain shipper and carrier interests to pursue a common set of positions with regard to a new cargo liability regime for ocean transport. In ICC's view CMI's initiative should focus foremost on modernization of the liability regime for the maritime leg of the transport operation.

ICC develops voluntary rules and provides essential services that facilitate trade. The ICC Incoterms, the ICC UCP 500, and the UNCTAD/ICC Rules for Multimodal Transport Documents are successful because they have been developed by industry for industry. ICC believes that any recommendation to make new cargo liability standards "mandatory in both ways", thereby restricting the right of parties to contract to establish alternative liability standards, constitutes a restraint of trade.

IG

1. The CMI's International Sub-Committee (ISC) in accordance with its terms of reference is preparing the outline of an instrument designed to bring about uniformity of the carriage of goods by sea and drafting appropriate provisions, including provisions on liability, to incorporate into that instrument. The reference reflects the concern that has been expressed at the lack of uniformity in international transport law, in particular the carriage of goods by sea and the proliferation of domestic legislation governing this mode of carriage. The position has not been helped by differing international Conventions (Hague/Hague-Visby and Hamburg) in force in different parts of the world. The lack of uniformity detracts from commercial and legal certainty, which is important to goods owners, carriers and their insurers.

2. Traditionally sea carriers contracted port to port, their responsibility under relevant maritime conventions being limited to the sea carriage, although they were free to assume responsibility for the goods prior to loading and post discharge. Current commercial and insurance practice as well as existing maritime conventions are generally structured to provide for this traditional type of transport. However, although the majority of bulk cargoes are still moved in this way, containerised cargo which now accounts for a very high percentage of cargo movements is frequently carried on a multi-modal basis, that is carried by more than one mode of transport but under a single contract. Bulk and break bulk cargo, however, continues to predominate in tonnage terms.

3. Under current commercial practice, a seller shipping goods under a CIF sale contract, will take out cargo insurance to cover loss or damage to the goods during transit. The terms conditions and extent of the cover will depend not only on the terms of the sale contract but the risks to which the goods are likely to be exposed. A typical form of standard marine cover, such as Institute Cargo Clauses (A) (ICC A), attaches from the time the goods leave the shipper's warehouse to the time they are delivered to the receiver's warehouse or placed in storage and subject to certain specified exclusions, provides cover

Synopsis of the responses to the Consultation Paper

for all risks of loss or damage. The cover extends to G.A. and salvage charges for which the insured may become liable during the adventure. However, the cover will not include liability for loss or damage which is inevitable as opposed to fortuitous. Thus liabilities arising from inherent vice or insufficiency of packing, are excluded, as is loss arising from insolvency of the carrier and delay, even if resulting from the operation of an insured peril.

4. Cargo insurance is very flexible. ICC A is one of the widest forms of standard terms but there are a number of different standard forms each designed to meet the particular risks to which the particular goods may be exposed during the course of transit. The shipper is not of course limited to insuring on standard terms. Express provisions can be incorporated in the policy to provide cover for specific or excluded risks e.g. delay.

5. A carrier will normally effect indemnity cover, usually if a shipowner through a P&I Club, to protect himself against liabilities arising out of the carriage of cargo on an entered vessel. The Rules of Clubs which are members of the International Group provide that liability will be excluded, should the carrier contract for sea carriage, on terms less favourable than the Hague/Hague-Visby Rules, unless the contract of carriage has previously been approved by the Club and special cover arranged. Clubs will allow claims under contracts of carriage, which by operation of law compulsorily incorporate onerous terms e.g. the Hamburg Rules.

6. The Hague/Hague-Visby and Hamburg Rules, conventions relating to the carriage of goods by sea, are essentially fault-based regimes. All incorporate limits of liability. The Hague/Hague-Visby Rules provide for wider exclusions from liability than the Hamburg Rules.

7. Clubs will also provide cover in respect of liabilities incurred under a multimodal contract involving a sea leg, under which the shipowner assumes responsibility for the whole of the carriage, including that performed by some mode of transport other than the entered vessel e.g. road or rail. Cover is subject to the contract first being approved by the Club, which will normally only occur if the member contracts on terms no less favourable than any legislation compulsorily applicable to such mode of transport, be it domestic law or an international unimodal convention e.g. CMR. A shipowner is required to preserve his rights of recourse against others involved in the performance of legs, other than the sea-leg.

8. Clubs that are members of the International Group, pool liabilities in excess of each Club's individual retention, currently US\$5 million, under the International Group Pooling Agreement, Cargo liabilities however are excluded from the Pooling Agreement to the extent that they arise as a result of an owner contracting on terms less favourable than the Hague/Hague-Visby Rules etc. unless the liability arose as a result of the mandatory application of terms more onerous than the Hague/Hague-Visby Rules or the liability arose during the land leg of a multi-modal contract previously approved by the Club. In very rare circumstances an individual Club may exercise its discretion to admit a claim or liability arising out of contracts on terms less favourable than the Hague/Hague-Visby Rules.

9. Under a fault based regime, such as found in the Hague/Hague-Visby and Hamburg Rules, the carrier whether or not fault is presumed, is generally liable if negligent, although certain regimes provide limited defences even in the event of negligence. Such regimes are intended to reflect the particular risks associated with the particular mode of transport e.g. exclusion of navigational fault under the Hague/Hague-Visby Rules.

10. Were a strict liability regime to be adopted, the carrier's defences in theory would be limited to establishing that the loss or damage was caused by an act wholly beyond the control of the carrier, such as an act of God or that of a third party etc.

11. Under a strict liability regime, the level of property insurance cover required by the shipper would inevitably be less than that required under a fault based system and should therefore cost less. However as the carrier would be exposed to greater liability than under a fault based system, indemnity cover would be likely to cost more and this would be passed on to the goods owner by way of an increase in freight rate. Furthermore payments and associated administrative and legal costs arising from incidents occurring during the adventure e.g. G.A. and salvage would continue to be funded at first instance by cargo interests (unless provision is made in the contract of carriage) albeit that ultimately such costs may be recovered from the carrier. Although fewer claims are likely to be disputed by the carrier under a strict rather than a fault based regime, with an associated reduction in administrative and legal costs, disputes would still arise.

12. However, with either system both the prudent goods owner and the prudent carrier will need to effect appropriate property and indemnity cover.

13. It is therefore unlikely that by adopting the one liability system rather than the other, there would be an overall saving on the total costs of the adventure. It is more likely that the shift in allocation of risk between the parties and their respective insurers would merely be accompanied by a re-distribution between them, of the costs of the adventure.

14. The ISC is presently considering whether the instrument it is drafting should extend to multi-modal transport, which includes a sea-leg. If it is to do so, a decision will have to be made, whether whatever liability regime is adopted, should operate uniformly, that is should it apply throughout the carriage, irrespective of the mode of transport employed, or whether a network system should be utilised. Under the latter system the multi-modal transport operator's (mto) liability will be governed by the particular liability regime, which is compulsorily applicable to the mode of transport on which, or the geographic area where, the loss or damage occurs whether an international convention or domestic law. For example CMR on a road leg.

15. Currently most mtos providing a combined transport service, whether shipowners, NVOCCs or freight forwarders, operate under contracts providing for network liability. However in response to commercial pressure, from powerful volume shippers who wish to utilise systems which they consider straightforward, and advantageous from a liability perspective, a number of

Synopsis of the responses to the Consultation Paper

mtos have agreed contracts which provide for uniform liability. These mtos require special cover to cater for liabilities, which exceed those, permitted by standard P&I cover.

16. In the case of approved multi-modal contracts the Clubs are in effect, extending cover to meet what are strictly non-marine risks e.g. loss or damage during road carriage. The Clubs will generally provide cover to meet the commercial needs of their members, provided the liabilities incurred can be mutualised and re-insured. It is likely therefore that if the shipping community wished to accept higher levels of liability, the Club system could be amended in order to accommodate them.

However, as pointed out above, a shift in the allocation of risk between the parties to a Contract of Carriage is unlikely of itself to reduce the overall costs of the adventure. Amending the regimes that presently govern the carriage of goods is worthwhile if the goal of greater international uniformity can be achieved, with a consequent benefit to all involved in the carriage of goods by sea and land. The current tried and tested practices should not be lightly abandoned. In a paper approved by the Maritime Transport Committee of the Organisation for Economic Co-operation and Development, the comment was made that “the greatest opportunity for improvement does not necessarily lie in the creation of a radical, new regime, but rather to identify those elements (probably the vast majority) on which there is agreement and use these elements as the basis for future work.”

IUMI

The Liability Committee supports the work of CMI. We believe that CMI is the right forum to discuss and possibly achieve harmonization in the law that governs the carriage of goods by sea. The draft outline instrument is a good basis for further discussions which will in 2002 be continued in UNCITRAL. Several times we have stressed that at present the Hague Visby Rules are applicable to the carriage of goods by sea world wide ratified by States or implemented into national law or by reference in paramount clauses in the bill of lading. As also by UNCITRAL the Hamburg Rules have failed. They have been ratified only by States representing less than 1 percent of the world fleet and about 5 percent of world foreign trade. However, the CMI project will only be promising if the views of the interested commercial parties will be observed by the ISC. In discussions at governmental level these commercial aspects are frequently neglected and legal arguments prevail. This for example has happened during the discussions on the Hamburg Rules. When economic aspects are neglected there is no guarantee that the new legal instrument will find the necessary support. In such a case, the new legal instrument will only lead to further proliferation of law.

NITL and WSC*Introduction*

The National Industrial Transportation League (NITL) and the World Shipping Council (WSC) have agreed to pursue a common set of positions

with respect to a new cargo liability regime for international ocean transport. Both parties agree to advocate these positions during the CMI and UNCITRAL processes, and in order to support the development, ratification and implementation of an international instrument that embraces these provisions, to advocate these positions before the appropriate Executive Branch departments of the United States government and the Congress. It is understood that this is a package representing mutual concessions and that neither party will support a proposal that is inconsistent with the agreed provisions set forth below without obtaining the other party's prior agreement. The parties recognize that a final cargo liability instrument will include provisions addressing other issues in addition to the common set of positions set forth herein and agree to work together and with other interested parties in developing such other provisions. The parties further agree that the provisions set forth in the MLA Text represent their agreement on the issues addressed, except as they have otherwise agreed in this Statement.

References to "MLA Text" refer to the September 24, 1999 U.S. Senate "Staff Working Draft" proposed by the U.S. Maritime Law Association; references to "CMI draft" refer to the May 31, 2001 draft submitted to the CMI ISC by its drafting group.

Supplemental Submissions

The League and the Council have agreed to concentrate and coordinate their efforts to obtain a more modern, uniform international cargo liability regime by participating in the CMI and UNCITRAL process, rather than by pursuing independent legislation in the U.S. or by advocating conflicting positions that leave drafters and negotiators uncertain of what would be acceptable to carrier or shipper interests. The parties believe that this course of action will best serve the interests of comity and international trade and provide more meaningful assistance to the effort to achieve international legal reform. In this regard, it was agreed that if such an instrument is produced, the parties would use their best efforts to ensure that the instrument is adopted in the United States. Additionally, both parties desire that the reforms agreed upon be timely adopted and implemented and, thus, have agreed to terms to assist in evaluating the progress of the development of a new instrument.

The League and WSC are keenly aware of the important work that CMI has already done to advance the task of developing a new international ocean liability instrument and we wish to commend the Chairman of the International Subcommittee and the members for their work to date. There are, however, many steps still to be taken before the instrument being considered by CMI could achieve broad international support.

In a letter dated April 25, 2001, Mr. Beare, the Chairman of the International Sub Committee of CMI, stated that "[o]ur aim is to submit to UNCITRAL by the end of the year a draft which outlines a regime which could prove generally acceptable and which the CMI considers to be a sound basis for further development" The League and the Council have submitted their joint proposal in the hope that it will materially assist CMI in meeting the objectives that the Chairman of the sub committee has outlined. The League

Synopsis of the responses to the Consultation Paper

and the Council pledge to work closely with the International Sub Committee and with CMI throughout the remainder of CMI's work in developing a draft instrument, and subsequently as CMI coordinates its future activities with the contemplated UNCITRAL intergovernmental working group.

In conclusion, the World Shipping Council and The National Industrial Transportation League wish to commend the CMI for all its efforts in this area. We look forward towards working with the Sub Committee and other interested parties in reaching a viable draft international convention.

Support for International Convention

1. The NITL and WSC agree that efforts to establish a new cargo liability regime for international ocean cargoes should be addressed through the CMI and UNCITRAL process, subject to the following conditions:

2. The NITL and WSC shall advocate the positions set forth herein in good faith before CMI and UNCITRAL.

3. Upon completion of an UNCITRAL instrument consistent with the principles set forth herein, the NITL and WSC shall use best and timely efforts to have the U.S. government ratify the Instrument and/or adopt implementing legislation consistent with the principles set forth herein.

4. The parties' agreement is based on the assumption that the CMI/UNCITRAL process will produce an international Instrument for ratification by member countries in a reasonable period of time. Specifically, the parties assume that the CMI should forward a draft convention to UNCITRAL by the end of the first quarter of 2002, and that the countries negotiating the UNCITRAL instrument should have the Instrument available for signature by member nations by the end of 2004. If these events do not occur within these time frames, the parties agree to meet and consult on what appropriate steps should be taken. If those consultations do not produce agreement within three months, both parties shall be free to pursue or oppose cargo liability law changes as they deem most appropriate.

The National Industrial Transportation League ("League" or "NITL") and the World Shipping Council ("Council" or "WSC") are pleased to submit these Joint Comments to the Comité Maritime International ("CMI"), which further describe the Joint Statement of Common Objectives on the Development of a New International Cargo Liability Instrument ("Joint Statement"), previously submitted to CMI on September 27, 2001. The Joint Statement sets forth the common positions of the League and the Council regarding numerous key issues relating to the development, ratification and implementation of a new international cargo liability regime for ocean transport.

In June 2001, NITL and WSC were honored to be named as observers to CMI's International Sub Committee ("ISC") meeting that was held on July 17-18 in London, at which CMI's May 31, 2001 Revised Draft Outline Instrument Concerning Liability for the Carriage of Goods in International Ocean Transport ("Draft Instrument") was thoroughly discussed. At the conclusion of that meeting, the sub committee resolved to take comments on the Draft Instrument, so that revisions might be made before submitting the draft for consideration at a meeting of the ISC to be held on 12 and 13 November 2001.

CMI currently plans to submit the results of its work to UNCITRAL in December 2001.

The League and WSC have submitted their Joint Statement to CMI, and are providing this supplemental submission, in the hope that it will assist CMI in addressing the issues that must be resolved before a new uniform international liability regime in ocean transport can be adopted. The League and the Council desire to be as helpful as possible in advancing that process. We hope that the proposal of major commercial stakeholders in this effort (i.e., liner shipping carriers and their customers) can offer a positive influence on both the development of a new legal instrument and the prospects for its acceptance and implementation by national governments. In reaching their agreement, both parties have made compromises to strongly held views in a joint effort to help support the creation of an acceptable new cargo liability convention. We believe that this proposal offers a balanced, international cargo liability regime that is responsive to modern trade practices.

I. Identity and interest of the National Industrial Transportation League and the World Shipping Council

The National Industrial Transportation League is an organization of shippers that conduct industrial and/or commercial enterprises throughout the United States and internationally. The League, founded in 1907, is the oldest and largest U.S. organization representing shippers of all sizes and all commodities. The League has approximately 600 separate company members. These include some of the largest commercial and industrial enterprises in the United States, many with operations throughout the world, as well as numerous smaller shippers. League members ship substantial volumes of commodities worldwide in all major international trades via ocean carriage. League members are involved in the manufacture and transportation of all types of products and commodities, and they are substantial users of international liner transport services. A list of the members of the League is attached to these Joint Comments as Appendix A.

The League has been heavily involved in issues relating to international ocean transportation. The League actively participated in the development and implementation of the Ocean Shipping Reform Act ("OSRA") in the United States, which substantially modified the U.S. regulatory regime applicable to international liner transportation. The League is a member of the U.S. Council for International Business, and through these auspices the League serves as a member of the International Chamber of Commerce and is a member of the Business and Industry Advisory Committee, as well as an industry observer to the Maritime Transport Committee of the Organization for Economic Cooperation and Development ("OECD"). In June 2001, the League was granted observer status to the July 16-18 meeting of the International Sub Committee of the CMI. The League's application as a Consultative Member of CMI is currently pending.

The World Shipping Council is a nonprofit trade association of over forty international ocean carriers, established to address public policy issues of interest and importance to the international liner shipping industry. The

Synopsis of the responses to the Consultation Paper

Council's members include the leading ocean liner companies—carriers providing efficient and reliable international transportation services worldwide. The members of the World Shipping Council are major participants in an industry that has invested over \$150 billion in the vessels, equipment, and marine terminals that are in operation today. They provide the knowledge and expertise that built, maintains, and continually expands a global transportation network that provides seamless door-to-door delivery service for almost any commodity moving in international commerce. The Council's member lines include the full spectrum of carriers from large global lines to niche carriers, offering container, roll on-roll off, and car carrier service, as well as a broad array of logistics services. In June 2001, the WSC was granted observer status to the July 16-18 meeting of the International Sub Committee of the CMI. A list of the members of the WSC is attached to these Joint Comments as Appendix B.

II. Process of the compromise between NITL and WSC on cargo liability

For a number of years, the League has been interested in modernizing the 1936 United States Carriage of Goods by Sea Act ("COGSA"). In 1998 the League intensified its efforts by testifying before the Congress and supporting a proposal that had been developed by the United States Maritime Law Association ("MLA"). The MLA proposal sought change of COGSA unilaterally by the United States in the form of domestic legislation. By the spring of 1999, the MLA proposal had been incorporated into a Working Draft developed by the staff of the U.S. Senate Subcommittee. Later that year, that Staff Working Draft was endorsed by a number of interests within the United States, including the League. However, by early 2000, various maritime interests indicated that they opposed the MLA proposal, and later that year strongly urged the U.S. Congress not to pursue it.

At the same time that the MLA proposal to reform COGSA was being considered, CMI, in coordination with UNCITRAL, was also reviewing cargo liability issues. In addition, the OECD undertook a review of possible alternative courses of action with respect to cargo liability.

Accordingly, in the early Spring of 2001, the Council and the League initiated informal discussions to determine if common ground might be found. Thereafter, numerous meetings were held and multiple issues were discussed over many months. The two parties' involvement in the CMI's International Sub Committee meeting in mid-2001 provided a further opportunity to analyse key issues and understand the position of a number of the many different interests concerned with this matter. Finally, on September 25, 2001, the League and the WSC finalized and signed their Joint Statement of Common Objectives.

It is a matter of public record that differences between shipper and carrier groups on this matter have historically prevented reforms from being realized. For example, efforts by concerned parties to advance the Hague Rules as modified by the Visby protocol in the U.S. trades were frustrated in part because shippers and carriers were unable to find common ground for an agreement. If meaningful reform is to be achieved, then shippers, carriers and

others in the maritime community will have to work together to find practical ways by which a new regime can work. Indeed, throughout the process of their discussions, the NITL and WSC recognized that forward movement was only possible if the final product was the result of significant compromises by both parties in an effort to reach a balanced middle ground. The Council and the League strongly believe that the Joint Statement of Common Objectives represents a fair and carefully-balanced accord that is worthy of international support.

COMMENTS ON THE CONSULTATION PAPER AND ADDITIONAL COMMENTS

Art. 1 DEFINITIONS

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

MEMBER ASSOCIATIONS

Switzerland

General reference is made to the introductory remarks on door-to-door transportation.

- 1.2 Carrier means a person who enters into a contract of carriage with the shipper.**

MEMBER ASSOCIATIONS

Australia and New Zealand

The following comments apply to the definitions of carrier (1.1), consignee (1.2), consignor (1.3) and Performing party (to a lesser extent). It is noted that none of the definitions include a reference to employees or agents. On one level this is appropriate but on another level it needs to be taken into account when various other matters are taken into consideration. For example, clause 4.1.1 identifies the conclusion of the period of responsibility for the carrier as being “when the goods are delivered to the consignee.” If a container, for example is collected from a container terminal by a road carrier whose services have been engaged by the consignee it is submitted that the instrument should make it clear that the carrier’s responsibility has come to an end. Clause 4.1.1, given the definition of “consignee” in clause 1.2, leaves it open to be argued that in such circumstances the carrier still remains responsible until the goods reach the premises of the consignee itself. The solution would seem to

Synopsis of the responses to the Consultation Paper

be to enlarge the definitions of “carrier”, “consignee” and “performing party” so as to make specific reference to employees and agents or include in provisions such as 4.1.1 the additional words after “consignee” “, its employees or agents.”

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

MEMBER ASSOCIATIONS

Canada

We remain very much of the view that the definition of “performing carrier” is too broad and imposes liability on agents who do not physically handle cargoes. Freight forwarders who act as carriers should be treated as carriers. However, many fulfill the more traditional role of acting as agent for the shipper, and on whose behalf they procure transport. Similarly, steamship agents are often the ones who procure inland transportation on behalf of ocean carriers.

Switzerland

We fail to see the benefit of such an extension from a contractual carrier to performing carriers or parties. The only real benefit is to add some liquidity, which should not be an issue in an area where cargo is normally insured and the insurance of the liability of the carrier has become an industry standard, almost to an extent that shippers may request a Club letter or an Insurance Certificate when booking a contract of carriage. Measured with the huge complications a regime of actual carriers adds – in particular in a door-to-door context – the CHMLA would request the deletion of Article 1.3 (and subsequent reference to a performing party).

If it is decided to maintain the concept of performing carrier/party, then the current definition is still too broad and needs to be reduced to the actual carrier/registered owner of vessel. Depending on the scope on door-to-door operations the performing carrier definition should, then, also include the land carrier.

CONSULTATIVE MEMBERS AND OBSERVERS

FIATA

The definition of “Performing Party” needs to be redrafted in a way that it refers exclusively to parties which physically handle the good as subcontractors of the carrier.

The text passage “undertakes to perform or procures to be performed” should subsequently be deleted.

Any concern that parties involved in the carriage having agreed that they undertake to carry the goods, and when loss or damage occurs may elude liability by stating that whilst they undertook to carry the goods they did not carry the goods themselves and therefore were not liable, is groundless. A party having agreed to carry the goods and passing on the task to someone else cannot deny responsibility. It does not matter if someone undertakes to do something and then does not do so. If a party undertakes to do something it is agreeing to take on responsibility and is liable. A party taking on primary contractual responsibility irrespective of whether the task is carried out by the party itself or passed on to another person is liable in any event.

In addition, also parties acting simultaneously as Performing Parties and agents for the shipper or consignee should be able to benefit from the Himalaya defence. The last sentence of the definition is therefore to be deleted.

In view of these considerations the text of the Performing Party definition needs to be formulated:

“Performing party means a person other than the carrier who physically performs any of the carrier’s responsibilities under a contract of carriage for the carriage, handling, custody or storage of the goods to the extent that that person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control, regardless of whether the person is a party to, identified in, or has legal responsibility under the contract of carriage.”

1.4 Shipper means a person who enters into the contract of carriage with a carrier.

MEMBER ASSOCIATIONS

Canada

The CMLA submits that the definition of “shipper” contained in the Hamburg Rules is perfectly acceptable.

CONSULTATIVE MEMBERS AND OBSERVERS

FIATA

The person who enters into a contract of carriage with a carrier may not necessarily be the shipper. In FCA, FOB or Ex-Works contracts of sale, it is the buyer (Consignee) who arranges for carriage and who enters into a contract of

Synopsis of the responses to the Consultation Paper

carriage with a carrier and commits to pay the freight. It may even be an intermediary in his own name or on behalf of his principal who enters into a back-to-back contract of carriage with the carrier or even a carrier who enters into a contract of carriage with a sub-carrier. This definition makes only the “Shipper” the party to the contract of carriage with the carrier as opposed to consignee or the controlling party as defined in the Instrument. It may be more appropriate to use the definition of shipper in the Hamburg Rules, which reads:

“Shipper” means any person [or persons] by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person [or persons] by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea. [Bracketed words added.]

See also comments on Article 7.7.

Consignor

MEMBER ASSOCIATIONS

Australia and New Zealand

See comments under Article 1.2.

China

We still hold the reservation of the definition of Consignor in this outline instrument. The definition of Consignor should be introduced and included in this instrument after the definition of Shipper (Art. 1.4) on the basis of need in commercial practice. Meanwhile, it shall be distinguished the rights, obligations and responsibilities between the person, who enters into the contract of carriage with a carrier, and the person who actually delivers the goods to the carrier but not the shipper himself. The latter one is usually called as Consignor in commercial practice. The definition of consignor may be preferred to as the concept based on the definition of the 2nd part of Article of the Hamburg Rules. That is

1.5 Consignor means a person by whom or in whose name or on whose behalf the goods are delivered to a carrier or a performing party.

The definition in the previous draft, namely, “Consignor means the person from whom a carrier receives the goods.” It appears not very appropriate, as whereby a trucking company or freight forwarder or stevedoring company may also qualify as a consignor. The definition in the previous draft is obviously wider than what we suggest above.

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

Australia and New Zealand

See comments under Article 1.2.

- 1.7 Transport document means a document issued pursuant to the contract of carriage by the carrier or a performing party that**
(a) evidences or contains the contract of carriage, or
(b) evidences the carrier's or a performing party's receipt of goods under the contract of carriage.

MEMBER ASSOCIATIONS

Italy

Transport document is defined as a document issued pursuant to the contract of carriage that evidences or contains the contract of carriage or evidences the carrier's or a performing party's receipt of the goods. It is thought that in the Draft Instrument the term "transport document" is always used in connection with the receipt of the goods, while according to the definition a transport document may not evidence the receipt of the goods, but merely the contract of carriage pursuant to which the goods are subsequently handed over to the carrier. It is therefore suggested that sub-paragraphs (a) and (b) of article 1.7 be linked by the conjunction "and" rather than "or".

Switzerland

The definition is not in harmony with the required contents of the Transport Document which, as given in 8.2., are based solely, but also exclusively, on alternative (b).

Relating to "negotiable transport document" please note that under Swiss Law the document remains a negotiable document if the notation "to order" is missing and the document is issued "in the name" of a consignee.

- 1.8 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."**

MEMBER ASSOCIATIONS

Italy

The definition of "negotiable transport document" is based on the manner in which the document may be transferred from one person to another, curiously repeated twice, once by a positive description and then by a negative description, rather than on the description of the right embodied in the document. It is thought that in the definition it should first be stated that the holder of the document has the possession of the goods described therein, the right to transfer such possession by means of the transfer of the document and to obtain delivery of the goods against surrender of the document. It is appreciated that all this is in part dealt with in the chapter on the right of control, but it seems useful to include the basic rights in the definition itself.

Synopsis of the responses to the Consultation Paper

There is then a difference between the name given to the document and its characteristics, as described in the definition. In fact, it is stated that “negotiable transport document” is a document that may be transferred. The notion of negotiability does not refer to the manner in which a document may be transferred, but rather to the underlying agreement. It is therefore suggested that the term “transferable transport document” would be more suitable.

It has been stated previously that the definition relates to the manner in which the document may be transferred. In reality the definition refers to the identification of the person to whom the goods are to be delivered. It is thought that the identification of the person depends on the manner in which the document may be transferred and that, therefore, it would be more proper to state first the rights incorporated in the document and then the manner in which the transfer can be made, according to whether the document is issued to order or to bearer. At present, the first and the third alternative seem to overlap. What is in fact the difference between a document issued to order and a document issued to order of a named person?

Switzerland

There must be something between a negotiable bill of lading and a seawaybill. A bill of lading which is made non-negotiable must remain the “key to the warehouse”, but is not transferable (this to affect Article 10.3 below).

United Kingdom

The BMLA is unhappy with the definitions of “negotiable transport document” and “non-negotiable transport document” in Article 1.8 and 1.9 of the draft Instrument. The subject has been discussed in a small working group on definitions set up by the International Sub-Committee.

The problem arises because:

- (a) it is not clear in that sense the word “negotiable” is used:
- (b) in English law (and in many countries which follow English law) a bill of lading is not negotiable in the sense that it can give to the transferee a better title than that possessed by the transferor, and
- (c) the difference in function of the two types of document does not depend on whether they are “negotiable” in the true sense.

It is considered that the distinction which the Instrument seeks to draw is between those documents where the right to delivery is transferred by a transfer of the document and those documents which evidence a contract of carriage under which the right to delivery may be transferred in some other way.

As a result of correspondence exchanged within the working group, the following definitions have been suggested:

“Transferable Transport Document” means a transport document, the transfer of which operates or is capable of operating to transfer the right to delivery of the goods from one person to another and by which the carrier undertakes to deliver the goods to the holder of the document, usually upon surrender thereof. Such a document representing the goods described therein

may be issued to order, to bearer or to the order of a person named in the document and includes a bill of lading so issued and any other document so issued which by custom, national law or otherwise, fulfils the above functions”.

Non-transferable transport document means any transport document which is not a transferable transport document and which evidences a contract of carriage under which the right to delivery of the goods may be transferred from one person to another otherwise than by transfer of the document.

These drafts are not yet necessarily in their final form and can be used as a basis for further discussion. They are, it is suggested, an improvement on the definitions set out in the draft Instrument.

1.9 Non-negotiable transport document means a transport document that

- (a) is prominently marked “non-negotiable” or “not negotiable”, or**
- (b) states that the goods are to be delivered to a person named in the document, or**
- (c) otherwise fails to qualify as a negotiable transport document.**

MEMBER ASSOCIATIONS

Japan

Subparagraph (b) of the draft Article 1.9 should be deleted. Mere statement that the goods are to be delivered to a named person is not sufficient to make a transport document non-negotiable in many jurisdictions.

CONSULTATIVE MEMBERS AND OBSERVERS

FIATA

The text passage should be removed because it refers also to named or nominate bills of lading that can be transferred by cession.

1.12 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.

MEMBER ASSOCIATIONS

Switzerland

Is this non-defining definition useful and necessary? We think that such definitions are not helpful and should be deleted.

1.13 Right of control has the meaning given in article 11.1

MEMBER ASSOCIATIONS

Australia and New Zealand

We query whether “Holder” should not be defined as “a person who (a) is for the time being in lawful possession of....”.

Switzerland

Is this non-defining definition useful and necessary? We think that such definitions are not helpful and should be deleted.

Art. 2 E-COMMERCE

Parties involved in the contract of carriage may agree that they communicate electronically. In such event, if there is an applicable legal requirement

- (i) either expressly or by implication that certain information should be in writing, or that certain consequences should follow if it is not, such requirement is satisfied by the transmission, generation or storage of such information by electronic, optical or similar means, provided that such information is accessible so as to be usable for subsequent reference;**
- (ii) for a signature, or that certain consequences should follow if there is no signature, such requirement of a signature is met in relation to a data message if an electronic signature is used which is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.**

MEMBER ASSOCIATIONS

China

The wording of this Article is reproduced from the UNCITRAL Modal Law on Electronic Commerce 1996 and the draft UNCITRAL Modal Law on Electronic Signature and seems appropriate.

However, being contained in the same article in the same Instrument, it is advisable that the expressions in the two paragraphs be identical as much as possible.

Switzerland

The CHMLA is interested in following the discussion on that issue, and would like to register its interest in as far as it is crucial that this instrument is compatible with current and future developments in E-Commerce.

CONSULTATIVE MEMBERS AND OBSERVERS

ICS

Our general position is that the Instrument should facilitate electronic commerce. We note that most of the major liner shipping companies are either developing their own e-commerce platforms, and/or are participating in platforms being created by commercial “on line portals” providers. ICS supports the view expressed at the recent International Sub-Committee meeting (16-18 July) that Chapter 2 alone may be insufficient to achieve that goal and agrees with the proposal that the drafting group and the Electronic Commerce Sub-Committee should be requested to go through the Instrument article by article to ensure that the provisions are applicable to both paper based and electronic transactions.

IG

The IG supports the view that the provisions of the DOI should be capable of applying to both paper and electronic transactions. It is likely that in the near future many more transactions will utilise electronic means of transmission and recording as these are developed by the industry and commercial providers. The DOI should therefore be reviewed by the CMI Electronic Sub-Committee to ensure that its provisions are compatible with electronic commerce.

Art. 3 SCOPE OF APPLICATION

3.1 The provisions of this Instrument apply to all contracts of carriage in which the place of receipt and the place of delivery are in different States if:

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

3.2 The provisions of this Instrument apply without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

Synopsis of the responses to the Consultation Paper

MEMBER ASSOCIATIONS

China

The provisions of this Instrument apply without regarding to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties, particularly for all the parties who have the same nationality. Under this event, the national law shall be applied, not this instrument. The Salvage Convention 1910 (Art. 12 (2)) and The Collision Convention 1910 (Art. 15 (2)) have the similar provisions, i.e. the national law not the convention shall apply when all the concerned parties have the same nationality.

So we suggest that it be allowed separate member state of this Instrument to make reservation on this point whereas all the parties concerned have the same nationality.

Croatia

(i) The intention of the draftsmen to ensure as wide application of the Instrument as possible, is understandable. However, uncertainties and ambiguities must be avoided, as well as submitting a carriage to the Instrument through *coincidental* links. (ii) Therefore, we would suggest deleting (d) not only because, (as pointed out in the Draft), “it may give rise to some uncertainty as to *where* the contract of carriage was entered into or the electronic record issued”, but, that place might (under applicable law) be the place of business of one of the *intermediaries* [through whom the negotiations leading to the contract were conducted], that *by chance* was located in a Contracting state. (iii) We would suggest deleting (c) as well, to avoid possible uncertainties. Namely, one would know whether the Instrument is applicable or not on a particular carriage *only at the end of the voyage*.

Denmark

We do support a wide application of the Revised Draft Outline Instrument (“the Instrument”). We would suggest an even wider scope of application than the scope suggested in the Instrument. The Instrument should also be applicable to the sea leg when the port of loading or port of discharge is situated in a contracting State. According to draft Article 3.1, a contract would not fall under the Convention where neither the place of receipt nor the place of delivery is situated in a contracting State although the port of loading and/or the port of discharge are situated in such a State.

We should also like to point out that in case the scope of the contract has been limited by virtue of Article 4.2 (b), the place of receipt/loading or the place of delivery/unloading should be the places/ports indicated in the contract after pre-carriage/before on-carriage.

France

Domaine d’application: L’AFDM estime que les propositions présentées sont acceptables, sous réserve que ne soient pas ignorées les dispositions de la Convention de Genève sur le transport multimodal.

Germany

We generally support the inclusion of door to door transport based on the network system as per Articles 1.1, 3.1, 4.1 as an option in addition to mere port to port transport. As this approach might cause conflicts with other Conventions dealing with door to door transport by land (e.g. COTIF/CIM 1999) in case of non-localized damage such conflict must be excluded by inserting an additional rule. Possibly the new convention may confine its scope of application to port to port transport if mandatory provisions of a convention on land transport apply.

Art. 3.1 d should be deleted as, in contrast to Art. 2 d of the Hamburg Rules, it does not lead to clear results. There might be different places which come into consideration.

Italy

We consider the extended scope of application essential in order to ensure the widest possible application of the Instrument. We believe, however, that article 3.1 should be coordinated with article 3.3. In fact the provisions of the Instrument do not apply to all contracts of carriage, since contracts of carriage evidenced by charter parties are excluded. Words such as “except as provided in article 3.3” could perhaps be inserted in the chapeau of article 3.1.

Japan

This Association supports the draft Article 3.1 which refers to “place of receipt” and “place of delivery”. Since the Instrument is designed to be applied to door to door, “port” concept is no longer appropriate to determine the scope of application.

Netherlands

Generally, we agree in substance to any provision not specifically referred to below.

3.1 These provisions are acceptable.

Norway

The draft provisions are considered to be acceptable in providing for a wide scope of application.

Peru

Considering the draft will apply to international transport, both incoming and outgoing shipments, it is important to adequate its wording to extend its scope of application to any nature of transport and whether the receiving point and/or delivery point are inland or not (thus including “door to door transports”, as it has been done in the Outline Instrument).

Having conformed the draft to “door to door transports” and as if the

Synopsis of the responses to the Consultation Paper

Outline Instrument shall only apply to multimodal transports as long as at any stage its has been through a sea leg, we feel that this shall not be required. Peru has enacted an International Multimodal Transport Act (approved by Legislative Decree N° 714, of November 8th, 1991) in which carriers liability will be much more limited if there has been no sea leg involved in the voyage than if it has (article 21). Andean treaties (as Decision 331, of March 1993) follows this same line (article 15). Thus, Peru both in national and regional laws, admits multimodal transports without sea transport being involved.

Spain

The Spanish MLA will agree with the provision of Article 3.1 as drafted in the outline, though it is suggested that the scope be amplified so to add:

“or if any of the above (a) to (e) are not applicable, then:

- (f) the place where the Carrier, or the performing party, has his principal place of business and this place is located in a Contracting State.*
- (g) the place where the Shipper has his residence and such is located in a Contracting State.”*

With regard to (d), it is remarked that in the event of E-Commerce it may not be easily inferred the place in which the contract was actually entered into.

Sweden

We principally support the wide scope of application of the Instrument.

Switzerland

Chapter 3 follows the traditional scheme for the scope of application further developed from the Hague Rules and Hamburg Rules. In the greater context of door-to-door application, the CHMLA would like to raise the possibility of rather following the model of the scope of application of the CMR convention: International transport from or to a Contracting State (Article 1 CMR). As a variant both State of Shipment and State of Destination should be Contracting States.

United Kingdom

In the past, and in particular in the discussions leading to the Visby Protocol of 1968, the BMLA has argued that the rules should apply only to outbound cargo since, according to all ordinary rules of private international law, the proper law of the contract of carriage of goods by sea is likely to be the law of the country of shipment. By contrast, the law of the country of destination is a most unlikely candidate for selection as the proper law of such a contract.

In today's circumstances, however, the BMLA no longer feels that it should maintain this position. The BMLA agrees with the Uniformity Sub Committee that the Instrument should apply to both inward and outward carriage. It also agrees that the Instrument should apply if the contract of carriage is entered into, or the transport document is issued, in a contracting state.

This leaves open the question of how to adapt the definitions to door-to-door transport. The BMLA notes that, in general, references to the port of loading and the port of discharge have been replaced by the “place of receipt” and “place of delivery”. No doubt it should be a criterion for the applicability of the Convention that the place of receipt or place of delivery is located in a Contracting State.

The BMLA does not consider that where the place of receipt is not in a Contracting State but the port of loading is in Contracting State, the Convention should apply to the transit; nor does it consider that where the port of discharge is in a Contracting State and the place of delivery is in a different jurisdiction which is not a Contracting State, there is any need to make the Convention applicable to the transit. Indeed there would be no logical reason to do this. The reasoning which requires that the receiver of the goods should have an effective remedy against the carrier in his own jurisdiction does not require that the Convention should apply merely because the port of discharge (if situated in a different jurisdiction from that of the receiver) is situated in a Contracting State. There is a reference to “ports of discharge” in paragraph (c) of Article 3.1. In the light of the commentary, it is presumed that this is a mistake. The BMLA considers that the reference to optional “ports of discharge” should be deleted.

United States

The U.S. MLA is in accord with the wording of this Section, and agrees that the Draft Outline Instrument should provide for the widest scope of application possible. It should be recognized that some nations may adopt the final instrument as domestic law, without necessarily becoming Contracting States. The U.S. MLA also suggests that a provision be included that any contract of carriage or transport document shall be required to contain a statement that the contract is subject to the provisions of this instrument (as is presently required under article 23(3) of the Hamburg Rules).

The U.S. MLA also suggests that the wording of Section 3.1 be clarified so that charter parties and similar private contracts that make reference to the Instrument are not subject to the Instrument as a matter of law, but simply incorporate the Instrument as a term of the contract.

CONSULTATIVE MEMBERS AND OBSERVERS

BIMCO

In general, BIMCO can support the wide application of the Revised Draft Outline Instrument. However, we have noted that, in view of a decision made in Singapore, reference to the ports of loading and discharging have been deleted from the provisions of sub-articles 3.1(a), (b) and (c). This deletion effectively narrows the scope of the Revised Draft Outline Instrument, as it will not longer apply to contracts of carriage involving ports of loading and discharge in a contracting state and where the place of receipt and delivery are

Synopsis of the responses to the Consultation Paper

situated in a non-contracting state. The International Subcommittee (ICS) may wish to reconsider this matter.

Institute of Chartered Shipbrokers

The Institute considers that the provisions are acceptable.

IUMI

The Liability Committee supports the idea to apply the instrument to door to door transport based on the network liability system. A new instrument which would be exclusively applicable to the carriage of goods by sea would be an anachronism as most if not all operators involved in container transport act as multimodal transport operators. To our information, in the General Assembly of UNCITRAL the idea has been opposed especially by the Delegations of Germany and the United States. Nevertheless, the ISC should proceed to include door to door transport. This is also in line with the statements of the commercial circles interested in maritime transport in informal consultations of hearings of the ECE Working Party on Combined Transport in Geneva. A new multimodal convention drawn up by ECE and possibly applicable to land transport only is detrimental to the idea of harmonization of law and will create even more legal uncertainties.

However, the inclusion of door to door transport might lead to a conflict of conventions which include provisions on multimodal transport (COTIF, CIM); the ISC should discuss possible solutions.

As regards the Scope of Application in article 3.1 we are in favour of the wording of the Hamburg Rules and support to maintain the reference to the port of loading and unloading. We see no conflict in respect of door to door transport. We doubt whether lit. d) is really necessary. Lit. d) should be deleted.

3.3 Charterparties

3.3.1 The provisions of this Instrument do not apply to charter parties.

3.3.2 Notwithstanding article 3.3.1, if a negotiable transport document is issued 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 or contained in that document from the time when and to the extent that the document governs the relations between the carrier and a holder other than the charterer.

MEMBER ASSOCIATIONS

Australia and New Zealand

This Association is not aware of any need for the additional bracketed portion in clause 3.3.1 to be inserted but if some jurisdictions see such a necessity then we query whether “slot charter agreements” should also be identified in the list of excluded contractual documentation.

We are of the view that clause 3.3 is likely to create confusion and needs to be carefully worded in the light of whatever decision is made in respect of clause 3.3.1.

Canada

We agree that the Instrument should not apply to charterparties.

Given the current “opting out” provisions in Chapter IV, we suggest that the place of loading and the place of discharge are also sufficient touchstones to bring the Instrument into play.

China

3.3.1 We agree with this point, it should not be expanded to other contracts of carriage such as contract of affreightment, volume contract, service contracts, and similar agreements, because the character of these contracts are not ascertained. For example, in China, COA is regarded as contract of carriage not charter party.

3.3.2 We suggest that the bracketed language should be deleted.

3.3.4 We hold the reservation opinion as above 3.3.1, so this provision should be deleted.

Croatia

It seems that the law is pretty settled and that the practitioners have not had problems in defining “charter parties” for the purpose of application of the Hague Rules. We are in favour of including the bracketed language in the rule to make sure that the *contracts similar* to charterparties (variants of the charterparty) are also excluded.

Denmark

The present exclusion of charterparties in the Hague/Visby and the Hamburg Rules should be maintained. A definition of charterparties is not in our view necessary, but in view of the development of a number of special contracts of affreightment like volume and service contracts all being special types of charterparties, we recommend to define the contracts which are excluded by drafting Article 3.3.1 as follows: “*The provisions of this Instrument do not apply to charterparties, contracts of affreightment, volume contracts, service contracts and similar contracts which are normally negotiated individually not being contracts of adhesion*”.

France

L'exclusion des chartes-parties du domaine de la future Convention doit être maintenue. La nature juridique de l'affrètement commande une distinction claire avec le contrat de transport. Le contrat d'affrètement, contrairement à ce qu'indiquent les termes de la proposition formulée à l'article 3.3.1. n'est pas assimilable à un contrat de transport et ne peut suivre le même régime juridique. Plus généralement, l'Association Française estime que l'exclusion

Synopsis of the responses to the Consultation Paper

proposée doit effectivement être étendue aux contrats voisins mais distincts évoqués ici: contract of affreightment, volume contracts, service contracts, slot charters (v. point iii). Sur la méthode évoquée (ii), il n'est pas nécessaire de définir ces contrats, mais simplement de les nommer. Il appartiendra au juge, saisi d'une éventuelle question de qualification, de déterminer la nature du contrat en cause, pour ensuite décider si la Convention est ou non applicable en fonction de la qualification retenue et des exclusions précisées dans le corps même de la Convention.

Germany

As it is impossible in practice to find a clear distinction between “charterparties” and other forms of contract we would prefer to maintain the sentence as it is. A definition could stimulate unwanted interpretations deviating from those the term used to have.

Italy

Since, however, charter parties are documents evidencing certain types of contracts of carriage, it would be preferable to say “The provisions of the Instrument do not apply to contracts of carriage evidenced by charter parties”.

Subject to our comments on article 3.3.2, we believe that the exclusion of (contracts evidenced by) charter parties should be maintained. There is in fact no reason for applying to charter parties a mandatory liability regime since the contractual power of the parties is basically the same and its variation depends on the market.

In view of the increasing number of types of charter party, it would in our view be advisable to include in the Instrument a definition of charter party.

Our replies to the three questions are, therefore, the following:

(i) The exclusion of (contracts evidenced by) charter parties should be maintained;

(ii) It would be advisable to define charter parties; the definition could be worded as follows:

“Charter party” means a document containing an agreement for the employment of the whole of a ship on a given voyage or voyages or for a given period of time as well as agreements for the carriage of a specified quantity of goods in a number of voyages and agreements for the carriage of containers in the space allocated therefor (slot charters), etc.”

(iii) Yes, the exclusion should be expanded and in order to fix the limits of such expansion a definition is necessary.

Article 3.3.2 provides, similarly to article 1(b) of the Hague-Visby Rules and to article 2(3) of the Hamburg Rules, that the provisions of the Instrument apply if a negotiable transport document is issued pursuant to a charter party. In our view there is no reason at present to restrict this provision to the case where a negotiable transport document is issued. We think in fact that the person named as consignee in a sea waybill deserves the same protection as the holder of a bill of lading. Nor is it entirely correct to state, as a condition for the application of the Instrument, that the document must govern the relations

between the carrier and any holder other than the charterer, because this is not the case when the bill of lading incorporates by reference a charter party.

Japan

Although charterparties should remain excluded from the scope of the Instrument, a definition of charterparties is not necessary. As is pointed out in the Consultation, the absence of a definition has caused little practical difficulty in applying this exclusion. The expansion of exclusion to other forms of contract is neither necessary nor desirable. The “charterparty” can be interpreted flexibly enough to avoid unreasonable results and the expansion could cause, rather than prevent, unnecessary disputes.

Netherlands

3.2 The exclusion of charterparties should be maintained. A further definition of ‘charterparty’ seems not necessary and it may be left to the judge whether, in any particular case, ‘booking notes’ and ‘slotcharters’ might fall under the term charterparty.

However, contracts commercially known as ‘contract of affreightment’, ‘volume contract’ and ‘service contract’ usually do not refer to a type of contract that might be considered as a charterparty. Consequently, these contracts should be separately mentioned and excluded.

Norway

(i) It is the position of our Association that the exclusion of charterparties should be maintained.

(ii)-(iii) In principle, the term ought to be defined if there were an easy and straightforward way of doing so, thereby making it clear that commercial concepts such as volume contracts, contracts of affreightment, service contracts etc. should also be excluded from the application of the Outline Instrument. However, in the lack of such an easy and straightforward definition, we consider it preferable not to define the term “charterparty”.

Peru

Article 3.3.1. Following a long-time consolidated tradition, the draft excludes Charterparties from its scope of application. Based in the restricted conflicts raised in the past due to this and taking into consideration that there is no reason for protecting neither party in Charterparties (and similar contracts), we understand it is convenient to keep the Charterparty exclusion to the Outline Instrument. Maybe only voyage charters, where the cargo may be somehow unprotected.

Spain

The Spanish MLA would wish:

- (a) a charterparty to be defined insofar such amounts to or is a contract

Synopsis of the responses to the Consultation Paper

of carriage concluded between the Carrier and a Shipper or Receiver where a document of transport has been issued in a non-negotiable form or otherwise where the holder of a negotiable document of transport is not the Charterer.

(b) under certain circumstances, as above defined, Charterparties should not be excluded from the scope of application.

(c) the inclusion should be expanded so for the instrument to apply to other forms of contract of carriage (COA, volume contracts, service contracts, slot charterers, etc.) provided that the conditions stated in the definition would be met.

Sweden

(i) It is the position of the Swedish MLA that, as a principle, the exclusion of Charter Parties should be maintained.

(ii)-(iii) Having recently had a Seminar in Sweden, where the question came to be discussed, it proves to be utterly difficult to make clear definitions of contracts of affreightments, volume contracts, etc.

One possibility would, of course, be to tie the mandatory rules to “*liner transportation*”. This may, however, prove to be no better as a definition. We think that volume contracts, quantity contracts and similar should be excluded, but we are not, in any event, able to suggest at present how the article should be worded.

Switzerland

The Convention needs to draw a distinction between the contract of carriage and charter parties, which are traditionally governed by the principle of freedom of contract. The distinction is difficult, since many charter contracts themselves contain elements of a contract of carriage. The explicit exclusion of charter parties is not entirely satisfactory, as the boundary line between the two types of contract is not clear and leaves too much freedom to the parties to call their contract of carriage a charter contract, and thereby escape the mandatory scope of application of the Convention. One other possibility would be to include charter contracts, but leave them entirely under freedom of contract. This, however, would, likewise require a clear line of distinction which we are not able to propose.

United Kingdom

The BMLA considers it important that the exclusion of charterparties be maintained. There is no possible reason to restrict the terms which can be included in freely negotiated charterparties.

The BMLA also considers that it is essential to define what is meant in this context by a charterparty. No definition was needed in the Hague and Hamburg Rules since those rules only applied “to contracts of carriage covered by a bill of lading or any similar document of title” (Art 1 (b)) and there was therefore no need for any exclusion of charterparties. But the Hamburg Rules

with their wider applicability to all contracts for carriage by sea excluding charterparties threw up the question, “how do you define charterparty?” If no definition is included in the Instrument, national Courts will come up with widely differing definitions. One view is that a charterparty must be for a named ship and that all agreements relating to ships “to be nominated” or ships “to be agreed” fall outside the definition of charterparty. Any such result would be quite absurd and must be avoided. It is important to avoid litigation as to whether particular contracts (such as tonnage contracts, COA’s and slot charters) fall within the definition “charterparty”.

The BMLA considers that the exclusion should be wide enough to exclude all contracts in writing, signed (or otherwise executed) by the parties which could reasonably be regarded as a form of charterparty. Accordingly, the definition should be broad and should include within it all agreements whereby one party charters from another party the whole or any part or proportion of a ship, whether on a bareboat, time, voyage or any other basis, whether or not the ship is named or is to be named or nominated subsequently and whether one voyage or a series of voyages is to be performed and should also include all agreements whereby one party contracts to provide any ship or tonnage to any other party for the carriage of goods.

If a sufficiently wide definition of charterparty is adopted there should be no need to exclude other forms of contract. If a narrower definition of charterparty is adopted, then the BMLA considers that there will have to be a separate exclusion of “contracts of affreightment” or “tonnage contracts” defined so as to embrace all agreements whereby one party agrees to provide any ship or tonnage to another party for the carriage of goods.

United States

(i) The U.S. MLA supports the exclusion of charter party contracts from this draft instrument. Charter parties have historically been excluded from the Hague and Hague-Visby Rules because of the private nature of their contractual arrangement.

(ii) The U.S. MLA recognizes that a workable definition for “a charter party” may be valuable, but based upon our own experience in seeking a workable definition we concluded that the inclusion of a definition in the instrument would ultimately cause confusion and unnecessary restrictions or side effects. The Hague and Hague-Visby Rules survived nearly 80 years without a definition of charter party, and the U.S. MLA therefore takes the view that the definition should be left up to the courts and the developments in the trade.

(iii) The U.S. MLA would also support expanding the draft instrument to include contracts of affreightment, towing contracts, and similar agreements that are functionally equivalent to traditional charter parties.

Synopsis of the responses to the Consultation Paper

CONSULTATIVE MEMBERS AND OBSERVERS***BIMCO***

BIMCO firmly believes that the exclusion of charter parties from the Revised Draft Outline Instrument should be maintained. The need to define charter parties in the first instance arises out of the fact that the Revised Draft Outline Instrument adopts the definition of “Contact of carriage by sea” from the Hamburg Rules, thus making the bold exclusion of charter parties from the Revised Draft Outline Instrument a necessity. Although we appreciate that it would require some redrafting, we would much prefer to see the adoption of the Hague/Hague-Visby Rules definition of “Contract of carriage” which spells out precisely the types of document that should fall within the scope of the Revised Draft Outline Instrument without having to make exhaustive exclusions or define “charter party”. It is important to appreciate that commercial parties are innovative and that new types of documents may appear with the passage of time resulting in exclusion lists becoming incomplete.

FIATA

“Service contracts” as well as “volume contracts” are customary in liner shipping trade to which the Outline Instrument applies. The terms cannot be equated with Charterparties, to which the Outline Instrument does not apply. If service contracts and volume contracts remain included in the exemption, ocean carriers, i.e. for instance shipping lines would be able to contract out of the Convention, which may also appear in contradiction of 17.1.

Any possible opting-out provision should apply equally to shipping lines and non vessel operating carriers.

ICS

ICS can support this Chapter. Charterparties, contracts of affreightment, volume contracts, service contracts or similar agreements should be excluded. Efforts to define such contracts could create more problems than would be solved. The simple exclusion set out in Article 3.3.1 should be maintained and expanded to include contracts of affreightment etc. The square brackets in 3.3.2 should be removed. 3.4 should be deleted in its entirety because it is unnecessary.

IG

The IG believes that charterparties and related carriage contracts should be excluded from the DOI. Furthermore if the term ‘charterparties’ is to be defined to include other specified types of contracts of carriage then it should be made clear that the definition is not limited to but merely includes those so specified.

Institute of Chartered Shipbrokers

The Institute is in full agreement with the proposal to continue to exclude charterparties from the application of the Instrument but does not see a need to develop a specific definition of the term for the purposes of the Instrument. Rather we believe that the presently accepted definitions, proven as they have been by practical experience and legal process, should be retained. Finally, the Institute does not support any expansion of the exclusion to other forms of contract as there are numerous problems with terminology within different trades and markets.

IUMI

- (i) The exclusion of charterparties should be maintained.
- (ii) Any definition of a charterparty might lead to problems whereas the absence of such a definition has not caused problems in practice.
- (iii) In our opinion, there is no need to expand the exclusion to include other forms of contract.

Art. 4 PERIOD OF RESPONSIBILITY

- 4.1.1** Subject to the provisions of articles 4.2 and 4.3, the responsibility of the carrier for the goods under this Instrument covers the period from the time when the carrier or a performing party has received the goods from the shipper in the place of receipt until the time when the goods are delivered by the carrier or a performing party to the consignee in the place of delivery.
- 4.1.2** The time and location of receipt of the goods is the time and location as agreed in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and location that is in accordance with the customs or usages in the trade or at the place of receipt. In the absence of any such provisions in the contract of carriage or of such customs or usages, the time and location of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.
- 4.1.3** The time and location of delivery of the goods is the time and location as agreed in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and location that is 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, the time and location of delivery shall be the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.
- 4.1.4** If the carrier is required 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 from whom the consignee may collect them, such

handing over will be regarded as a delivery of the goods by the carrier to the consignee under article 4.1.3.

4.2 The parties may agree in the contract of carriage that

- (a) particular activities that pursuant to the contract of carriage are to be performed during the period referred to in article 4.1.1, such as loading, stowage, discharging, or temporary storage of the goods, shall be carried out by or on behalf of the shipper or the consignee;
- (b) the carrier acting as an agent of the shipper may contract out specified parts of the carriage to a third party, thereby limiting the scope of the contract of carriage.

In the event that a negotiable transport document is issued, such document shall on its face reflect any agreement made in accordance with this article.

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

Alternative I

- (a) [conclude a contract with such third party on the terms that are customary for the particular mode of transport or are compulsorily applicable to the part of the carriage that is contracted out;
- (b) take care that parties to such contract shall be the shipper and such third party, while the consignee under such contract shall be a subsequent carrier or the consignee under the contract of carriage, as the case may be;
- (c) exercise reasonable care, having regard to the specific factors that locally apply, in the selection of the third party;
- (d) provide such third party with all information and instructions that are necessary for a proper carrying out of his tasks, including, as the case may be, information on any loss of or damage sustained by 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;
- (e) take care that any information that the shipper, the controlling party, or the consignee may reasonably request in respect of the part of the carriage contracted out to the third party, such as the name of the third party and the intended or actual place or date of transfer of the goods to the third party, is provided to any of these persons with reasonable despatch;
- (f) provide the consignee under the contract with the third party with all the information and documents that may be required for such consignee to obtain delivery of the goods from the third party;
- (g) effect payment of the remuneration due under such contract, unless otherwise agreed.]

Alternative II

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

- 4.4** If during any of the periods (1) from the time when the carrier or a performing party has received the goods from the shipper until their loading on to the vessel and (2) from the discharge of the goods from the vessel until the time when the goods are delivered by the carrier or a performing party to the consignee,
- (a)** there are any provisions contained in any international convention or national law that
 - (i)** cannot be departed from by private contract to the detriment of the shipper; and
 - (ii)** apply according to their own terms to any or all of the carrier's activities under the contract of carriage during any such periods, [irrespective whether the issuance of any particular document is needed in order to make such international convention or national law applicable]; and
 - (b)** a claim or dispute arises out of loss of or damage to the goods, or delay, that occurred during any such period, then such provisions, to the extent that they are (1) of such mandatory nature, and (2) in terms of nature and structure suitable to be applied within the scope of the provisions of this Instrument, shall be applied to such claim or dispute and shall prevail over the provisions of this Instrument. Otherwise, this Instrument shall apply according to its terms.

MEMBER ASSOCIATIONS*Canada*

In Singapore we expressed the view that the Convention should be limited to port to port. However, the prevalent view there was that the Instrument should be door to door. If that is so, we are concerned with the "opting out" provisions which give with one hand and take away with another, such as the provisions in Section 4.2 which provide that the carrier may act as agent for the shipper in arranging certain parts of the carriage, i.e. inland carriage on a door to door shipment, and thereby avoid liability.

Whatever the pros and cons of that point, we submit that the Instrument should make it crystal clear that any agreement between the shipper and the carrier that the shipper load, stow, and so on should not in any way affect the rights of a third party holder of the Bill of Lading. In such cases, the carrier would be liable to the Bill of Lading holder for damage arising from loading or stowing, but would have a contractual recourse against the shipper.

*Synopsis of the responses to the Consultation Paper****China***

We suggest that the event where the carrier or the performing party receives the goods from the consignor (not only the shipper) which is commonly occurred in the practice shall be considered in this instrument.

Denmark

We support the extension of the convention to door-to-door contracts. The parties should be free to determine the scope of the contract. Thus they should be able to agree either to a door-to-door transport or to a through transport, where the carrier acts as an agent for the shipper for specified parts of the carriage.

We can agree that when a through transport contract is entered into, safeguards should be included in the Instrument. The most important safeguard would be a requirement that the contract quite clearly provides for through transport and quite clearly defines that part of the carriage, which falls under the contract so limited, and that part for which the carrier only arranges carriage as agent for the shipper.

Furthermore, we can accept a safeguard as suggested in Alternative II whereas we cannot accept Alternative I, where we believe that a number of the proposed safeguards are self-evident, ambiguous or controversial. Alternative I would inhibit through carriage including merchant haulage, e.g.

– re (a): Where certain terms are compulsorily applicable to the part of carriage that is contracted out, such terms would apply in any case by virtue of the mandatory law and such terms need not to be specified in the contract. It would, indeed, be quite a monumental task for any carrier to ascertain that no provisions of a through transport contract would contradict any applicable mandatory law or convention.

– re (d): The obligation of the carrier to provide a third party carrier with all information and instructions that are necessary for proper carrying out of his tasks is a very sweeping obligation, indeed.

re (g): Whether the carrier shall effect payment of the remuneration due under a through transport contract should be a matter of the parties to regulate. The Instrument should not set up a presumption or a binding rule in this respect.

France

Article 4.2 et 4.3. L'Association Française peut difficilement opter entre l'alternative I et l'alternative II, qui ne correspondent pas au système français. S'il fallait faire un choix, la formule générale de l'alternative II semblerait préférable.

Germany

We support a provision on through transport and prefer alternative II of Article 4.3. The exercise of due diligence appears to be a sufficient standard of responsibility if through transport is legitimated by an explicit agreement between the contracting parties. Apart from that alternative I would generate too much litigation because it contains too many uncertain terms.

Italy

Article 4.1.1. The period of responsibility is stated to be the period from the time when the carrier has received the goods “in the place of receipt” until the time when the goods are delivered “in the place of delivery”. It is not clear what is the purpose of the words “in the place of receipt” and “in the place of delivery”. If the purpose is to indicate the contractual places of receipt and delivery, it would be better to say so.

Article 4.1.2 and art. 4.1.3. Reference to the “customs and usages in the trade or at the place of receipt” and respectively to the “customs and usages in the trade or at the place of destination” may give rise to some problems of interpretation first as regards the distinction between customs and usages (in article 17 of the European Convention on Jurisdiction and Enforcement of Judgments the word used is “practices”), secondly as regards the trade to which reference is made and, thirdly, as regards the possible conflict between the customs and usages “in the trade” and “at the place of receipt”.

Article 4.2. We do not think that it is proper to deal in the same article 4.2 with two entirely different situations and suggest to remove from that article paragraph (a) which has nothing to do with through transport. Alternatively article 4.2 could deal – but in different terms as we shall say below – with the situation mentioned in paragraph (a) while paragraph (b) could be moved to article 4.3.

As regards article 4.2(a), we doubt that it is correct to say that particular activities during the period of responsibility of the carrier may be carried out by or on behalf of the shipper or the consignee.

Firstly, we believe that this provision is meant to apply to port-to-port contracts and not to door-to-door contracts and to regulate the situation covered by clauses such as “fio” and “fios”. Then we believe that it would be more correct to state that when activities such as loading, stowage, unstowage and discharge are carried out by or on behalf of the shipper or the consignee, the time when the goods are taken in charge by the carrier (or performing party) shall be deemed to be the time when the aforesaid activities at the loading place are completed and the corresponding activities and the discharge place begin. In other words the effect would be to construe the “fios” clause as an agreement to postpone the taking in charge of the goods by the carrier until stowage is completed.

Coming now to articles 4.2(b) and 4.3 (which is related only to 4.2(b)), we are of the view that, subject to wording, alternative I is preferable since it clarifies that the carrier has certain duties that otherwise could remain in doubt: for example, the duty set out under (f).

As regards the present wording of article 4.3 and of alternative I we have the following comments:

- in the opening sentence the expression “contracts out” is in our opinion imprecise: the carrier does not “contract out” a part of the carriage since he has never “contracted in” that part but has agreed with the shipper to perform a part of the carriage and to enter into a contract of carriage on behalf of the shipper with another carrier;

Synopsis of the responses to the Consultation Paper

- in paragraph (a) the words “the part of the carriage that is contracted out” should be replaced by “that part of the carriage”;
- in (b) the words “under the contract of carriage” are too generic since there could be doubt as to the contract to which they refer and therefore we suggest to replace them with “under the contract of carriage between the carrier and the shipper”;
- in (c) we believe that the “specific factors” that are relevant are rather those relating to the type of cargo;
- in (d) reference could perhaps be made also to the (special) characteristics of the goods;
- in (e) reference to the consignee does not seem proper, since the consignee has no right to request information from the carrier unless he becomes the controlling party;
- in (f) we suggest to delete the words “under the contract with the third party” that are not necessary but perhaps are misleading.

Article 4.4. While it is proper to give priority to mandatory rules contained in other applicable international conventions in order to avoid a conflict between conventions, there seems to be no reason whatsoever to state that national mandatory rules shall prevail. If the Instrument will be given the force of law in the country where litigation is brought, the provisions of the Instrument should prevail over domestic mandatory rules.

Japan

The basic framework set out in draft Outline Instrument regarding through transport is acceptable. As for the drafting alternative, Alternative II which provides duties of the carrier in a general manner when contracting out specific parts of the carriage to a third party is more appropriate.

While this Association supports the basic framework set out in Article 4.4 which is based on network system, there are a few problems with the draft. The present draft Article 4.4, as is criticized by a few delegates at the ISC in July, excludes the application of the Instrument when a part of the carriage is covered not only by an international convention but also by national laws with a mandatory nature. It would be necessary and desirable to respect other international conventions, such as CMR, which will contribute for the uniformity in the area of, for example, carriage of good by are, by road or by rail-road. The Instrument should not hinder the possible developments of such conventions whether which already exist or will appear in future. However, there is no justification to give priority to domestic legislations. This Association shares the view expressed at ISC that the reference of national law in draft Article 4.4 should be deleted.

With regard to the application of other international conventions, one should note that the present draft Article 4.4 could cause potential conflict. In order to escape from the scope of this Instrument, the Draft Article 4.4 (b) requires that the loss or damage occurred during any such period to which other conventions etc. would apply. As a result, under present Draft Article 4.4

(b), this Instrument shall apply if the loss or damage is not “localized”. However, assume, for example, a convention has a provision such as “when the location where loss of or damage to the goods occurred cannot be specified, provisions of this convention shall apply to such loss or damage”. In this case, both the Instrument and the convention in question would claim for the application. Unfortunately, there already exists a convention with a similar provision. (*See*, Subparagraph 3, Article 18 of Warsaw Convention cited below). Draft Article 4.4 should be carefully reexamined to avoid this potential conflict.

Warsaw Convention

Article 18 (3) 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 transshipment, 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.

Netherlands

The network principle should be restricted to provisions relating to carrier’s liability, limitation of liability and, possibly, time for suit.

Further, it should only apply in the event the damage in question occurs solely during the inland part to which the other mandatory law, as referred to in the article, might be applicable.

We prefer the short provision of Article 4.3 Alternative II

Norway

In keeping with our legislative tradition, Alternative II is preferred by our Association which, however, could conceivably also live with a more elaborate and detailed draft such as in Alternative I.

Peru

Articles 4.2 and 4.3. Having included “door to door transport” in this draft, it is appropriate to accept special agreements between carriers and shippers in connection with operative issues that will arise during the voyage, such as loading, handling and storing (4.2.(a)), and the prospect of naming the carrier as agent for contracting other carriers on certain portions of the voyage (4.2.(b)), provided it is always clear that the carrier will be liable for the entire voyage (as stated in 4.1.1). Notwithstanding the mention that these agreements shall be written on in the transport instrument whenever it is issued (last paragraph of 4.2), we feel that the appointment of the carrier as agent shall be always evidenced (even if there is no instrument involved in the voyage) and a written instruction should be granted by other means.

Special provisions on obligations and liabilities of carriers when acting as agent must be included in the draft following Alternative I of 4.3. However 4.1.1 shall not be subject to 4.3, as this will limit carrier’s liability in case of damage or loss of the goods during the custody of a performing party.

Synopsis of the responses to the Consultation Paper

We assume Through Transport title to this paragraph is referred as equivalent to Multimodal Transport where the carrier assumes responsibility for one entire voyage, in opposition to a carrier acting only as a contracting agent for other means of carriage. At this stage we must point out that there is nothing in Peruvian national nor international law that prevents a carrier from accepting a performing parties' liabilities with respect to inland parts of the voyage. Even considering 4.3 and 4.4 as a constraint network system, it still seems too broad for wrapping up an entire voyage and does not satisfies the objective of having one carrier as liable during the whole continuous voyage.

Spain

The Spanish MLA would not support the regulation in the instrument of "through transport" options for two reasons, namely, as follows:

- (a) it goes against uniformity (contracting out)
- (b) these situations will be governed by the general law of agency.

Non-regulation in this instrument would not mean outlawing it.

Sweden

Even if we believe that a through transport instrument is desirable, we think that it is important that it could easily be transformed into a convention with more limited scope, should that prove to be necessary. That means we would rather prefer a more narrow instrument than none at all.

Alternative II is preferred by our Association, although we do not necessarily object to Alternative I.

Switzerland

The Convention should become the basis of a new global uniform regime regulating maritime transportation in terms that satisfy the requirements of modern trade and modern technologies. To this aim any new regime must, in our view, cover the whole transport phase, which increasingly involves land carriage as an ancillary mode of transport to the carriage of goods by sea and transport documents issued likewise to cover the whole transport phase. It is our view that this Convention accommodates modern trade reality in that it covers the entire period in which the carrier has the goods in its custody, irrespective of whether this is in a port or inland, and provides rules which are applicable to the forms of transport which are ancillary to the carriage of goods by sea.

The CHMLA, therefore, welcomes the fact that the Convention also regulates the relationship between the shipper and the NVOCC who is contracting for a door-to-door transport. However, the Convention can legislate the non-maritime transport phases of the carriage of goods only if the interests of the representatives of those transport phases on land and ancillary to the sea leg are taken into account in the drafting of the regulations. Therefore, inasmuch as the planned Convention considers door-to-door transport and provides for a network system (though as minimal as possible),

all modes other than the sea carriage should be invited to participate in the proper drafting process. The final product must be able to obtain the acceptance of all modes becoming subject to the planned Convention.

In any case, Art. 4.2, as it stands, should be redrafted to clarify that the through transport contract is an exception of the normal door-to-door contract.

We prefer Alternative I.

CHMLA wants to restrict Article 4.3.(a) to International Conventions only. It is the view of the CHMLA that the Instrument should prevail, except in cases which are absolutely necessary based on pre-existing International Conventions.

The CHMLA recognises that the extension of the scope to on land sections of the contract of carriage constitutes possibly the highest burden of the drafters. Following concerns were raised:

- As it is often difficult to ascertain which mode of transport is subsidiary to another, the drafters decided to apply the Instrument to transports that take place wholly or partly by sea. In other words, if a multimodal or door-to-door transport includes a sea leg, it will be governed by this Instrument. If it is only a land-air-inland waterways combination, it will not. It is not justified to make a distinction between a door-to-door transport with and without a sea leg and to have a set of rules that applies to the one, but not to the other. For shippers who export and import worldwide, or for freight forwarders who issue door-to-door transport documents for different destinations, it will be an unnecessary complication to have to cope with a regime that applies to some of the door-to-door transports only.

- The requested study on the necessity and the feasibility of door-to-door coverage should show which of the possible solutions is better: whether to have one convention to cover door-to-door transport including a sea leg (thus leaving other door-to-to door transports non regulated), or to have two conventions: one for maritime, i.e. port-to-port transport, and (maybe at a later stage) a multimodal transport convention.

- Like other unimodal conventions, the Instrument should regulate the usual issues of transportation in a way suitable for maritime transport. In addition, also like other unimodal conventions (CMR Art.2, COTIF/CIM Art. 1(3) and (4), CMNI Art. 2(2), Warsaw Art. 31, Montreal Art. 38) , it should contain a provision dealing with pick-up and delivery services.

- It remains to be decided whether work should be continued towards obtaining an all-embracing door-to-door convention that includes “areas of transport law not at present governed by international liability regimes”.

- Whereas it seems clear to the CHMLA that the maritime transport has to be regulated by an international convention, it should be considered whether the regulation of the whole door-to-door transport should have the character of mandatory law. Further, one could envisage to leave this portion entirely to the scope of the UNCTAD/ICC Rules.

- In any case, a network system of liability should be preserved. The unimodal conventions now in force have mandatory application, and are

Synopsis of the responses to the Consultation Paper

considered to be satisfactory instruments. Any departure or derogation from them would perhaps, in the short term, not be welcomed by the States bound by them. If provisions like the obligations of the carrier and of the shipper, right of control, transfer of rights and rights of suit are going to be inserted in the new Instrument, they should be drafted in a way not contradicting the unimodal conventions.

— What certainly needs to be regulated in such a door-to-door convention is the liability for non localised damage. A uniform liability should be provided only for this kind of damage. On this point, a distinction between a door-to-door transport, respectively with and without a sea leg, entraining different limitations of liability, can be acceptable.

— Organising transports and judging the rights, obligations, and liabilities of all the parties involved become unnecessarily more complicated if a different system applies when, e.g. an export to mainland Italy is regulated by one set of rules, whereas another set of rules applies when the destination is Sicily. The same can be said for exports from the Continent to Great Britain when they go through the Tunnel and when they are carried by sea.

4.2 For the sake of clarity, (a) and (b) should be better separated into two articles. Further, we believe that the text of (b) does not clearly state that the provision covers port-to-port as well as to door-to-door contracts. This lack of clarity reaffirms the need for a special regime for door-to-door contracts, in particular, if evidenced by negotiable documents. The CHMLA suggests further that it is better shown in Article 4.2.(b) that this is the traditional transshipment or rather through carriage situation which is not the general door-to-door contract, but a variant, leaving a particular leg to another carrier, contracted by the initial carrier as agent for the shipper/consignee.

In particular, both the maritime and the door-to-door instrument should regulate situations where a carrier turns to act as a forwarding agent. Further, to stress the difference between these two types of liability, to evade confusion between the two, and to protect the shippers better, through transport should be clearly defined at the beginning of the text. For the same reasons, the provisions regulating through transport should not be hidden or mixed with other provisions (like in 4.2.(b) and 4.3). This topic has, instead, to be placed in a separate Chapter. In addition, in a door-to-door document, a carrier who at least partially performs through transport should for that part be called forwarding agent. Finally, it is very important for the shipper to realise that the person who issued such a “through”-transport document does not assume the carrier’s liability for the whole voyage. Therefore, the provision that a negotiable transport document should mention the through transport on its face should be retained. The same might also apply to any other transport document.

We prefer Alternative I.

4.3 CHMLA wants to restrict Article 4.3.(a) to International Conventions only. It is the view of the CHMLA that the Instrument should prevail, except in cases which are absolutely necessary based on pre-existing International Conventions.

United Kingdom

The BMLA considers that Article 4.2 should provide sufficient protection to the consignee against abuse by the carrier of the liberty to contract out specified parts of the carriage. The BMLA prefers Alternative II in Article 4.3 to Alternative I but it considers that the drafting of Alternative II should not be treated as being in its final form and that it could benefit from further discussion.

United States

(i) The U.S. MLA does not see Article 4.2(a) as one limited to through transport. Indeed, it is more likely intended to cover the situation under port-to-port bills of lading in which FIO or FIOS arrangements are negotiated between the shipper and the carrier. In order to accommodate the widest scope of commercial activity and practice, the U.S. MLA has no objection to the concept of the parties agreeing to allow the shipper or the consignee to load or stow the cargo. However, the carrier must remain ultimately responsible, as against an innocent third party, for proper load, stow, and discharge.

Furthermore, the final clause of Section 4.2 does not offer adequate protection to consignees and other innocent third parties. Because a transport document on its face must reflect an agreement under this article only when a “negotiable transport document is issued,” a carrier would be free to issue a non-negotiable transport document without disclosing an agreement under this article.

(ii) The U.S. MLA does not endorse Article 4.2(b), which is more likely to involve door-to-door carriage or transshipment operations. The U.S. MLA favors the mandatory application of the instrument to all parties that participate on behalf of the carrier in performing the carrier’s obligations. As written, this provision would promote attempts by carriers and their agents to seek ways to avoid the application of the instrument by defining their efforts as “on behalf of the shipper.” In truth, every action under a contract of carriage is an activity carried out on behalf of the shipper. Allowing different rules and liability schemes to apply to specified segments of the carriage would result in a lack of uniformity and predictability.

As regards Article 4.3, the U.S. MLA repeats the same objections recited above in Point 3(ii). However, to the extent that such a section is required in the new instrument, the U.S. MLA prefers Alternative II which is closer to our present law and more in line with our common law system.

CONSULTATIVE MEMBERS AND OBSERVERS***BIMCO***

“Door-to-door” services vary between those carriers or operators who are prepared to assume full responsibility for the entire voyage (usually the larger container operators) and those carriers who are only prepared to offer such services on a limited responsibility basis (smaller entities who may not

Synopsis of the responses to the Consultation Paper

necessarily be engaged in liner activities on a regular basis). The two types of services are often referred to as “multi-modal” and “through transport” respectively. BIMCO has developed and implemented standard documents covering both types of services.

It is BIMCO’s firm view that there is a commercial demand for carriers to be able to offer through transport services and therefore agrees that such services should not be outlawed under the Revised Draft Outline Instrument.

It is difficult to perceive why a carrier would not exercise due diligence in selecting a sub-carrier because also in respect of through transport there may be cases where the carrier’s ultimate liability exposure depends on his recourse possibilities against the actual sub-carrier for possible fault or neglect. The carrier’s recourse actions do fail from time to time simply because the sub-carrier is insolvent or the sub-carrier (if he is not a sea carrier) is able to limit his liabilities to a larger extent than the carrier. So, invariably, the carrier will exercise due diligence in selecting a sub-carrier and make sure that the sub-carrier is provided with the necessary information to perform his part of the voyage as he should.

If the majority view is that the Revised Draft Outline Instrument should contain provisions as regards the carrier’s duty to exercise due diligence in selecting a sub-carrier to perform part of the voyage, then we would favour alternative II. The first alternative is, as far as we are concerned, too problematic.

As an example sub-article (b) provides that “*the carrier shall take care that parties to such contract shall be the shipper and such third party...*”. It should be borne in mind that what the shipper under a through bill of lading is asking for is for the carrier to arrange for the goods to be taken all the way through to a particular destination. For the part of the voyage to be carried out by the sub-carrier a feeder bill of lading, if it is a sea transport, will be issued. Since it is the carrier and not the shipper under the through bill of lading who tenders the goods for loading under the feeder bill, it should be the carrier who should be named as shipper in the feeder bill.

The requirement that “*the carrier shall take care that parties to such contract shall be the shipper, etc.*” is, in our view problematic. In order for the carrier to be able to instruct the feeder carrier to name the shipper under the through bill of lading as the shipper under the feeder bill, he must, at least when English law applies, have express authority from the shipper to do so. This is because the carrier in naming the shipper under the feeder bill will create rights and obligations for the shipper. If, for instance, there are potential liabilities on the part of the shipper (for example, he has not provided correct information in shipping dangerous goods) and the carrier did not have his specific instruction to name him as shipper under the feeder bill, the shipper will be exposed to liability from the feeder carrier. If the feeder carrier is successful in claiming against the shipper, the shipper may have a recourse action against the carrier for all losses arising from having been named in a contract of carriage that he is not a party to.

In our view, it would be rather inconvenient for the commercial parties if the carrier had to ask for the shipper’s express authority to be named as

shippers under the feeder bill and, above all, the venture would be fraught with some risk for the carrier if he for some reason fails to obtain such authority.

We recognise that mistakes do occur in respect of the issuing of bills of lading under a through transport operation, however, we do not believe that detailed provisions in a carriage of goods by sea regime will cure that problem.

Furthermore, we query the difference in the wording of Alternative I(c) and Alternative II in respect of the selection of a third party.

Sub-article (g) states that the carrier shall effect payment of the remuneration due, unless otherwise agreed. Where the carrier collects freight for the whole transport, he will usually also pay remuneration under the sub-contract. However, we believe that is a matter that should be left entirely to the commercial parties to deal with as they deem fit.

ICS

ICS strongly supports application of the Instrument to door to door maritime transport. Chapter 4 is generally consistent with the ICS position that an instrument should be developed which applies to both maritime transport and any ancillary transport on land, where undertaken, based on a network liability system.

The Instrument provides the commercial parties with flexibility in determining the scope of the contract, including the period of responsibility. It is both a unimodal and multimodal instrument. As stated in the explanatory notes, where tackle to tackle transport is agreed (as will often be the case in bulk trades), the responsibility of the carrier will not extend beyond tackle and the Instrument will apply. However, where door to door transport (or any transport beyond tackle to tackle) is agreed, a network liability system will apply. In cases where it is not possible to establish when the damage occurred (concealed damage), the Instrument will apply.

4.1.2 and 4.1.3 are new provisions intended to specify as precisely as possible when the period of responsibility of the carrier should begin and end. They are considered to be an improvement on the similar Hamburg Rules provisions and preferable to the similar draft US COGSA provisions and can be supported by ICS. (Drafting point: "time and location" could be more appropriately expressed as "time and place" or "date and place" throughout the Instrument).

4.2 and 4.3 is consistent with the ICS position that the Instrument should include provisions regarding through transport i.e. that carriers should remain free to contract in the capacity of an agent of the shipper if they so choose and to contract out parts of the carriage to a third party. Through transport is an essential part of commercial life and provisions on through transport are necessary for the continuance of merchant haulage.

ICS supports Alternative II, i.e. that the carrier should have a general duty to exercise due diligence in the selection of third parties rather than the detailed duties proposed in Alternative I. Some of the provisions in Alternative I would be difficult to comply with and others are ambiguous. For example:

- (a) how can carriers in their standard through carriage contracts ensure

Synopsis of the responses to the Consultation Paper

that the terms comply with all national laws which may be compulsorily applicable?

(d) the obligations are very general and onerous; and

(g) which requires the carrier to effect payment of the remuneration due under the sub-contract, unless otherwise agreed, is not acceptable.

It has been argued that Alternative I would create greater certainty as to what was required. However, while Alternative I is more detailed, the requirements do not create any greater certainty than Alternative II e.g. Alternative I (c) is basically the same requirement as Alternative II. Furthermore, Alternative II is consistent with carrier's existing obligations under national laws.

4.4 provides for a network liability system which is described in the accompanying notes as being "as minimal as possible". The intention should be to give precedence to certain mandatory provisions of international conventions or national laws only (e.g. those dealing with liability, limitation of liability and prescription (time limits)).

This could possibly be accomplished by inserting a new provision in 4.4 (a) as follows:

"4.4 (a) (iii) deal with carrier's liability, limitation of liability, prescription; and".

ICS supports the suggestion made at the recent International Sub-Committee meeting to insert "solely" after "occurred" in 4.4 (b).

ICS believes that the provisions in Chapter 4 should be mandatory core provisions of the Instrument.

Institute of Chartered Shipbrokers

The Institute is of the opinion that Alternative II to Article 4.3 is the most appropriate as it is not considered necessary to list functions responsibilities. Once this starts, where does it end?

IG

The IG reiterates the view that it has expressed on a number of occasions to the ISC that the DOI should cover both tackle to tackle and multi-modal transport.

4.2 (a) as in the Hague/Hague-Visby Rules permits the parties the freedom to determine under the contract of carriage which party will be responsible for certain operations other than the actual carriage of the goods e.g. loading, stowing etc. The IG supports this approach not least because it will often permit the parties to contractually allocate responsibility to the party actually performing the particular operation.

4.4 provides for a network liability system, albeit that the ISC indicate that it should be a 'minimalist' one.

As was pointed out in the IG's previous paper containerised cargo which accounts for a high percentage of cargo movements is generally carried on a

multi-modal basis (para 2) under contracts providing for network liability (para 15) e.g. contracts subject to Unctad/ICC terms.

A recent Study carried out on behalf of the EC in relation to intermodal transport indicated that 95% of EU shippers surveyed, reported a loss rate of less than 0.1% of cargo movements, of which less than 1% led to litigation. The IG estimates that of those matters that do lead to litigation, 80-90% settle prior to a hearing. Whilst accepting that the % loss rate might be marginally higher in certain parts of the world, in the IG's opinion these statistics support the view that the network system has proved both practical and effective.

Moreover the adoption of a uniform system would in many jurisdictions conflict with domestic legislation presently in place enacting or incorporating unimodal International Conventions, as is recognised by the ISC. This would substantially reduce the likelihood of the DOI gaining widespread support.

Having said this the purpose of an International Convention is to promote uniformity and international comity. The IG accordingly agrees with the ICS and the ISC that only mandatory provisions of International Conventions that have been enacted into domestic law, rather than the entire Convention, should override the like provisions of the DOI.

IUMI

Both provisions are interrelated. Alternative II imposing a general duty to exercise due diligence in selecting the second carrier is supported. If the parties agree in the contract of carriage that specified parts of the carriage can be contracted out to a third party the carrier shall exercise due diligence in selecting the third party. There is no need to provide more precise guidelines to the parties.

NITL and WSC

Shipper's Agent functions – The Instrument should recognize that the carrier may act as an agent of the shipper, rather than as a carrier, to make certain arrangements with other contractors (e.g., truckers, warehousemen) for the shipper's account (see e.g., CMI Draft Article 4.2). In such event, the carrier's duties should be defined by an agreement of shipper and carrier and by the law otherwise applicable to the arrangement.

“Network” Basis for Inland Liability – The Instrument should be mandatorily and exclusively applicable to the contracting carrier and other parties performing the duties of the carrier under the contract of carriage as provided for in CMI Draft Articles 6.3.3 and 6.10; provided that the mandatorily applicable substantive liability terms (e.g., liability limits, presumptions, burdens of proof, exemptions from liability) applicable to inland activities, (e.g., truck and rail) should apply in the circumstances set forth in CMI Draft Section 4.4. The parties agree that the scope of different mandatorily applicable laws should, in the interest of promoting a uniform liability regime, be as narrow as can be practicably achieved. The parties agree to the period of responsibility as provided for in CMI Draft Articles 4.1.2 and 4.1.3.

*Synopsis of the responses to the Consultation Paper**Supplemental Submission*

Period of Responsibility. – The parties agreed that the beginning and ending of the carrier's responsibility for the cargo should be determined by the contract of carriage, otherwise by usages in the trade or at the place of receipt or destination. *See* CMI Draft Instrument Art. 4.1.2 and 4.1.3.

Scope of Coverage. – The parties agreed that to promote uniformity the Instrument should apply broadly to the contracting carrier and the carrier's agents and servants performing the duties of the carrier, and that the Instrument should apply to all actions against the carrier, whether based in contract, tort or other causes of action. However, to the extent that loss or damage occurs on the inland portion (e.g. a motor or rail transportation movement) of a through transportation movement in which the ocean carrier is the contracting carrier, and another liability regime is mandatorily applicable to the inland portion of the through movement, then such other regime should apply to determine the liability for the loss. *See* CMI Draft Instrument Art. 4.4.

Carrier as Shipper's Agent. – The parties agreed that the Instrument should recognize the current practice whereby a carrier may serve as the agent of the shipper, rather than as a carrier, with respect to certain activities (e.g. arranging inland transportation or warehousing for the shipper's account). *See* CMI Draft Instrument Art. 4.2. When acting as the shipper's agent, the carrier's liability would be governed by agency or other legal principles.

Art. 5. OBLIGATIONS OF THE CARRIER

5.1 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.

5.2 [The carrier shall be bound, before and during the voyage, to exercise due diligence to:

- (a) make and keep the ship seaworthy;**
- (b) properly man, equip and supply the ship;**
- (c) make the holds, refrigerating and cool chambers and all other parts of the ship, including containers, if supplied by the carrier, in which the goods are carried fit and safe for their reception, carriage and preservation.**

The carrier shall during the period of its responsibility as referred to in article 4.1 properly and carefully keep and care for the goods. He shall also properly and carefully load, stow, carry and discharge the goods.]

5.3 Notwithstanding article 5.2, the carrier may

- (i) sacrifice the goods when the sacrifice is extraordinary, and reasonably made for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.**
- (ii) shut out, unload, destroy or render the goods innocuous if they become an actual danger to persons, property, or to the environment.**

Art. 6. LIABILITY OF THE CARRIER**6.1 Basis of Liability***Alternative I(a)*

- 6.1.1** [The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage, or delay took place during the period of its responsibility as referred to in article 4.1, unless the carrier proves that neither its fault nor that of a performing party caused the loss or damage.]

Alternative I(b)

[The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage, or delay took place during the period of its responsibility as referred to in article 4.1, unless the carrier proves that such loss or damage was caused by events or through circumstances that a diligent carrier could not avoid or the consequences of which a diligent carrier was unable to prevent.]

Alternative II

[The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage, or delay took place during the period of its responsibility as referred to in article 4.1, unless the carrier proves that neither its fault nor that of a performing party caused the loss or damage. In order to prove the absence of fault the carrier must provide evidence that it has taken such reasonable measures as the characteristics of the transport and the circumstances of the voyage require and, in particular, that it has taken the measures described in article 5.2.]

- 6.1.2** [When the carrier proves that the loss or damage has been caused by one of the following circumstances, it shall be presumed that to such extent neither its fault nor that of a performing party [contributed to] [caused] the loss or damage:
- (i) an act or omission of the shipper, the holder, or the consignee,
 - (ii) insufficiency of or defective condition of packing or marking,
 - (iii) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods,
 - (iv) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party, or the consignee,
 - (v) any act, neglect or default of the carrier or a performing party subsequent to the time when the goods become an actual danger to persons, property, or to the environment, and any measure taken in order to prevent the goods from becoming such an actual danger,
 - (vi) fire,
 - (vii) interference by or impediments created by public authorities,
 - (viii) piracy, terrorism, riots, and civil commotions,
 - (ix) strike, lock-out, stoppage, or restraint of labour,

- (x) saving or attempting to save life or property at sea,
- (xi) perils, dangers and accidents of the sea or other navigable waters,]

6.1.3 If the loss or damage is caused in part by a breach of the carrier's obligations and in part by a cause for which the carrier is not liable, then the carrier is liable for such loss or damage to the extent that such loss or damage is attributable to that breach, and is not liable for such loss or damage to the extent that such loss or damage is attributable to such other cause. [To the extent that the apportionment cannot be established with sufficient certainty, having regard to the circumstances, then the liability of the carrier shall be one-half of the loss or damage.]

MEMBER ASSOCIATIONS

Australia and New Zealand

Art. 5. This Association submitted an "Additional Comment" in our response to the CMI Questionnaire, prior to the New York Colloquium.

The Additional Comment was in regard to a currently unsatisfactory area concerning the carriage of temperature-controlled goods. Carriers under the current legal regimes have to provide a cargo-worthy ship (provision of refrigeration spaces etc. Article 3.1 of the Amended Hague Rules), but surprisingly do not have the obligation to document to the commercial parties and other interested parties how they perform their duties of providing refrigeration when cargo is out of sight and reach on the high seas. This is an important issue when goods arrive with either actual or suspected damage. All too often, carriers find some reason to withhold their temperature/cold-air supply recordings.

Issues of food safety and the increasing vigilance of health authorities arise. A lack of information on the storage conditions that the goods have experienced does not assist a purchaser's confidence. Insurers also find it difficult to advance claims without knowing the actual conditions the cargo has experienced at sea – higher bacterial counts than normal, for instance, can have many causes. (Under all risks cargo insurance contracts, claimants may only have to show that the damage occurred during the period of insurance cover). Once insurance claims are paid, there is often extensive and unnecessary legal activity during the subrogated recovery action, complicated due to the withholding of information by carriers.

Australia and New Zealand and other southern hemisphere countries (some of "developing world" status) have considerable sea voyages to their markets in North America and Europe. From New Zealand, for example, a container of frozen lamb can be at sea for six weeks on its way to a European supermarket. Many such cargoes are containerised. Modern containers no longer have a recording instrument commonly known as a "Partlow Chart", which records the temperature on a circular paper disc, which was sometimes visible to cargo surveyors. Modern containers have more accurate electronic

recording sensors, which hold the information for up to three or so months. This information is only accessible to the carrier, who can download the data using proprietary equipment and software. However, if that information is not retrieved, it is eventually overwritten and forever lost.

Cargo interests frequently use their own portable temperature recorders in container shipments of high value – e.g. chilled lamb. (Chilled product is much more susceptible, compared to hard-frozen goods, to movements in temperature). Where available, both sets of information should be available for parties to work from a position of knowledge concerning the transportation sensitive cargo.

Accordingly our Association would like to see a provision along the following lines inserted:

“Following delivery of goods which have been carried under controlled temperatures (whether in containers, or otherwise) the carrier must, if requested so to do by any of the persons referred to in article 13.1, make available within 14 days of being so requested, copies of such documentary evidence and/or electronically stored information (such as recording charts or downloaded electronically stored data) which it has relating to the temperatures at which the goods have been carried.”

Art. 6. This Association considers that, if the decision is made to delete nautical fault (on the basis that carriers should not be able to avoid liability in circumstances in which there has been negligence by its employees or agents, it seems somewhat inconsistent to have a presumption of innocence where there has been intervention by an authority (whether in relation to quarantine or other matters) and such intervention has been caused by the fault of the carrier. On balance we do not consider that the presumption in (iv) is appropriate in a list where the presumed circumstances of a carrier’s innocence clearly relates to activities for which the carrier could not be responsible.

The same comments apply in relation to paragraph (v).

We consider that the opportunity should be taken to clarify that it is latent defects to the ship, its apparel or equipment which is referred to.

Whilst some members of this association prefer, on grounds of risk apportionment, to retain the nautical fault defence the prevailing view is that this exclusion should not be retained in the list of presumptions.

In view of the fact that many countries have legislation imposing liabilities on owners or masters for the acts of pilots (with consequent exclusion of liability on their employer, whether a government instrumentality or a private enterprise) it would be inappropriate to provide an exception (or a presumed innocence of carrier) for the acts of a pilot. It is the view of this Association that the ultimate responsibility for the acts of a pilot should rest with the master and the owners/the carrier.

This Association queries whether, in clause 6.1.3, it is intended in Line 4 to require the carrier to prove “the extent to which the loss was caused by an event for which it is not liable”. This Association does not consider that the bracketed portion is necessary. In circumstances in which the carrier fails to establish the extent to which any loss has been caused by an event for which it

is not liable then the carrier would bear a liability for the total loss or damage as the early provisions in 6.1.3 provide.

Croatia

Article 5.2. The existing rule [requiring exercise of due diligence *before* and at the *beginning* of the voyage] has been serving well. Nobody ever suggested that the carrier does not have to take reasonable steps to *care* for or protect the cargo should the ship become disabled at sea. The new wording might be understood as adding something more to the carriers obligations *under standard shipping practice*, which we understand, is not the case.

Article 6.1.2 (i) Some of the exceptions might have been used for the same cause [like Act of God and perils of the sea for a storm; or latent defect and 5.2 Rule]. But as many exemptions are settled through many court and arbitration decisions, it would be best to retain the same exceptions (ii) Approach to the nautical fault will be changed by introduction of the ISM Code. It seems that a claimant would relatively easily rebut the presumption that in case of crewmember's nautical fault "neither carrier's fault nor that of a performing party has caused or *contributed* to cause that loss or damage". (For example if in the *Marion* case the cargo was damaged the carrier would have not been in a position to invoke the nautical fault exception. With bridge procedures, standing orders etc. the nautical fault defence will be less and less attractive.

The *exoneration* "*error in the navigation or in the management of the ship*" should be drafted in a separate article. It seems that in order to make the *exoneration* really work it should be provided that the *carrier* could not rely on the *exoneration* if an error in *the navigation or in the management of the ship* (a) was *predominately* caused by *their fault*; or alternatively (b) *gross negligence* or alternatively (c) *personal act or omission done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result*.

We do support retention of this exoneration, which over the years shaped the spread of risks between cargo and P&I insurance providers. [Likewise, shipowners bear risks of pilot error (low limits of liability) or tug error – exoneration clauses].

Denmark

We agree to a fault-based regime with a reversed burden of proof. We do not believe that a liability system based upon strict or "strictish" liability for the carrier has any role to play in maritime transport of goods. In our view, the CMI should be careful not to draft provisions deviating from the rule on fault liability with a reversed burden of proof, unless somehow it is demonstrated that such rule is unclear. We firmly support Alternative I (a) and we cannot support Alternative I (b) and Alternative II. It may be argued that Alternative I (b) and Alternative II do not deviate that much from Alternative I (a), but the history of the Hamburg Rules clearly demonstrates how dangerous it is to attempt to change the wording, unless the purpose is to establish quite a different liability rule.

The catalogue (c)-(q) in the Hague/Visby Rules Article 4.2 should basically be retained. In our view, (c)-(q) of the catalogue are exceptions, compare (q) and the Protocol of Signature. Views differ as to whether (a) and (b) should be retained. Carriers regard (a) and (b) simply as reflecting a division of insured risks between the carrier and the shipper, whereas shippers regard (a) and (b) as outdated and unreasonable. This is very much questions of a highly political nature and these questions should therefore be left for decision by UNCITRAL or even by the diplomatic conference. We suggest basically retention of the catalogue (c)-(q). As to (a) and (b), we would suggest alternative texts, one with and the other without (a) and (b).

As to the obligation to make the ship seaworthy at the beginning of the voyage, we believe that this obligation should be extended as proposed in Article 5.2 (a) to the whole voyage. It seems to us today somewhat out of tune with the ISM Code and safe shipping requirements not to require the shipowner to keep the ship seaworthy throughout the voyage. Thus we can support Article 5.2 as a whole. We do not agree, however, to the statement in the Outline that extension of the duty to exercise due diligence throughout the voyage is consistent with exclusion of the exception for error in the management of the ship. We believe that in many cases an error in management of the ship will not make the ship unseaworthy.

We believe a provision on allocation of loss should be included and suggest instead of the proposal in Article 6.1.3 a provision along the line of the US COGSA proposal, Section 9 (e) which seems to us to be a clearer and more balanced provision than the proposal in Article 6.1.3.

Accordingly our responses to questions (i)-(vi) are as follows:

- (i) The liability regime should be based upon presumed fault.
- (ii) We prefer Alternative I (a).
- (iii) The catalogue (c)-(q) should basically be retained as exceptions in alternative versions: One with (a) and (b) included and the other with (a) and (b) excluded.
- (iv) The seaworthiness obligations should be extended to the whole voyage.
- (v) We are opposed to Alternative II (and Alternative I (b)).
- (vi) A provision on allocation of loss corresponding to the proposal in the US Draft COGSA, Section 9 (e) should be included.

France

Chapitre 5 et Article 6.1. Il s'agit d'effectuer un choix et d'aménager, le cas échéant, un système de responsabilité reposant sur une faute présumée selon les préférences qui ont pu être exprimées lors de la Conférence de Singapour.

L'Association approuve le système de faute présumée reposant sur le transporteur, dans la tradition de ce que prévoit l'article IV- 2 (q) des Règles de la Haye-Visby. L'Association n'opte pas pour le système proposé par l'Alternative II.

Reste le choix entre l'alternative I (a) et l'alternative I (b). Celui-ci est

Synopsis of the responses to the Consultation Paper

fonction de l'importance accordée à la faute de l'agent du transporteur. Il faut également relever que les expressions employées pour qualifier l'absence de faute, condition de l'exonération, sont distinctes dans l'alternative I (a) et I (b). L'alternative I (b) reprend les expressions de la Convention de Budapest et se réfère à une preuve de l'absence de faute exonératoire reposant sur une appréciation *in abstracto* (c'est la référence au "diligent carrier").

L'Association Française estime que le choix de l'alternative I (a) est préférable, même si des opinions différentes ont pu être exprimées. Sans qu'une nette majorité se soit ici exprimée, l'Association estime que la liste de l'article 6.1.2 n'est pas nécessaire. Sa suppression pourrait permettre une appréciation plus adaptée aux circonstances de chaque cas de l'absence de faute. La liste de l'article 5.2 pourrait éventuellement être maintenue. L'Association estime qu'il conviendrait de préciser qu'une telle liste, si elle devait être retenue, n'est pas limitative.

Germany

We support the following principles:

- i) The liability regime should be based on the principle of presumed fault.
- ii) We support Article 6.1.1 Alternative I (b). While Alternative I (a) is focussing on subjective criteria alternative (b) takes an objective approach which complies with other modern Conventions (road transport – CMR, inland waterway transport – CMNI) and the demands of door to door transport.
- iii) We prefer the exemptions drafted as exceptions not as presumptions of absence of fault. However, in practice it will not make much difference which Alternative is preferred.
- iv) This item should be considered after a decision on Article 6.1 has been reached.
- v) see iv).
- vi) In principle we agree to the apportionment of liability which coincides with a general principle of German civil law. However, we disagree with the 50:50 rule which might become the standard because it is always impossible to be sufficiently certain about the extent of responsibility of the carrier if it did not cause the damage alone.

Italy

We state below our opinion on the issues listed in the Paper:

- (i) The regime to be adopted should be a regime based on presumed fault;
- (ii) The wording of Alternative I(a) is that of article 4(2)(q) of the Hague-Visby Rules. It is a wording which has been tested during a long period and the meaning of which is clear, while that of Alternative I(b) is new and can give rise to uncertain interpretations: what is the meaning of the words "loss or damage ... caused ... through circumstances"? What precisely is the burden of proof on the carrier? Should he identify the "event" or the "circumstance" that caused the loss or damage? Is the notion of "diligent carrier" the same as that

of a carrier who exercises – to use the words of the original French text of the Hague Rules 1924 – a “diligence raisonnable” or a “diligent carrier” be more diligent than a “reasonably diligent” carrier? We believe we should not use a new wording when there is an existing one which is satisfactory.

(iii) In our opinion all exemptions should be drafted as rebuttable presumptions of absence of fault. It is always possible that in the chain of events the fault of the carrier is involved: the consignee should be able to prove this. We suggest that in the opening sentence of article 6.1.2 the words “to such extent” should be deleted and both the words “caused” and “contributed to” should be included as alternatives. The sentence would thus read:

When the carrier proves that the loss or damage has been caused by one of the following events it shall be presumed that neither his fault nor that of a performing party has caused or contributed to cause such loss or damage:

It is correct that the events listed fall within the wording of Alternatives I(a) and (b) but the burden of proof is different: in Alternatives I(a) and (b) the carrier must prove the absence of fault while in article 6.1.2 he must prove that the loss or damage has been caused by a specified event, in which case the absence of fault is presumed. We are consequently of the view that the present approach ought to be maintained. Here follow our comments on some of the exemptions:

(i) Is there any reason why the controlling party is not mentioned?

(iv) The problem here is whether the action of the shipper takes place after the goods have been taken over by the carrier or before and, correspondingly, whether the action of the consignee takes place before delivery or after.

(v) Why the carrier should be excused for his neglect or default?

(iv) We think that the obligations set out in article 5.2 should be included as they have been drafted. They will serve as a guideline for the courts as they have done so far. Continuity, when not in conflict with changes in ship operation, is important. Such changes instead require that the obligation to make the ship seaworthy becomes a continuous obligation.

(v) The first sentence of the paragraph in brackets in Alternative II reproduces the text of Alternative I(a). Of course it should not be repeated twice. The second sentence is instead new and, we think, could give rise to conflicting interpretations. We assume it has been added in order to provide a guideline to Courts, but we are afraid that it could imply an unnecessary burden for the carrier in all cases in which the absence of fault can be proved without providing the evidence mentioned in this rule. We believe that the second sentence has the effect of introducing the provision of Alternative I(b), which in our view should not be adopted.

(vi) We believe that an article along the lines of 6.1.3 should be included but its wording should be amended as per article 5.7 of the Hamburg Rules.

Japan

This Association believes that the present liability regime has allocated

Synopsis of the responses to the Consultation Paper

the risk of carriage of goods by sea efficiently and therefore it is neither necessary nor desirable to change it significantly at present. The followings are the answer to the specific questions in the Consultation.

(i) The Instrument should be based on a presumed fault regime as is supported by majority at Singapore Conference.

(ii) As for the wording for the presumed fault regime, Alternative 1(a) is preferable. The long discussion in ISC in July, 2001 suggests there is considerable disagreement as to the interpretation of Alternative (b) and this would result in less uniformity when a case comes to national courts.

(iii) The catalogue of situations listed in draft Article 6.1.2 should be drafted as exceptions which would exonerate the carrier from liability like Article IV, paragraph 2 of Hague-Visby Rules rather than presumptions of absence of fault.

The wording of present draft Article 6.1.2 also has another problem regardless of the nature of the exceptions. The draft Article provides “when the carrier *proves* the loss or damage has been *caused* by one of the following circumstances”. (emphasis added) However, once it is *proved* that one of the circumstances listed in Article 6.1.2 *caused* the loss or damage, if we set aside the case of multiple causations provided in Article 6.1.3, there is no room for proving that the other factors, including carrier’s fault, caused the loss or damage. A more deliberate wording seems to be necessary for this Article whether it is drafted as exoneration or presumption. For reference, Japanese Code provides as follows (emphasis added);

Article 4 of International Carriage of Goods by Sea Act

“2. The carrier may be discharged from the liabilities provided for in the preceding Article, regardless of the provision of the preceding paragraph, when he proves any one of the following facts and, also, that the damages to the goods carried are such as naturally arise from that fact. Provided, however, that the same shall not apply to a case where it is proven that the damages could have been avoided if the due diligence provided for in the preceding Article had been exercised, and such due diligence has not been exercised.

(1) Perils of the sea and other navigable waters;

(2) Acts of God;

.....”

There are further comments on exemption.

First, regarding the elimination of errors in navigation defense and errors in management defense, this Association strongly wishes that the draft Instrument should refer to the different views on the issue in the commentary, since the issue has long been discussed and various views have been expressed in ISC and in Singapore Conference.

Second, several traditional exemptions, such as “latent defects not discoverable by due diligence” (Article IV 2.(p) of Hague-Visby Rules, “act of god” (Article IV 2.(d)) and “act of war”(Article IV 2.(e)) , look disappeared from the list. These exemptions should be maintained.

The draft Article 6.1.2 changes the existing rule on fire defense. The

actual fault of privity of *carrier himself/ herself* is required for the carrier being liable under Hague-Visby Rules while the fault of masters or other employees is sufficient under draft Article 6.1.2. This Association would like to maintain the fire defense as is in Hague-Visby Rules.

(iv) The obligations set out in 5.2 should be included in 6.1.1 to make it clear that the observance of due diligence is the prerequisite on carrier's part of proving absence of fault.

(v) Although it is desirable to include the words in bracket in Alternative II of 6.2.2, attention should be drawn to the fact that draft Article 5.2 changed the carrier's obligation from Hagu-Visby Rules in that the provision extends the obligation to exercise due diligence for seaworthiness throughout the voyage. This Association believes that this does not necessarily follow the elimination of error in management defense and that there is no need for change in this respect. Subject to the modification of the obligation in 5.2 as explained above, this Association supports the inclusion of the words in bracket.

(vi) The Instrument should include an article as to the allocation of loss in the case of contributing causes and the principle set out 6.1.3 is acceptable. The presumption for the loss in the second sentence (now in bracket) seems to be problematic. The carrier should be liable for all the loss as far as there is causation between the breach of carrier's obligation and the loss and the carrier cannot identify the extent of the loss which is attributable to him/ or her.

Netherlands

Our answers to the questions in the Consultation Paper are as follows:

(i) A regime based on presumed fault is acceptable.

(ii) We prefer Alternative I (a).

(iii) All the exemptions should be drafted as presumptions of absence of fault. However, the list should, where feasible, follow the list of Hague-Visby Rules. The current HVR exception (a), the 'nautical fault', should be listed between [].

(iv) The obligations of article 5.2 should be included. Views were divided whether these obligations should be extended to the period during the voyage.

(v) No, the words in brackets in Alternative II should not be included.

(vi) Article 6.1.3, including the part in brackets, is regarded as a useful provision.

Norway

(i)-(ii) The Norwegian Association favours a presumed fault based regime as contained in Art. 6.1.1, Alternative I (a).

(iii) If there were to be exemptions such as in Art. 6.1.2 of the Outline Instrument, which in our view would not be necessary given the generality of Alternative I (a) of Art. 6.1.1, we think that they should be drafted as presumptions of absence of fault.

Synopsis of the responses to the Consultation Paper

(iv)-(v) In the same manner, we consider Art. 5.2 to be superfluous in principle. Knowing that it probably means a lot to many, we would not have problems in accepting it if it were to be favoured by a majority. In such a case, we could also accept the last sentence of Alternative II of Art. 6.1.1 of the Outline Instrument.

(vi) Finally, we do consider it useful to have a provision on concurrent causes as set out in Art. 6.1.3 of the Outline Instrument, save that the last sentence thereof should in our view be deleted. Given that the liability is based on presumed fault, it is for the carrier to prove the extent of other causes, failing which the carrier will have to absorb the entire liability.

Peru

Chapter 5 and Article 6.1. Brackets in Article 5.2 should be deleted, as obligations set out in (a), (b) and (c) are important to be explicitly stated.

Consistently with this our opinion is that Alternative II for Article 6.1.1 must prevail. We understand that proving that carrier or a performing party complied with Article 5.2 will not be enough for being exonerated, as 5.2 only has some of the core obligations of a carrier; hence Alternative II provides that in particular (but not only) must have proved compliance to 5.2.

In the same line, events set out in 6.1.2 as exceptions to the presumption of liability of the carrier or a performing party should only be reserved to when losses or damages are due to force majeure and to third parties' actions, and when the carrier did not contributed directly or indirectly to the loss or damage. However, the exception comprised in paragraph (xi) appears to be very too broad. Peruvian law has a similar provision in its International Multimodal Transport Act, but exonerates the carrier (who has the burden of proof) if any event set out in article 26 occurs. Notice that Peruvian national law not only eliminates the presumption of liability as in the Outline Instrument but exonerates the carrier. Circumstances similar to (xi) of the Outline Instrument are not considered as exonerating in our law, but following legal requirements and authorities instructions are. Regional treaties (article 11 of Andean Decision 331, as amended by Decision 393) follows Peruvian national law but extends its scope to delay.

Accepting that liability will subsist in case of contributing acts to the loss or damage of the goods as in Article 6.1.3 is mostly appropriate when establishing concurrent liabilities, and fixing a one-half share of the loss or damage to the carrier as proposed in the bracketed sentence should be acceptable (which is consistent with most Latin American Civil Codes).

Spain

The Spanish MLA's views are the following:

- (i) The regime should be one based on presumed fault.
- (ii) The wording of the provisions stated under Alternative I(b) would be preferred.
- (iii) The exemptions should be drafted as presumptions of absence of fault

only. By choosing Alternative I(b) it will be perhaps unnecessary to specify them.

(iv) The obligations of the Carrier, as set out in Article 5.2, should not be included.

(v) Not applicable in view of our reply under (iv) above.

(vi) Affirmative; an article along the lines of Article 6.1.3 would be satisfactory, but deleting the lines in brackets.

(vii) Alternatively to (i) above, the Spanish MLA could accept a regime based on strict liability but with a short list of exoneration or exculpatory causes (fundamentally, force majeure, act or omission of a third party and fault of the claimant).

Sweden

(i)-(ii) We do not favour a strict liability regime. A regime based on present principles is clearly acceptable, but we could also live with the presumed fault based regime as contained in Article 6.1.1, Alternative 1 (a).

(iii) If there were to be exemptions such as in Article 6.1.2 of the Outline Instrument, which in our view would not be necessary given the generality of Alternative 1 (a) of Article 6.1.1, we think that they should be drafted as presumptions of absence of fault.

(iv)-(v) In our view, there is no need for Article 5.2, but if strongly felt by others we do not object to such solution. We could then also accept the last sentence of Alternative II of Article 6.1 of the Outline Instrument.

(vi) A provision on concurrent causes, as set out in Article 6.1.3 of the Outline Instrument, would be useful, although we concur with the Norwegian MLA that the last sentence should be deleted. Given that the liability is based on presumed fault, it is for the carrier to prove the extent of other causes, failing which the carrier will have to absorb the entire liability.

Switzerland

(i) We are of the opinion that the basis of liability should be a general liability principle based on presumed fault. In doing so, the wording should follow as much as possible Article 4 II lit. q Hague Rules, and be supplemented by a revised list of exceptions.

(ii) We think this provision should be based on the wording of Alternative I(a).

(iii) The exemptions should be drafted as presumptions of absence of fault, only affecting the burden of proof.

(iv) We think that the obligations as set out in Art 5.2. should be transformed into the format of a proper exception making the proof of due diligence relating to seaworthiness an actual proper exception.

The words “in accordance with the terms and conditions of the contract” could be misunderstood to say that Chapter 5 is subject to freedom of contract.

The CHMLA very much supports a provision in line with Article 5.2.

Synopsis of the responses to the Consultation Paper

In a modern codification of the law on carriage of goods by sea, the duty to care relating to seaworthiness of the vessel will have to be extended to the entire period of custody. Along with the decision to provide specific door-to-door rules, the overall language and structure of the Convention must be adapted to other modes of transport. Many issues, such as the basis of liability, which in many instances addresses particular features of typically maritime nature, must be given an equivalent notion “on land”.

Where the shipper or consignee has performed a particular part of the handling himself (a fact the Instrument recognises also in Article 4.2.(a)), the Convention could introduce a new section, clarifying the fact that cargo interests carry their own responsibility for risks which are related to the shipper’s influence or intervention in the logistical chain of events. We suggest that such a provision could read as follows:

“Where the shipper agrees to inspect the ship or to perform parts or the whole of the loading, stowing and discharge of the goods, the carrier shall not be deemed to have failed to exercise due diligence or care by reason of an act or omission of the shipper or the owner of the goods, their servants or agents in respect of such inspection or in respect of the loading, stowing and discharge of the goods. Nothing contained in this proviso shall absolve the carrier from taking such precautions by means of supervision or inspection as may be reasonable in relation to any activity carried out by the shipper or the owner of the goods as aforesaid.”

(v) No! We opt for Alternative I (a).

(vi) An article clarifying the situation where the damage was caused by concurrent occurrences, i.e. by some for which the carrier is able to rely on a defence and by others for which he remains liable, should certainly be included in the Convention. An article along the lines of 6.1.3., under which the carrier’s liability can be reduced when it is proven that concurrent causes have contributed to the loss or damage of the goods, is satisfactory.

The CHMLA supports variant/Alternative I(a).

We suggest that a provision that elevates the basis of liability to a general liability principle could – as pure drafting matter – also read as follows:

“The carrier shall be liable for loss resulting from loss or damage to the goods[as well as from delay in delivery], unless the carrier proves that the loss, damage or delay did not result from any fault or neglect on the part of himself, his servants or agents.”

We agree, in principle, that the Instrument lists some acceptable exemptions/exceptions which are apt to reverse the burden of proof (see general comments above). We would – stronger than what has been done by Drafters – rely on the Hague Rules’ wording. We suggest that the list of exceptions of Article 4 II Hague Rules is reduced to 8 specific exceptions, simultaneously making the proof of due diligence relating to seaworthiness an actual proper exception. We propose that the provision could read:

“When the carrier proves that the loss or damage has been caused by one of the following circumstances, it shall be presumed that the loss or

damage did not result from any fault or neglect on the part of himself, his servants or agents:

- (a) unseaworthiness unless caused by want of due diligence to make the ship seaworthy in accordance with the provisions of Article 5.2. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article;*
- (b) perils, dangers and accidents of the sea or other navigable waters;*
- (c) acts of public enemies, arrest or restraint of princes, rulers or people, riots or civil commotions;*
- (d) strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;*
- (e) act or omission of the shipper or owner of the goods, his agents or representative;*
- (f) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;*
- (g) insufficiency or inadequacy of packing or marks;*
- (h) saving or attempting to save life or property at sea or any other reasonable deviation.*

Since this provision clarifies the burden of proof relating to the proof of an exception, we suggest that it would be necessary to clarify also the proof that the loss or damage took place during the period for which the carrier is responsible (so-called *prima facie* case) with a provision such as this:

“The burden of proof shall be on the shipper to show:

- (a) That the claimant is the owner of the goods or is otherwise entitled to make the claim;*
- (b) That the loss or damage took place during the period for which the carrier is responsible;*
- (c) The physical extent of the loss or damage;*
- (d) The monetary value of the loss or damage.”*

The Instrument follows the Instructions from the Singapore Conference that error in navigation (Article 4 II lit. a Hague Rules) is not carried forward into the Instrument as exemption. CHMLA agrees: The so-called “error in navigation” exception leads to countless questions of definition and demarcation, and contradicts the otherwise unlimited concept of liability for acts and omissions by servants and agents. The definition of “error in navigation”, as compared to the duty to man the vessel properly (Article 3 (1) (c) Hague Rules), leads to a situation where the exception can now scarcely be relied upon without at the same time calling into question the vessel’s state of seaworthiness in relation its manning. In light of this, it is doubtful whether there is still scope for the “error in navigation” exception. Viewed from this perspective, it is hard to understand why the exception for “error in navigation” seems (still) to constitute one of the major stumbling blocks in reaching a consensus on a revised liability regime.

The historic justifications of the fire defense are no more valid. If fire is created by the cargo, then the exceptions of Article 6.1.2 (iii) (or equivalent) and for third party goods the general liability rule of Article 6.1.1. would

Synopsis of the responses to the Consultation Paper

relieve the carrier from liability. Fire – as a particular type of damage – should neither be an exemption (as Article 4 II lit. b Hague Rules) nor an exception reversing the burden of proof. Therefore, CHMLA is of the opinion that the fire exception (Article 6.1.2.(vi)) should be eliminated.

Further, the allocation of the burden of proof for the fire exception is complicated and inconsistent. Even within individual national rules, there are many uncertainties and discrepancies. These pertain to the issue of proving “personal responsibility” and the question of whether, in response to the successful raising of the fire exception by the carrier, the party interested in the cargo can in turn prove that the failure by the carrier to make the vessel seaworthy was the cause of the fire. These questions are further complicated, in the United States and in Great Britain, by the fact that, in addition to being subject to the relevant-carriage-of-goods-by-sea legislation, the carrier benefits from the general exclusion of liability under the Fire Statutes, which have their own basis for allocating the burden of proof. Thus, an incident involving a fire leads to a reversal of the burden of proof in the very situations where it is practically impossible for the party interested in the cargo to provide evidence of negligence. This is why we believe that a modern carriage of goods system should make it clear that it is the carrier who would have to prove the exculpatory fire exception, if it is maintained.

Section 6.1.2 in brackets should be deleted. As an alternative, we suggest that the provision could also read:

“Where the carrier proves that the cause of the loss of or damage to the goods was partly independent of his or his servants’ or agents’ fault or neglect, he shall not to that extent be liable for such loss or damage.”

Calculation of compensation – We believe that the Convention would profit from a provision that clarifies that “the market value” is only *prima facie* the measure for damages and that the cargo claimant might still be able to prove a higher value and a greater loss. At the same time, a provision should clarify in which currency the cargo claim is to be calculated, using the presumption applied by some courts, i.e. basing the claim on the currency of destination.

A provision dealing with both elements could read:

“The [...] amount recoverable shall prima facie be calculated by reference to the value of such goods at the place and time at which the goods are discharged, or should have been discharged from the ship in accordance with the contract. If the shipper claims to have suffered a greater loss than the above amount, he must be able to prove this higher amount.

The amount of loss and damage shall be calculated prima facie in the legal currency of the place at which the goods are discharged from the ship or should have been discharged in accordance with the contract.”

United Kingdom

(i) The BMLA agrees that the liability regime should be a regime based on presumed fault, that is to say, that if loss or damage is shown to have taken place during the period of the carrier’s responsibility, the carrier should be

liable unless he can prove that the loss or damage was not caused by any fault on his part or that of his servants or agents.

(ii) The wording of the provision setting out the carrier's core liability (Article 6.1.1) should be based on Alternative 1(a) and not on Alternative 1(b).

(iii) The BMLA considers that the sub-paragraphs of Article 6.1.2 should be drafted as presumptions of absence of fault and not as exemptions which would exonerate the carrier from liability. It is true (as suggested in the Consultation Paper) that the circumstances referred to in those sub-paragraphs fall within the general words of Article 1(a) but the raising of the presumption may have the effect of shifting the burden of proof so that, once the presumption is raised, the cargo has the burden of proving negligence.

As to the specific matters referred to in the sub-paragraphs, the BMLA considers that all are justified and should be included except that a case can be made out for excluding sub-paragraph (xi), particularly in view of the difficulty of defining "perils of the sea".

Two of the exceptions in Art IV Rule 2 of the Hague Visby Rules have been omitted and, in the view of the BMLA, should be added to the list of presumptions in Article 6.1.2. These are "act of war" (which should be broadened to include hostilities not amounting to war) and "quarantine restrictions".

The BMLA notes the views of carriers and P&I Clubs that there remains a case for retaining the exception of negligent navigation (possibly in a modified form), at least where the negligence is that of a pilot whose services the carrier has no alternative but to employ.

(iv) The BMLA considers that the matters listed as obligations in Article 5.2 should be included in some form (perhaps as setting a standard by which absence of fault is to be assessed).

(v) The BMLA does not consider that it is necessary to include the bracketed words in Alternative II of Article 6.1.1. (But see (iv) above).

(vi) An article should be included to provide for the allocation of loss. The BMLA does not consider either the first or second (bracketed) sentences of Article 6.1.3 to be satisfactory. The BMLA supports Article 5 (7) of the Hamburg Rules and especially the proviso which requires the carrier to prove the amount of the loss, damage or delay in delivery that is not attributable to his fault.

United States

(i) The U.S. MLA agrees that the regime should be based on "presumed fault," meaning that if a cargo claimant proves that the occurrence that caused the loss, damage, or delay took place during the period of the defendant carrier's responsibility, then the defendant carrier's responsibility for that occurrence is presumed. The cargo claimant need not prove the defendant carrier's "fault." It is important to stress, however, that a "presumed fault" regime (by definition) creates only a presumption, which is necessarily rebuttable. The U.S. MLA's support for a "presumed fault" regime is premised

Synopsis of the responses to the Consultation Paper

on the assumption that satisfactory provisions will exist to govern the carrier's rebuttal burden.

(ii) The U.S. MLA generally supports the approach taken in Alternative I(a) because it more closely follows the well-established approach of the Hague and Hague-Visby Rules. Alternative I(a), however, corresponds only to article 4(2)(q) of the Hague and Hague-Visby Rules. The U.S. MLA strongly supports the continued recognition of the "catalogue" of defenses in article 4(2)(b)-(p) of the Hague and Hague-Visby Rules, part of which is included in Article 6.1.2 of the Revised Draft Outline Instrument. Alternative I(a) should be expanded to recognize that the carrier can rebut the "presumed fault" *either* by "prov[ing] that neither its fault nor that of a performing party caused the loss or damage" *or* by proving that one of the circumstances listed in Article 6.1.2 caused the loss or damage (thus creating the non-fault presumption mentioned in Article 6.1.2). In addition, Article 6.1.2 should include the full catalogue of defenses.

(iii) The U.S. MLA believes that the Article 6.1.2 exemptions could be drafted either as presumptions of absence of fault or as exceptions which would exonerate the carrier from liability. The practical effect would be the same. If they are drafted as presumptions of absence of fault (as in the Revised Draft Outline Instrument), then the cargo claimant has the opportunity to rebut the presumption (by proving that the fault of the carrier or a performing party did cause the loss or damage). If they are drafted as exceptions which would exonerate the carrier from liability (as in the Hague and Hague-Visby Rules), then there should be explicit exceptions to the exceptions to state that the carrier is not exonerated from liability when the cargo claimant proves that the fault of the carrier or a performing party caused the loss or damage.

The U.S. MLA recognizes the argument that "some, or all, of the circumstances [listed in Article 6.1.2] fall within the general words of Alternatives I(a) and (b) and that it is therefore strictly unnecessary to specify them." This argument may even be compelling in some countries. The Nordic Codes, for example, appear to have eliminated the list without creating difficulties. At least in the United States, however, it is unlikely that the ultimate Convention would be applied as intended unless the full "catalogue" of defenses in article 4(2)(b)-(p) of the Hague and Hague-Visby Rules is included. U.S. judges generally lack experience in maritime law. Many would assume that if the law were amended to delete the full catalogue of defenses then the intention must have been to change the law. Some judges would be unwilling, as a matter of principle, even to consider the *travaux préparatoires* that would demonstrate a different intent. The U.S. MLA accordingly reiterates its view, expressed at the meetings of the International Sub-Committee on Uniformity of the Law of the Carriage of Goods by Sea, that the full catalogue of defenses should be included in the text of the final Convention. This inclusion will be very helpful in some countries (including the United States) and will cause no harm in other countries (even if it is unnecessary). Just as the Uniformity International Sub-Committee reached a consensus on this conclusion (*see* 1999 Yearbook at 109), so the current International Sub-

Committee should also support the inclusion of the full catalogue of defenses from article 4(2)(b)-(p) of the Hague and Hague-Visby Rules.

Although the U.S. MLA strongly favors the continued inclusion of the full catalogue of defenses from article 4(2)(b)-(p) of the Hague and Hague-Visby Rules, we do not favor the expansion of the catalogue. Thus we object to the drafting of Article 6.1.2(iv) to the extent that it could be construed to permit the carrier to avoid liability when it is “handling, loading, stow[ing], or unloading” cargo “on behalf of the shipper,” etc. Similarly, we object to the drafting of Article 6.1.2(v) to the extent that it could be construed to absolve a carrier from any liability occurring after a danger has arisen, even if the danger has passed. For example, if a container had caused a problem during a voyage but the problem was resolved, the carrier should not be entitled to avoid any subsequent liability for unrelated incidents. Similarly, Article 6.1.2(vi) (“fire”) should be restricted to fires on a vessel, and should protect only those operating the vessel. Fires on land should not be a defense, nor should land-based defendants be entitled to the benefit of the fire defense.

(iv) The obligations as set out in Article 5.2 should be included in the Convention (subject to the comments that follow).

(v) All of Alternative II for Article 6.1.1 is in brackets. Based on the commentary following Alternative II, however, the U.S. MLA assumes that the question refers to the possible expansion of the language referring to Article 5.2. The U.S. MLA would not favor a provision that treated the carrier’s fulfilling the Article 5.2 obligations as a necessary part of satisfying its burden of proof under Article 6.1.1 or as a precondition to relying on the Article 6.1.2 presumptions or exonerations.

If the carrier’s breach of Article 5.2 is *not* causally related to the loss, it is irrelevant and should be ignored. If the carrier’s breach of Article 5.2 *is* causally related to the loss, then the carrier could not satisfy its burden under Article 6.1.1 or rely on Article 6.1.2 in any event. When the unseaworthiness that results from the carrier’s breach of Article 5.2 is causally related to the loss, then “its fault ... caused the loss or damage.” The carrier could not satisfy its burden of proof under Article 6.1.1, and the case should fall within an exception to the exceptions created by Article 6.1.2.

Under the Harter Act, the U.S. Supreme Court held that the carrier’s failure to exercise due diligence to furnish a seaworthy vessel precluded the carrier from relying on section 3 of the Act (which generally corresponds to article 4(2) of the Hague and Hague-Visby Rules), even when the resulting unseaworthiness was unrelated to the loss. *May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft (The Isis)*, 290 U.S. 333 (1933). The Hague Rules changed this rule. The U.S. MLA would not favor a return to the Harter Act regime.

(vi) An article along the lines of Article 6.1.3 should be included to provide for an allocation of loss. Article 6.1.3 substantially as drafted is satisfactory. The U.S. MLA supports the concept expressed in the bracketed language, but would support an amendment to clarify that the carrier’s liability for one-half the damage is a default rule that should apply only when there is

Synopsis of the responses to the Consultation Paper

no evidence to establish the correct allocation. It is unclear what is meant by “sufficient clarity” in the current draft. When it is uncertain whether the carrier should be liable for 80% or 90% of the damage, for example, the court should do its best to pick some figure in that range. It should not hold the carrier liable for only 50% of the damage simply because it does not have enough evidence to choose between 80% and 90% “with sufficient clarity.”

CONSULTATIVE MEMBERS AND OBSERVERS

BIMCO

BIMCO notes that the Singapore Conference preferred a liability system based on fault. BIMCO can certainly lend its support in this respect. There is no basis for arguing that a fault-based liability regime is insufficient to induce carriers to undertake the necessary loss control measures to minimise loss or damage to goods. On the contrary, the fault-based liability regime has for many years induced carriers to undertake such control measures, the costs of which are economically justified by the reduction in the risk of loss and damage and consequent reduction in related insurance claims.

In respect of the questions raised in (i)-(iii) of paragraph 4 of the consultation paper, we like to respond as follows:

(i) BIMCO fully supports a liability system based upon presumed-fault in accordance with the Hague-Visby Rules.

(ii) BIMCO supports alternative I(a). However, as regards the inclusion of delay, please refer to our comments below under paragraph 5.

(iii) As regards Article 6.1.2 we are concerned at the proposal that the different perils mentioned should no longer being considered as a case of exoneration of liability, but only as a presumption of absence of fault.

We have great difficulty in seeing the rational for this proposition and wonder how this is intended to operate in practice. It hardly makes any sense to talk about presumption of absence of fault or liability if, for instance, the carrier can demonstrate that loss or damage was caused by the act or omission of one of the parties under sub-article (i) (i.e., the shipper, the holder or the consignee).

We strongly believe that the perils to be mentioned in the Revised Draft Outline Instrument should be straightforward exemptions so, that if the carrier can bring him within of those exemptions, he will not be liable.

BIMCO understands that there was considerable support at the Singapore Conference for the removal of the nautical fault defence. Discussing this matter at the OEDC workshop held in January 2001, BIMCO drew attention to the case of “*Hill Harmony*” arguing that the defence or error in navigation is still relevant in the carriage of goods by sea. First of all, it must be realised that the master often has to make difficult decisions in respect of navigation on the high seas in circumstances that are not comparable with those to be taken on land. Secondly, he may have to make such decisions bearing in mind not only the safety of the vessel and its crew but also the interests of commercial parties – considerations that may well conflict with each other.

While BIMCO fully agrees with the decision reached in the “*Hill Harmony*”, bearing in mind the particular facts of that case. However, a slight amendment of those facts would illustrate quite clearly the dilemma that owners may face when encountering fierce weather conditions at sea. For instance, had the vessel been en-route when the master saw a storm forecast – and had he decided to take a different route to avoid the storm resulting in increasing costs and duration of the voyage – would the owners be in breach of the time charter? This begs the question of which criteria the maser needs to bring into force in making his decision whether to deviate or not. It may be that the vessel is able to withstand heavy weather but nevertheless suffers damage during the encounter and neither damage to the vessel nor possible damage to cargo will be recoverable from the time charterers. If the master decides to deviate he may well face an off-hire claim from the time charterers who may also try and recoup from the owners any claim for delay that the cargo owners may pass on to the time charterers.

BIMCO cannot support that the owners defence in respect of error in navigation should be removed without further consideration of a number of other proposed changes in the Revised Draft Outline Instrument. Overall, the Revised Draft Outline Instrument is perceived to constitute a radical shift in risk, as regards cargo damage, from shippers to owners. An element to be considered in conjunction with a possible removal of the defence of error of navigation is the provisions in respect of delay as they are closely linked together. Initially, we are of the opinion that no liability for delay should be imposed upon the carrier where the parties have not agreed upon a fixed time limit within which the cargo must be delivered. It must be realised that a sea carriage often involves long distance sailings where the weather has a greater impact on timings than in other modes of transport. Despite sophisticated merchant vessel design it is impossible for the carriers to avoid delays on occasion. However, we will be prepared to consider this further depending the outcome of the discussions in respect of the nautical fault defence.

FIATA

The exemptions have been drafted from a sea carriage point of view and considerations would be necessary to those exemptions that exist in respect of other types of carriage.

ICS

ICS firmly believes that liability should be based on fault as in the Hague/Hague-Visby Rules.

The imposition of strict liability is not appropriate in contractual relations where the parties are able to protect themselves via the contract, insurance etc. Carriage of goods contracts are essentially a matter of private law rather than public law. They deal with the pragmatic allocation of risk between two parties on an equal footing, and their purpose is to provide for an efficient and economic distribution of losses with the minimum impact on the cost of transport.

The Hague/Hague-Visby Rules define the shipowners’ basis of liability in

Synopsis of the responses to the Consultation Paper

a precise manner and include a number of important defences which establish the overall scope of the shipowner's liability. Their long history has produced extensive case law to help interpret the practical application of the Rules. As a result, the Hague/Hague-Visby Rules provide a high level of consistency and predictability and their implications are clear to shipowners, cargo owners, freight forwarders and others who are involved in maritime transport.

ICS favours detailed liability provisions as in the Hague/Hague-Visby Rules. Article 3(1) and (2) and Article 4(2) (the "catalogue" of defences) of the Hague/Hague-Visby Rules provide helpful guidance to the parties and courts and are well understood.

ICS has the following responses to the questions posed in paragraph 4 of the Consultation Paper:

(i) Should the fault-based regime be based on presumed fault?

This would be consistent with the Hague-Visby Rules and can be supported by ICS.

(ii) If so, should the wording of the provisions setting out the carrier's core liability be based on Alternative I(a) or (b)?

Alternative I(a) is closer to the Hague-Visby Rules and, except for the reference to delay, can be supported by ICS. Alternative I(b) is based on the CMNI Budapest Convention (Inland Waterways) and introduces an objective standard i.e. that of "a diligent carrier" and litigation would be required to establish its meaning.

(iii) Should the exemptions be drafted as presumptions of absence of fault, as in Article 6.1.2 as drafted, or should some, or all of them be drafted as exceptions which would exonerate the carrier from liability?

ICS supports the view that the exemptions should be drafted as exonerations, as in the Hague-Visby Rules. A carrier who shows that he is within the exemptions should, to that extent, automatically be exonerated from liability.

As stated in the explanatory notes accompanying Article 6.1.2, at the Singapore Conference there was considerable support for eliminating the nautical fault defence. ICS, with the support of the P&I Clubs and others, argued for retention of the defence. In addition, a number of delegates were willing to consider elimination of the defence in the context of a larger package.

Accordingly, ICS is of the view that it is premature to delete the defence in its entirety and requests that it be included in the draft in square brackets for further discussion.

Elimination of the defence together with extension of the duty of due diligence as proposed in Article 5.2 and a change in the nature of the remaining defences from exonerations to rebuttable presumptions of absence of fault would represent a considerable shift of risk from cargo interests to carriers. This would lead to an increase in insurance costs for carriers without any corresponding decrease for cargo interests (this has been confirmed by cargo insurers in previous discussions on the subject).

ICS argues that there are valid reasons for maintaining the nautical fault defence in its entirety or at least in part. It is misleading to compare sea

transport with road, rail or air transport. The concentration of values is far greater, the period of time in transit is also many times that of the others and the exposure to unavoidable elements during the voyage over which the carrier has little or no control mean that the sea voyage is still a “common adventure” in a way in which no normal land or air journey ever is. A spread of risk is accordingly necessary at sea.

At the Singapore Conference we gave the facts of the *Hill Harmony* case (Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (*The Hill Harmony*), [2000] 3 W.L.R. 1954) to illustrate that the defence is still relevant today. The master often has to make difficult spur of the moment navigation decisions in circumstances that are not comparable with those on land and which may significantly impact the cargo carried, no matter how sophisticated the vessel or how well the cargo has been stowed. Such decisions will often be made under commercial pressure from cargo interests who want their cargo delivered at a particular time.

We also argue that the pilot error defence should be maintained given that carriers rarely have any choice in the allocation of a pilot.

We therefore propose that possible elements of a package be discussed and that the following text be inserted in Article 6.1.2:

“[(i) *Act, neglect, or default of the [master, mariner,] pilot[, or the servants of the carrier] in the navigation [or in the management] of the ship.*”

In our view, partial or total elimination of the nautical fault defence would only be acceptable in return for: narrow delay provisions; reasonable limits of liability which would be unbreakable except in cases of intentional or reckless personal acts or omissions (see Article 6.8); a provision on apportionment of damage corresponding to the draft US COGSA (September 1999) provision (sec. 9(e)); reciprocity (requiring carriers and cargo interests to adhere to the defences and limits in the instrument and prohibiting them from giving up their rights and immunities); and the inclusion of a burden of proof provision requiring the party alleging negligent navigation or management of the ship to prove such negligence (as in draft US COGSA). In this connection, it is our understanding that the Hague-Visby limits would be acceptable to shippers provided that such limits were capable of being reviewed in certain circumstances on the basis of an agreed procedure (we refer to the agreement between the World Shipping Council and NitLeague).

Furthermore, ICS is concerned that some of the traditional defences have been omitted e.g. war, quarantine, latent defects etc. and, subject to a satisfactory explanation for their deletion (the explanatory notes say that an attempt has been made to shorten and simplify the list), believes that they should be reinstated

(iv) *Should the obligations as set out in Article 5.2 be included?*

Article 5.2 is based on Article 3 (1) and (2) of the Hague-Visby Rules but the obligation to exercise due diligence before and at the beginning of the voyage to provide a seaworthy ship is extended to an obligation to do so throughout the voyage. This is said to be consistent with the exclusion of the exception of error in management of the ship but we are not convinced that this

Synopsis of the responses to the Consultation Paper

is necessarily so. While a prudent carrier would exercise due diligence throughout the voyage to maintain a seaworthy ship in any event, a conventional/statutory extension would significantly increase carriers' obligations. A carrier's ability to discharge such obligations would obviously vary considerably depending on whether the vessel was in port or in the middle of the ocean and litigation would be necessary to establish the parameters of the new requirement. The existing obligation has been interpreted by courts over the years and its meaning is generally considered to be settled.

(v) If so should the words in brackets in Article 6.1.1 Alternative II be included?

For the sake of clarity, Article 6.1.1 should include a cross-reference to Article 6.4.1.

If Article 5.2 is included, Alternative II would place the burden of proving the exercise of due diligence on the carrier which would be consistent with Article 4 of the Hague-Visby Rules. However, in our view it is not necessary to expand Alternative I (a) if Article 5.2 is included. ICS supports Alternative 1 (a) together with the inclusion of Article 5.2 but considers that Article 5.2 should be redrafted to confine the obligation to exercise due diligence to before and at the beginning of the voyage. (See also the ICS position regarding delay below.)

An alternative approach may be to apply the obligation as follows:

"5.2 The carrier shall be bound, before the commencement of the voyage and before the departure of the vessel from any intermediate ports of call during the voyage, to exercise due diligence to:"

(vi) Should an article be included to provide for an allocation of loss, and, if so, is an article along the lines of Article 6.1.3 satisfactory?

ICS takes the view that where a breach of the carrier's obligations and an excepted peril combine to cause loss/damage, the approach adopted in the proposed amendments to US COGSA would be preferable to the Hamburg Rules solution.

Article 6.1.3 combines elements of both the relevant draft US COGSA provision and the Hamburg Rules provision. However, it is not expressly stated which party bears the burden of proof. ICS would prefer clarity regarding the burden of proof and, accordingly, would support further refinements to this Article so that it is more closely aligned to the draft US COGSA provision.

Institute of Chartered Shipbrokers

The Institute broadly supports the text of Article 5.1 but expresses its reservations relating to the obligation under Article 5.1(a) for the carrier to keep the ship seaworthy during the voyage. The definition of an unseaworthy ship can take many forms and in practical situations there may be instances where it is better for the vessel to operate, albeit temporarily, in an unseaworthy condition if this is done with the aim of ensuring the successful prosecution of the voyage. We therefore believe that this sub-clause should be redrafted to take account of the practical realities of operating a vessel at sea.

The Institute supports Alternative I(b) of Article 6.1.1.

With regard to Article 6.1.2, the Institute supports the draft but expresses its preference for “contributed to” over “caused” in line 3. With regard to the exceptions in sub-sections (i) to (xi), the Institute believes these are reasonable. While there is no doubt that the “error in navigation” defence in Hague Rules has been misused, the very strong exception taken to the deletion of this exception by the shipowning community had a large bearing on the lack of success in fully implementing Hamburg Rules or implementing the UNCTAD Multimodal Convention. We consider that there should be some compromise to give these rules the opportunity of wider support. A modified “error in navigation” defence should continue to be available and related to the realistic stress and pressure on the ship’s command. Surely it is possible to draft such an exception clause that would exclude common carelessness or negligence.

IG

In its previous paper the IG expressed the view that irrespective of whether a fault based liability system similar to that found in the Hague / Hague-Visby Rules or a ‘strict’/‘stricter’ system were adopted, the overall costs of a marine adventure were unlikely to be substantially reduced, if at all. The more probable result of opting for the one rather than the other would merely result in a re-allocation of risk and an associated re-distribution of costs between carrier and cargo interests or much more likely, their respective insurers. The Study which we referred to in paragraph C above, reported that a very large majority (75-80%) of EU shippers purchase cargo cover, as it costs very little in relation to the value of the cargo (often below 0.1%), a reflection of the low incidence of loss and damage. Since the IG Clubs insure some 90-92% of sea-going vessels it is clear that the majority of ocean carriers effect indemnity insurance.

The IG has previously indicated to the ISC that in its view the DOI should provide for a fault based system, similar to that under the Hague/Hague-Visby Rules. As has been pointed out by the ICS this would ensure that:

(a) the extensive body of legal precedent relating to the interpretation of such a system, built up over many years (at not inconsiderable expense) in different jurisdictions that in many instances have adopted a common approach, would remain of value.

(b) Carriers, cargo interests and insurers alike can continue to rely on a well-established system with which they are familiar, that provides a high degree of consistency and commercial certainty.

In the IG’s view it would take many years and substantial costs to recover these obvious benefits, if the DOI were to provide for some other stricter form of liability system.

For these reasons the IG support the adoption of:

- (i) the ‘basis of liability’ wording as set out in Alternative I(a).
- (ii) a catalogue of exoneration’s from liability, similar to that contained in the Hague/Hague-Visby Rules.

The ISC has put forward for consideration:

Synopsis of the responses to the Consultation Paper

(a) the extension of the carrier's obligation to exercise due diligence in relation to the vessel's seaworthiness, to the whole of the voyage.

(b) the elimination of what is termed the 'nautical fault defence'.

The adoption of the one and the elimination of the other would in the IG's view alter the allocation of risk between carrier and cargo interests or more correctly their insurers, by imposing a greater risk on the carrier. The carrier would therefore bear an increased share of the overall costs of the adventure.

If it is decided that the nautical default defence should be eliminated in relation to the fault or negligence of the master or servants of the carrier, the IG believes that it should be retained in relation to pilot error since as has been previously pointed out the carrier in many instances must engage a pilot and further has no choice in the selection of the particular pilot.

IUMI

(i) The liability of the carrier should be based on fault as in the Hague/Hague-Visby Rules.

(ii) Alternative I(a) is supported as being closer to the Hague-Visby Rules. The wording of alternative I(b) can be found in the CMNI, adopted in October 2000 and introduces an objective standard. The term "diligent carrier" might lead to difficulties in the legal interpretation. The carrier has to prove that the loss or damage was caused by events or through circumstances that a diligent carrier could not avoid or the consequences of which a diligent carrier was unable to prevent. This double burden of proof seems to bring the liability very near to strict liability.

(iii) The majority of Committee Members supports the view that exemptions should be drafted as exceptions which would exonerate the carrier from liability as under the Hague-Visby Rules.

(iv) The question whether the obligations set out in Article 5.2 should be included can only be decided after a decision on the alternatives of Article 6 have been taken. Of course such obligations provide guidelines for courts and might therefore be beneficial. But, in the discussions of all these issues the balanced system of risk allocation between cargo owners and their insurers and carriers and P&I Clubs should be borne in mind. Every shift of the risk from one to the other side will most certainly lead to higher liability insurance premiums whereas cargo premiums will not be reduced correspondingly.

(v) See (iv).

(vi) At present, under many jurisdictions the carrier has to prove the extent to which the loss or damage is not attributable him and to the breach of his obligations. In practice the provision in square brackets would have the result that generally the liability of the carrier will be one half of the loss or damage as such a solution will be easier than to establish the apportionment. The sentence in square brackets should therefore be deleted.

NITL and WSC

Error in Navigation. – The basic liability scheme should be a fault based

regime as in the Hague Visby Rules. The list of exemptions should continue as in the MLA Text Section 9(c), including the elimination of the exemption for errors in navigation or management of the vessel. The burden of proof provision in MLA Text Section 9(d)(2) should be adopted in conjunction with the elimination of the error of navigation exemption.

Burden of Proof. – The burden of proof and liability of shipper and carrier in situations of dual fault should be governed by language similar to MLA Text Section 9(e).

Supplemental submission

Carrier Liability. – The parties agreed that the liability of a carrier for cargo loss or damage should be “fault-based,” as opposed to a strict liability regime. The parties agreed that the basis for carrier liability as provided in the Hague-Visby rules should govern. Generally, under a fault-based regime, a party is responsible for loss or damage that results from its acts or omissions, unless the circumstances show that the loss was not the result of its fault.

Error in Navigation. – The parties agreed that the elimination of the “error in navigation” or “nautical fault” defense should be included as a part of an acceptable package of changes included in a new Instrument. The error in navigation defense exonerates a carrier from liability for cargo loss or damage when the carrier could prove that negligent navigation of the vessel caused the loss or damage. All other defenses of the carrier, as provided for in the Hague-Visby rules, and as drafted in the MLA Proposal, should be preserved.

Burdens of Proof. – The parties agreed that the burdens of proof in a cargo loss or damage action should be modified in certain cases. The changes agreed to are as follows:

(i) **Negligent Navigation.** – The burdens of proof should be the same as the Hague-Visby rules, except that, in cases where a party alleges that the loss or damage was the result of negligent navigation or management of the vessel, the burden should be on that party to prove such negligence. This change would essentially shift the burden of proof at trial normally borne by the carrier (i.e. to show that it was not negligent) to the shipper or other complainant (i.e. to show that the carrier was negligent). *See* MLA Proposal, sec. 9(d)(2).

(ii) **Contributing Causes of the Loss.** – In a case where the loss or damage was caused in part by the fault of the carrier, and in part by another cause that was not the fault of the carrier (such as where the loss was the result of conduct or an event included in the list of defenses provided in Hague Visby), then the carrier should be liable for the loss only to the extent that the shipper or other complainant can prove that the loss resulted from the carrier’s fault. The carrier will not be liable for the loss to the extent that it can show that the loss was the result of one or more the defenses or exceptions to liability included in the Instrument. Thus, the carrier may be liable for only a portion of the loss to cargo that was caused by its fault, in a case where more than one cause contributed to the loss, subject to the liability limitation. *See* MLA Proposal, sec. 9(e)(1).

(iii) **Equal Sharing of the Loss.** – In a case where the carrier’s fault was a contributing cause of the loss to cargo but was not the only cause, and where the parties are unable to establish at trial the extent to which the carrier was at

fault (e.g. the proportion of the loss for which the carrier was responsible), then the total liability of the carrier should be one-half of the loss or damage, subject to the liability limit. *See* MLA Proposal 9(e)(2).

6.3 Liability of Performing Parties

6.3.1 (a) A performing party is subject to the responsibilities and liabilities imposed on the carrier under this Instrument, and entitled to the carrier's rights and immunities provided by this Instrument (i) during the period it has custody of the goods; and (ii) 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.

(b) If the carrier agrees to assume responsibilities other than those imposed on the carrier under this Instrument, or agrees that its liability for [the delay in delivery of,] loss of, or damage to or in connection with the goods shall be higher than the limits imposed under articles [6.4.2,] 6.6.4, and 6.7, a performing party shall not be bound by this agreement unless the performing party expressly or impliedly agrees to accept such responsibilities or such limits.

6.3.2 (a) Subject to article 6.3.3, the carrier shall be responsible for the acts and omissions of

(i) any performing party, and

(ii) any other person, including a performing party's sub-contractors, employees, servants, and agents, who performs, undertakes to perform, or procures to be performed any of the carrier's responsibilities under the contract of carriage, [to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control,] as if such acts or omissions were its own. Responsibility is imposed on the carrier under this provision only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency, as the case may be.

(b) Subject to article 6.3.3, a performing party shall be responsible for the acts and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its sub-contractors, employees, servants and agents, as if such acts or omissions were its own. Responsibility is imposed on a performing party under this provision only when the act or omission of the person concerned is within the scope of its contract, employment, or agency, as the case may be.

6.3.3 If an action is brought against any person, other than the carrier, mentioned in article 6.3.2, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Instrument if it proves that it acted within the scope of its contract, employment, or agency, as the case may be.

- 6.3.4 If more than one person is liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for in articles [6.4], 6.6 and 6.7.**
- 6.3.5 Without prejudice to the provisions of article 6.8, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Instrument**

MEMBER ASSOCIATIONS

Australia and New Zealand

In clause 6.3.1(b), we think the inclusion of the bracketed words “or impliedly” could give rise to unnecessary disputation and it would be preferable not to include them.

Croatia

Article 6.3.1(b). It seems more appropriate in this case to include only the *express* agreement. Namely, any performance under a transport instrument by the performing party might be taken as an implied acceptance.

Article 6.3.2(a)(ii). The bracketed words should be deleted. The carrier should be responsible for the performing carrier and any third party to which the performing carrier has delegated some responsibilities. Qualification of such delegation by the bracketed words would unduly weaken the position of claimant (even though he would probably be unaware of the delegations). It seems more appropriate burdening the carrier with reimbursing action against the performing party and/or its subcontractor(s).

CONSULTATIVE MEMBERS AND OBSERVERS

FIATA

In view of the redraft of 1.3. the text passage “undertakes to perform or procures to be performed” needs to be removed from 6.3.2 (ii).

ICS

Article 6.3 deals with liability of performing parties. The ICS position is that the instrument should deal with liability of the contracting carrier only. It is the contracting carrier with whom the shipper contracted and the fact that the contracting carrier in some cases sub-contracts part of the transportation to another carrier and in some cases performs the whole transportation himself should not change the legal position of the shipper. In addition, multiparty suits tend to be more protracted and difficult to settle. The arguments reinforce the case for all action to be taken against the contracting carrier, who would then have recourse rights.

We understand that shippers have also expressed a preference for the instrument to deal with liability of the contracting carrier only (we refer to the agreement between the World Shipping Council and NitLeague).

Synopsis of the responses to the Consultation Paper

However, ICS recognises that others have supported the regulation of liability of performing carriers in the Instrument and if that view prevails we would make the following comments:

The definition of “performing party” in Article 1.3 of the Instrument is narrower than the definition of “performing carrier” in the previous draft. This is explained in the notes accompanying Article 1.3. A narrow definition has been adopted for the purposes of imposing liability, but the scope of the Himalaya protection (Article 6.3.3) applies to a wider class of parties. This approach could be supported by ICS.

We would propose deletion of the words “or impliedly” in the sixth line of Article 6.3.1(b), because in our view the performing party should not be bound by greater responsibilities or higher limits agreed by the carrier unless the performing party has expressly agreed to them.

Article 6.3.3 would require the performing party to prove that it acted within the scope of its contract etc. which could be used by claimants to circumvent the protection. ICS proposes deletion of the phrase “if it proves ... the case may be.”

It should be made clear that the carrier has rights of recourse against the performing carrier, as in other international conventions.

IG

6.3 provides for the liability of ‘performing parties’ as defined in paragraph 1.3. The IG reiterates its belief that liability under the DOI should be ‘channelled’ to the contracting carrier alone and that the liability and protection of performing parties should be addressed through contractual indemnities. The concept of providing for the liability of performing parties as defined, seems to be an unnecessary complication of a regime the objective of which should be to simplify in so far as possible the carriage of goods involving a sea leg. The concept of channelling liability to a single party in international conventions has proved very successful e.g. the CLC Convention.

NITL and WSC

Performing Parties – The Instrument should not provide a right to sue a party performing the obligations of the carrier (see CMI Draft Articles 6.3.2(a)(i) and (ii)). The right of suit for cargo claims should be solely against the carrier issuing the contract of carriage. Agreement to a higher liability limit or greater responsibilities by the contracting carrier should not be binding on a performing party, unless the performing party agrees to such higher limit or responsibility.

Supplemental Submission

Performing Parties. – The parties agreed that the Instrument should not provide a right to bring an action for cargo loss or damage against a party that performs the obligations of the contracting carrier. Rather, all such actions must be commenced against the contracting carrier. The contracting carrier is responsible for the acts and omissions of any party that performs the duties of the carrier (including subcontractors and agents of performing parties). *See*

CMI Draft Instrument Art. 6.3.2. This provision assists in promoting a more uniform and predictable application of the Instrument.

6.4 Delay

6.4.1 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 [or, in the absence of such agreement, within the time it would be reasonable to require from a diligent carrier, having regard to the characteristics of the transport and the circumstances of the voyage].

6.4.2 If the loss or damage caused by delay in delivery includes consequential loss or damage, the amount payable as compensation for such consequential loss or damage shall be limited to an amount equivalent to [... times the freight payable for the goods being delayed]. In addition, the aggregate liability under article 6.7.1 and the first sentence of this article shall not exceed the limit that would be established under article 6.7.1 for the total loss of the goods in respect of which such liability was incurred.

MEMBER ASSOCIATIONS

Australia and New Zealand

This Association favours some limitation on the amount that can be recovered in respect of delay. The present Australian law on this topic provides one possible solution. The amount recoverable under Australian law is limited to the lesser of: “The actual amount of the loss, or 2? times the sea freight payable for the goods delayed; or the total amount payable as sea freight for all of the goods shipped by the shipper concerned under the contract of carriage concerned.”

This Association does not support a non-mandatory regime in this regard as such a regime would almost certainly result in standard provisions being inserted in bills of lading which consignees would have no opportunity to vary and carriers would presumably insert extremely low limits.

Canada

The carrier is liable under our law for wrongful delay. We agree that damages arising from delay should be covered, but submit that it is far too unwieldy to submit such claims to a different limitation of liability regime.

Croatia

Article 6.4.1. It seems that in judicial practice a view prevails that damages for delay are included in the phrase “loss or damage” of the Hague Rules. Now, to restrict delays to the agreed time performance period cases only, would prompt some to conclude, not only that there is no remedy under the Instrument for delays in such cases, but that the Instrument as *lex specialis*

Synopsis of the responses to the Consultation Paper

prevents application of the general law as well. Others, would argue that the general principle of law – requiring that an obligor has to act reasonably - simply can not be ignored. Therefore, it would be preferable to include the words in the brackets.

Article 6.4.2. We suggest to limit liability for loss or damage caused by delay under article 6.7.1., as we do not see the reason for having lower or different ceiling for liability for delays *versus* liability for physical damage to cargo.

Denmark

We can support Article 6.4.1 without the last three lines in parenthesis. This is particularly so if the navigational error exemption is abolished. In that case, the captain may be put in a bit of a dilemma if a more general delay liability is established: Severe weather conditions may make the captain think twice before proceeding with the voyage if the navigational error defence is abolished, but in such a case the shipowner may easily incur liability for delay.

When a time of delivery has been expressly agreed upon, we are in favour of limitation of liability for consequential loss or damage based upon freight rather than based upon weight/package.

France

Article 6.4. L'Association est favorable à une telle disposition et pour l'introduction de la partie de l'article 6.4.1 qui figure entre crochets. L'Association est favorable à une responsabilité pour les pertes ou dommages dus au retard (article 6.4.2). Une telle responsabilité doit être limitée, mais peut dépasser le montant du fret (par exemple, on peut prévoir qu'elle sera limitée à 3, à 4, ou à 5 fois le fret). L'Association estime que le calcul peut toutefois n'être pas toujours simple à effectuer ou très logique, lorsque le dommage lié au retard ("consequential loss") est partiel et n'affecte qu'une partie de la marchandise (hypothèse de fret global).

Germany

A majority of our Working Group favours imposing a liability for delay which depends on an express agreement on the time of delivery. The limit of liability in this respect should be left open until a consent on the principle has been reached.

Italy

(i) In our opinion very seldom the shipper will be able to obtain the endorsement in the transport document of the date by which the good should be delivered at destination and, therefore, the bracketed part of this provision is necessary. We have only some doubts on the expression "diligent carrier" and suggest the following alternative wording:

Within the time normally required for the completion of the transport from the place of receipt of the goods by the carrier to the place of delivery

This provision, however, should not be mandatory.

(ii) The economic loss resulting from delay can be as great as the physical loss of the goods and we see no reason why the limit should be related to the freight. We believe the limits in Article 6.7 should apply.

Japan

Hague-Visby Rules arguably do not cover the consequential loss caused by delay and the draft Outline Instrument changes this by providing for the compensation for such loss in certain cases. While it is necessary for the Instrument to provide an article for delay, a caution should be taken so that the carrier's liability should not be unreasonably augmented. Bearing this in mind, this Association would answer the specific questions in the Consultation.

(i) The liability based on "reasonableness" which now appears in bracket should be deleted from Article 6.4.2. Such a provision would induce unnecessary disputes. The carrier should be liable for consequential loss due to delay only when parties expressly agreed on the time for delivery. *If the liability for delay where there is no express contractual provision for the time of delivery is included in the Instrument*, the party should be free to opt out the liability for delay by inserting an express provision such as "arrival times are not guaranteed" etc. in the contract. (See, Comment on 9. Mandatory Provisions)

(ii) There should be an independent limitation of liability for delay along the lines of Paragraph 1(b) of Article 6 of Hamburg Rules.

Netherlands

6.2 Also in case of delay, no consequential damage should be compensated.

6.4 NMLA's view is that provisions on delay, if any, should not be mandatory law under the Instrument.

The speed of the voyage and the reliability of the vessel are essential elements of the product that a carrier offers to the market. These elements may be regarded as being reflected in the remuneration that a carrier receives for his product, i.e. the freight. Because of this primarily commercial nature, provisions on delay are unsuitable for mandatory law.

As a compromise, we could live with a definition of delay as 'the period in excess of an agreed (maximum) duration of the voyage'. In that case, parties should be left free to agree on the penalty if such delay occurs.

If in case of delay the Instrument would allow compensation for consequential damage, such damage should, in the absence of any specific agreement of the parties, be limited to the amount of freight charged by the carrier for the goods delayed.

Norway

(i) Our association would favour Art. 6.4.1 without brackets, i.e. with the language within brackets.

Synopsis of the responses to the Consultation Paper

(ii) We accept that the liability for consequential loss arising from delay should be limited by reference to the freight payable in respect of the goods delayed, or possibly a multiple thereof. We note, however, that there are no specific limits for such losses in the Norwegian Maritime Code. Hence the liability for delay is limited in the same way and with the same amounts per kilo or shipping unit as liability for loss of or damage to goods generally.

Peru

With respect to delays in cases where no specific time for delivery has been agreed, we understand that carrier must still act diligently. Thus, pursuing carriers obligation to exercise due diligence according to 5.2, brackets on wording to 6.4.1 must be removed, following Peruvian national law and Andean treaties. These last instruments establishes that whenever there is no term agreed for delivery carrier shall act diligently and if goods are not delivered in the next 90 calendar days to the delivery date shipper may deem they are lost.

However, Andean Decision (second paragraph of article 9) ascertains that even if a delay has taken place the carrier will only be liable if the shipper has declare time as essence and the carrier has agreed to it. We consider this highly inappropriate (as it will be not accepting the bracketed sentence of 6.4.1).

Consequential damages are not equivalent to actual physical damages, which indeed should be remedied accordingly with the value of the damaged goods. In opposition to this, it seems fair that compensations for consequential damages due to delays in delivery of the goods should be limited to amounts based in the freight paid to the carrier. Again, Peruvian International Multimodal Transport Act (article 22) and Andean Decision 313 (article 17) law links consequential damages to the paid in freight.

Spain

(i) The Spanish MLA would support the provision with the addition of the words in brackets.

(ii) The limitation for consequential losses (economic loss alone) is also acceptable.

(iii) A provision for “constructive loss” of the goods out of excessive delay, e.g. 90 days, is thought to be necessary, although giving always the Carrier the right to trace and deliver later those goods considered to have been lost if the consignee is willing to accept such delivery.

Sweden

Generally, there is a need to determine what is meant by delay; a guaranteed delivery time is different from a situation where delay has to be determined as a reasonable period, taking into consideration the circumstances in the individual case. Some more thought may also have to be given to delay in relation to deviation. That being said, we basically concur with the Norwegian MLA.

(i) We favour Article 6.4.1 without brackets, i.e. within the language within brackets.

(ii) We accept that the liability for consequential loss arising from delay should be limited by reference to the freight payable in respect of the goods delayed, or possibly a multiple thereof. We wish to point out that there are no specific limits for such losses in the Scandinavian Maritime Codes. Hence, the liability for delay is limited in the same way and with the same amounts per kilo or shipping unit as liability for loss of or damage to goods generally.

Switzerland

(i) We are of the opinion that the best solution would be to restrict the application of the liability for delay to cases where the time is either agreed on or where time factors are communicated to the market (time schedules of shipping lines) in such a way that the shipper and the consignee may rely on these communications. Such a solution would effectively leave it to the parties interested in the time aspect of the performance of the contract of carriage to clarify this in their contract of carriage, and it is clear that any delay to an agreed delivery time must bring about an indemnification.

(ii) We believe that the limits in 6.7, that is, the same limitation of liability provision applicable to all other types of damages covered by the liability regime, should apply. Additionally, we think that it may be necessary to state that, should the goods fail to be delivered before the extinction of the time bar, the claimant may claim the full value of the goods, limited by the general limitation amount just as if the goods had been lost.

Further, we think that a particular request for a notice of delay to the Carrier should be provided, barring the consignee/shipper to claim delay-damage after a specific period.

No legally practical or practicable test has been suggested which could clarify how “reasonable time” is to be defined. Therefore, we prefer that the bracketed text of the provision be omitted. This would allow compensation for delay only in cases of expressed agreement. To broaden the scope one could delete the word “expressly” as to allow proof of any other form of agreement.

Provided that the indemnification for delays is limited to agreed times of arrivals, we think that this special limitation could be deleted and replaced by the same limitation provision applicable to all other types of damages covered by the liability regime, with the additional statement that should the goods fail to be delivered before the extinction of the time bar, the claimant may claim the full value of the goods, limited by the general limitation amount just as if the goods had been lost.

United Kingdom

(i) The BMLA considers that liability should be imposed on the carrier where no specific time for delivery is provided for in the contract of carriage. The obligation should be to deliver “within the time which it would be reasonable to require of a diligent carrier having regard to the circumstances of the case”. The BMLA prefers “circumstances of the case” to “circumstances

Synopsis of the responses to the Consultation Paper

of the voyage” in view of the extension of the Convention to “door to door” transport. The BMLA also considers that it should be made clear that where there has been delay (eg. in delivering within the time expressly agreed upon) the carrier may still rely on absence of fault (see Article 6.1.1). The defences to a claim for delay should be the same as one for loss or damage.

(ii) The BMLA supports the view that there should be a separate limit of liability applicable to delay and that this should be based on a multiple of the freight. But it does not agree with the wording of Article 6.4.2 which refers to a limit for “consequential” loss or damage. The meaning of this expression is obscure and would give rise to much dispute and litigation. Does “consequential loss” include a loss of market value, a loss of use, or a loss of resale profit? It would be preferable to follow the model of Article 6, 1(b) of the Hamburg Rules and to make the limit applicable to “delay in delivery according to the provisions of Article 6.4.1”. It is to be noted that the expression “consequential loss” is used in Article 6.4.2 whereas “economic loss” is referred to in Article 6.9.2. Do the two expressions have the same meaning? The same expression should be used in both.

United States

(i) The U.S. MLA is not in favor of including the language contained in the bracketed section of Article 6.4.1. Liability for delay should be limited to instances when such damages has been specifically provided for in the contract.

(ii) The U.S. MLA is of the opinion that any damages for delay should be subject to the same limits provided in Article 6.7.

CONSULTATIVE MEMBERS AND OBSERVERS

FIATA

Unless a specific delivery date is contractually agreed upon, there should be no excessive liability for delay or for consequential loss. An intermodal train delay of only one day or the late arrival of a feeder vessel connection could mean hundreds of containers failing to be loaded on a scheduled ship and a delay of one week or more, depending on the service frequency. Yet, a carrier offering an intermodal or through service ought to be accountable for failure to make timely connections, for overbooking and shutting out cargo or for loading on a wrong ship (misdirection). Therefore, if there was no delivery date expressly agreed upon and there is delay, a reasonable penalty would be simply the forfeiture of the freight payable or a refund if the freight was paid. We would suggest to include the wording in square brackets.

BIMCO

BIMCO can support liability for delay where the parties may have agreed that delivery will be made within a specific time. If it is agreed that the Revised Draft Outline Instrument should contain provisions in respect of liability for consequential loss or damage arising from delay, the limitation should be

based upon freight in accordance with commercial practice. (See, by way of example, clause 3(b) of BIMCO's "Conlinebill 2000").

ICS

Article 6.4 deals with delay. ICS has the following responses to the questions posed in paragraph 5 of the Consultation Paper:

(i) *Should liability for delay be imposed on the carrier where no specific time for delivery is provided for in the contract of carriage?*

ICS takes the view that no liability should be imposed in such circumstances. Article 6.4.1 without the words in square brackets corresponds to the ICS position and achieved widespread support at the Singapore Conference. The words in square brackets did not appear in the previous draft. Liability for delay is primarily a commercial matter which should be left to the parties to negotiate. The duration of a voyage depends on many factors and it would not always be possible to apply standard provisions.

We propose that Article 6.4.1 be redrafted as follows:

"6.4.1 Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within a time expressly agreed upon, if any."

(ii) *Should there be a separate limit, based on freight, for consequential loss arising from delay or should the limits in Article 6.7 apply?*

The limits in 6.7 apply to "liability for loss of or damage to or in connection with the goods". As stated in the explanatory notes, delay will sometimes cause physical damage to the goods and liability for that could be limited in accordance with 6.7. However, delay will sometimes cause economic loss even though the goods themselves are not physically damaged e.g. a delayed consignment of Christmas decorations. ICS takes the view that there should be no liability for consequential loss unless the parties have expressly agreed to such liability by separate contract.

Institute of Chartered Shipbrokers

The Institute supports the unbracketed words in Article 6.4.1. Additionally in Article 6.4.2, the Institute supports the inclusion of a freight rate multiple as a basis for limitation of compensation.

IG

6.4 provides for liability in the event of delay. Assumption of responsibility for delay even in limited circumstances places a further risk on the carrier. The IG therefore agrees with the majority view, for the reasons put forward by the ICS, that if the carrier is to be liable for delay it should:

- (a) only be imposed if a specific time for delivery has been agreed.
- (b) not extend to consequential loss unless agreed.

IUMI

- (i) A majority of Committee Members is in favour to impose liability for

Synopsis of the responses to the Consultation Paper

delay only on the carrier if a specific time for delivery has been agreed upon in the contract. Under other transport conventions the carrier is liable for delay even if no specific time for delivery has been agreed in the contract. But carrier and shipper are commercial parties on an equal level. The shipper and the carrier can agree on a specific time for delivery if the goods must arrive within a certain time to avoid consequential loss or damage. If no specific time is agreed an interest of the shipper that the goods arrive within a certain time does not seem exist. Therefore, no liability should be imposed on the carrier when no specific time for delivery has been agreed in the contract.

NITL and WSC

Delay. – Damages may be recovered for actual physical damage to cargo resulting from delay; provided that such damages would be available under the Instrument only if the contracting carrier agreed in writing to delivery by a date certain. In any case, damages would be subject to the Package/Unit limit (point B. 2 above). A contracting carrier and a shipper may explicitly agree to consequential, liquidated or other damages in a contract of carriage.

Supplemental Submission

The parties agreed that the carrier should be responsible for actual physical damage that result from a delayed delivery where the shipper and carrier have agreed in writing to a specific date for delivery, subject to the liability limit. This would increase the recovery to U.S. shippers and shippers subject to the Hague Visby Rules, since there generally is no recovery for delayed shipments under COGSA or Hague Visby. Additionally, a shipper and carrier may agree in a contract to hold the carrier responsible for additional or different damages, such as consequential or liquidated damages, that may result from delayed deliveries.

6.5 Deviation

- (a) The carrier is not liable for loss, damage 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) Where under national law a deviation of itself constitutes a breach of the carrier's obligations, the consequences of such breach shall be determined exclusively in accordance with this Instrument.**

MEMBER ASSOCIATIONS

Australia and New Zealand

This Association would support the addition of the following words at the end of sub-clause 6.5(a), “or circumstances beyond the control of the carrier” and the insertion of the following words after deviation in line 2: “authorised by the shipper, or deviation ...”

Croatia

Hamburg rules qualify the attempt to save property by requiring “reasonable measures to save property at sea”. We guess that the test of *reasonableness* would apply anyway, but it seems useful to stress that the risks related to an attempt to save property at sea for salvage remuneration should be balanced against care for cargo on board of the carrying vessels..

Switzerland

We suggest that, due to great diversity in the interpretation of the concept of deviation, the new Convention should add the term “*a reasonable deviation*” as an additional exception in Article 6.1.2.

CONSULTATIVE MEMBERS AND OBSERVERS

NITL and WSC

Deviation. – The concept of unreasonable deviation should only apply with respect to the routing of an oceangoing vessel and an unreasonable deviation will lead to a loss of the liability limit only in cases covered by CMI Draft Section 6.8.

Supplemental submission

The parties agreed that the Instrument should clarify the “unreasonable deviation” concept, which in the past has been used to “break” the liability limitation and hold the carrier responsible for greater damages. In this regard, it was agreed that the concept should not be broadly employed but rather should extend only to cases involving a deviation in the routing of an oceangoing vessel and should only result in the “breaking” of the liability limit when the conditions set forth in item 6 above are met. Narrowing the application of the unreasonable deviation concept is intended to provide for a more consistent and predictable application of the Instrument.

6.6 Deck cargo**6.6.1 Goods may be carried on deck only if**

- (i) such carriage is required by applicable laws or administrative rules or regulations, or
- (ii) they are carried in or on containers on decks that are specially fitted to carry containers, or,
- (iii) in cases not covered by paragraphs (i) or (ii) of this article, 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.

6.6.2 When the goods have been shipped in accordance with article 6.6.1(i) and (iii), the carrier shall not be liable for loss of 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 article 6.6.1, the carrier shall be liable, irrespective of the provisions of

article 6.1, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.

6.6.3 When the goods have been shipped in accordance with article 6.6.1(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 article 6.6.1(iii) and, where a negotiable transport document is issued, is not entitled to invoke that provision against a third party that has acquired such negotiable transport document in good faith.

6.6.4 If the carrier under this article 6.6 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 the articles 6.4 and 6.7; however, if it was expressly agreed to carry the goods under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods which exclusively resulted from their carriage on deck.

MEMBER ASSOCIATIONS

Australia and New Zealand

In the penultimate line of sub-clause 6.6.1(iii), we query what circumstances are intended to be covered by the words “or follows from other usage in the trade in question” but, in any event, suggest that the words “is consistent with” might read better than the words “follows from”.

We query whether the reference to “good faith” is necessary if our suggestion for the inclusion of the word “lawful” in 1.13 is acceptable.

Italy

Article 6.6.1 sets out three cases in which goods may be carried on deck: (i) when such carriage is required by applicable laws or administrative rules or regulations; (ii) when goods are carried in or on containers on deck that are specially fitted to carry containers; (iii) when in cases not covered by the preceding provisions the carriage is in accordance with the contract or complies with the customs of the trade or follows from other usages in that trade. Then article 6.6.2 provides that when goods are shipped in accordance with article 6.6.1(i) and (iii) the carrier shall not be liable for loss, damage or delay caused by the special risks involved in their carriage on deck. No reference is, however, made to article 6.6.1(ii) and it is therefore unclear what is the liability regime applicable in case of loss, damage or delay in respect of containerised cargo on decks specially fitted for their purpose. Article 6.6.2 provides that if the goods are carried on deck in breach of article 6.6.1 the carrier shall be liable for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck. It is suggested that rather than mentioning the case of the carrier being in breach of article 6.6.1, reference should be made to the situation where stowage on deck is made in cases not covered by that article.

6.7 Limits of liability

- 6.7.1** The carrier's liability for 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 has 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 carrier and the shipper.]
- 6.7.2** 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.
- 6.7.3** 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 that 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 that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

MEMBER ASSOCIATIONS***Australia and New Zealand***

This Association is content for the bracketed portion in the last three lines to be included.

Croatia

Article 6.7.1. We would suggest avoiding alternatives and use the following wording: “ ... *except where a higher amount than the amount of limitation of liability set out in this article had been agreed upon between the carrier and the shipper and included in the contract particulars.*” This wording should make it clear that the higher amount has to be *agreed upon*, and not only, in the discretion of the shipper, be declared and included in the contract particulars. The carrier has a right to reject higher limits for whatever reason [like insurance cover]..

Italy

The limits do not apply where the nature and value of the goods has been declared by the shipper and inserted in the transport document. The question, however, arises whether by declaring the value the shipper is not required to prove the actual value of the goods in case they are lost or damaged, the declaration constituting a prima facie evidence of such value. It is thought that since the declaration of value has the purpose of excluding the operation of the limits and replacing such limits with the value so declared, the value constitutes a new limit and the consignee has the same burden of proof he would have had if no such declaration had been made. An additional reason for this is that the carrier would have no means (or time) to check the correctness of the value declared by the shipper prior to inserting it in the transport document. The additional provision according to which a higher amount may be agreed between the parties has been placed in square brackets for the reason that it has to be decided whether any mandatory provision (such as that on the limits of liability) should be one-sided or two-sided mandatory. It is thought that the mandatory character of the limits of liability is dictated for the protection of the shipper and that, therefore, as in the Hague Rules, it should be permitted to the parties to increase the limits. It would be odd to allow a declaration of value, which results in the abolition of the limits, and to deny the possibility of agreeing a higher limit.

Switzerland

It remains to be clarified in what circumstances and following what procedures the applicable limitation figures should be revised in light of inflation. We suggest here a rule following the model of the Montreal Convention 1999, as follows:

“(1) Without prejudice to the provisions of Article 6.7.3. of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles ... shall be reviewed by the Depositary at five year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or, if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or, in the first instance, since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighed average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in Article 6.7.3.

(2) If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 percent, the Depositary shall notify State Parties of revision of the limits of liability. Any such revision shall become effective six months after its notification to the State Parties. If within three months after its notification to the States a majority of their

State Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the State Parties. The Depositary shall immediately notify all State Parties of the coming into force of any revision.

(3) Notwithstanding paragraph 1 of the Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one third of the State Parties express a desire to that effect and on condition that the inflation factor referred to in paragraph 1 has exceeded 30 percent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph."

CONSULTATIVE MEMBERS AND OBSERVERS

ICS

In our view, reasonable limits of liability and an appropriate tacit amendment provision should be considered as part of the package in connection with partial or total elimination of the nautical fault defence.

While it may be premature to discuss the actual limits of liability at this stage, we would point out that the Hague-Visby limits are generally considered to be adequate for the vast majority of claims. When considering the limits, claims experience must be taken into account and ICS would be opposed to proposals based solely on deterioration of monetary values. Many other factors are involved, such as the type and value of commodities, and improvements in packaging and transport generally. Furthermore, preliminary research suggests a significant decline in the relative value of freight rates over the years.

ICS suggests that the following amendment (in bold) should be made to Article 6.7.1:

*The carrier's liability for 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 ad valorem freight is agreed** and the nature and value of the goods has been declared by the shipper before shipment and inserted in the transport document.*

Institute of Chartered Shipbrokers

With regard to Article 6.7, the Institute broadly supports the proposed text but refers the Comité back to its submission on Maritime Cargo Liability Regimes (provided in January 2001 via Mr. Roger Clarke, Consultant to the OECD MTC investigation) insofar as we believe that containers should be considered as one unit irrespective of whether or not the shipper has enumerated the contents. As we commented at that time, it is today almost unknown for container contents to be physically checked at any stage of the transport chain, except for Customs or health reasons, and even these checks

Synopsis of the responses to the Consultation Paper

are now being replaced by electronic means. A new Convention should therefore reflect modern commercial practice, under which the carrier is not in a position to ascertain to his own satisfaction whether the information provided by the shipper is an accurate reflection of the contents of that container and accordingly should not be required to assume a liability that he cannot accurately assess.

NITL and WSC

Package/Unit Limitation. – The Hague-Visby liability limits and the Special Rule for Consolidated Goods should be incorporated into the Instrument and govern all trades as per MLA Section 9(h)(1) and (2). The liability limit should be “unbreakable” in all cases, except as provided in CMI Draft Article 6.8. The parties agree that the Hague-Visby limits should be subject to a procedure that would allow adjustment of the limits according to the following terms: (a) the limits would not be subject to adjustment for a period of seven years from the time the Instrument entered into force or were last adjusted; (b) a majority of parties to the Instrument must forward a proposal for an adjustment for consideration by all the parties; (c) a vote of 2/3 of the parties to the Instrument would be needed to adjust the limit; (d) the limit in effect could not be increased or decreased by more than 21% in any single adjustment, and in total, not more than 100% cumulatively above the initial limits; and (e) any adjustment would be effective one year from the date of the vote approving the adjustment.

Supplemental Submission

Limitation of Liability. – The parties agreed that the carrier’s liability for loss or damage to cargo should be limited to and should be based upon the standard set forth in the Hague Visby rules (666.67 Special Drawing Rights (“SDR”), as defined by the International Monetary Fund, per package or 2 SDR per kilogram of the gross weight of the goods lost or damaged). This change would bring the U.S. cargo liability system in line with international standards, and would nearly double the liability limitation set forth in COGSA. However, as discussed immediately below, the standard would be subject to a procedure for amendment.

Procedure to amend liability limit. – The parties agreed that the liability limit may be adjusted in the future, in order to ensure that the Instrument is a “living” document that would not become out-dated over the years. Adjustment to the limitation standard should be subject to specific terms and procedures, including that: (i) the Hague Visby standard would be fixed for a period of seven years from the time the Instrument entered into force (and any adjusted standard would be fixed for at least seven years); (ii) a proposal for amendment would require the support of the majority of the parties to the Instrument; (iii) 2/3 of the parties to the Instrument must vote to adjust the limit; (iv) no single adjustment may alter the limitation by more than 21%; (v) the limitation shall not be increased cumulatively by more than 100%; and (vi) any adjusted limit would take effect one year from the date of the vote adopting the adjusted limit.

Definition of Package. – The parties agreed that the Instrument should clarify the meaning of the term “package,” to assist in the application of the liability limitation. The parties agreed that where goods have been consolidated in a container, pallet or similar transportation device, the number of packages identified in the bill of lading or other contract of carriage as being packed in such consolidating device shall govern. Thus, in such cases, the container or pallet should not be considered the “package” when applying the liability limitation.

6.8 Loss of the right to limit liability

Neither the carrier nor any of the persons mentioned in article 6.3.2 shall be entitled to limit their liability as provided in articles [6.4.2,] 6.6.4, and 6.7 of this Instrument, or as provided in the contract of carriage, if the person seeking to recover in excess of the limitation amount proves that [the delay in delivery of,] the loss of, or the damage to or in connection with the goods resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with the knowledge that such loss or damage would probably result.

MEMBER ASSOCIATIONS

Australia and New Zealand

It seems to this Association to be inappropriate to let a carrier limit its liability in circumstances in which an employee or agent of the carrier was responsible for the act or omission which was done with an intent to cause loss or damage or recklessly etc. That, however, would seem to be the effect of the wording of this section since it would presumably be the corporate carrier who is seeking the benefit of limitation but its employees or agents who have done the act complained of. Similarly if it is a stevedore/longshoreman company or terminal operator that is seeking the benefit of limitation the personal acts or omissions done with the requisite intent or recklessness of their employees would not preclude reliance on limitation on our reading of the provision. The note to subsection 8 draws attention to the fact that intentional acts could be performed either by servants or agents or by the carrier personally and the point we wish to make is that is true in the respect of both loss and damage as well as delay and we think, to be consistent, the limits should be breakable in circumstances in which any employees or agents of anyone seeking to limit their liability would break their right to limit.

Croatia

The words in both brackets should be included.

Italy

The provision on the loss of the right to limit, which is basically the same

Synopsis of the responses to the Consultation Paper

as in the Hamburg Rules (which differs from that in the Hague-Visby Rules for the intentional or reckless action is referred to the very loss that occurred by using the words “such loss”), calls for one drafting and one substantive comment. The former is that the reference to the limit “as provided in the contract of carriage” at present should be placed in square brackets as has been done for the parallel provision in article 6.7.1. The latter is that some further thoughts should be given to the requirement that the action should be personal. The rule “respondeat superior” is thus applied in part: the carrier is liable for the acts of his servants or agents (now included in the expression “performing party”) but his liability is always limited, even if the action is intentional or reckless. Is that right? It must be considered that the “performing parties” (including, therefore, the carrier’s servants or agents) lose the right to limit if the action is intentional or reckless. In our opinion also the carrier should lose the benefit of limitation in such case. The risk of the servants or agents (and, also, sub-contractors) causing loss of or damage to the goods intentionally or recklessly is a risk within the sphere of activity of the carrier, and it is only right that he should bear it. In any event, if this were not the case, consideration should be given to the possibility of defining the “personal act” when the debtor is a legal entity. Such definition, which for example has been made in Germany when giving effect to the 1976 Limitation of Liability Convention, would enhance uniformity in a very delicate area.

Switzerland

Not entirely clear whether only the actual acts of “the person claiming the right to limit” are breaking the limit, or whether also acts of such a person’s “servants and agent” would count as such an act.

CONSULTATIVE MEMBERS AND OBSERVERS

IG

6.8 deals with the loss of right to limit. The IG believes that if it is decided that the DOI should impose liability for consequential losses for delay, limits relating to such loss should be unbreakable.

NITL and WSC*Supplemental Submission*

Breakability of the liability limit. – The parties agreed that in the interest of ensuring uniformity and predictability in cargo loss and damage cases, the liability limitation should be applied in all such cases, except when the party seeking to recover from the carrier proves that the loss or damage resulted from an act or omission of the carrier that was intended to cause the loss or damage, or was reckless and the carrier had knowledge that the loss or damage would probably result. *See* CMI Draft Instrument Art. 6.8. Thus, the liability limitation should apply in all cases, except where it is shown that the carrier’s actions or omissions which caused the loss or damage were particularly egregious.

6.9 Notice of loss, damage or delay

- 6.9.1** 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 or the performing party who delivered the goods 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 that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.
- 6.9.2** No compensation shall be payable for economic loss resulting from delay in delivery unless written notice of such loss was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.
- 6.9.3.** When the notice in writing referred to in this chapter is given to the performing party that delivered the goods, it shall have the same effect as if that notice had been given to the carrier, and notice given to the carrier shall have the same effect as notice given to the performing party that delivered the goods.
- 6.9.4.** In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods.

MEMBER ASSOCIATIONS***Australia and New Zealand***

The same point as we have made earlier in relation to the definition of “carrier” would apply to line 5 of this sub-clause. If notice is given to an employee or agent of the carrier because of the restricted definition of “carrier” it is arguable that compliance with the provision does not take place. The same may not necessarily be true in relation to the giving of notice to the “performing party” as the definition of “performing party” goes beyond single persons and arguably giving notice to an employee of a performing party would be sufficient as such persons are likely to have been performing one of the carrier’s responsibilities under the contract of carriage. However for the avoidance of doubt it may also be necessary to refer to employees or agents of the performing party in this clause. In the penultimate line, once again, the reference to “consignee and the carrier or the performing party” should be enlarged to encompass their employees or agents.

Italy

Article 6.9.1 provides that the carrier shall be presumed to have delivered the goods according to their description in the transport document unless notice of loss or damage is given to the carrier before or at the time of delivery or, if the loss or damage is not apparent, within three working days. It is not

Synopsis of the responses to the Consultation Paper

clear what is the effect of the notice: if the presumption of proper delivery ceases to exist, does the notice have the same value of a proof of the loss or damage? This would not be reasonable, because the consignee should not be allowed to discharge the burden of proof by means of a unilateral notice which only indicates the general nature of the loss or damage. But if this is not the case, what is the effect of the notice? It is appreciated that a similar provision exists in the Hague-Visby Rules, but its effect has always been unclear and it would not be reasonable to repeat it without stating what its effect is.

Switzerland

This provision has to be carefully compared to applicable land-solutions. Thus, if a door-to-door application is maintained: a consignee situated somewhere inland receives his shipments usually by road. When shipments are containerised, the damage is usually discovered when the container is opened at the consignee's premises, and very often it cannot be proved at which transport leg the damage actually occurred. In this case, according to CMR, the consignee has seven working days to make reservations against the carrier for a non apparent damage. The consignee may not easily know whether the goods he received were shipped under CMR or under this door-to-door instrument. It might not be justified to change this period to three days if there was a sea leg that preceded the road transport.

Art. 7 OBLIGATIONS OF THE SHIPPER

- 7.1 A shipper shall, in accordance with the provisions of the contract of carriage, deliver the goods ready for carriage and in such condition that they will withstand 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.**
- 7.2 The carrier shall provide to the shipper, on its request, all the information, including instructions, that it knows or ought to know and that is reasonably necessary or of importance to the shipper in order to comply with its obligations under article 7.1.**
- 7.3 The shipper shall provide to the carrier all the information, instructions and documents that are reasonably necessary for:**
 - (a) the handling and carriage of the goods, including precautions to be taken by the carrier or a performing party, unless the carrier or the performing party already knows or ought to know such information or instructions;**
 - (b) 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 issuance of the transport documents, including the data referred to in article 8.2.1(a) and (b), the name of the party to be identified as the shipper in the transport document and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the carrier.
- 7.4 The information, instructions and documents that the shipper and the carrier provide to each other under articles 7.2. and 7.3 must be accurate and complete, so as to enable the other party fully to rely on such information, instructions and documents for the purpose for which it is requested or intended within the scope of the contract of carriage. Each party, however, is entitled, but never obliged, to examine whether the information, instructions and documents provided by the other party are accurate and complete.
- 7.5 The shipper and the carrier are liable to each other, the consignee, and the controlling party for any loss or damage that is caused by either party's failure to comply with their respective obligations under the articles 7.2, 7.3, and 7.4.
- 7.6 The shipper is liable to the carrier for any loss, damage, or injury caused by the goods, unless the shipper proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent.
- 7.7 If a person is identified as the shipper in the transport document and accepts that document, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 14.
- 7.8 The shipper shall be responsible for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, servants, agents, and any other persons who act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Responsibility is imposed on the shipper under this provision only when the act or omission of the person concerned is within the scope of its contract, employment, or agency, as the case may be.

MEMBER ASSOCIATIONS

China

7.2 The title of chapter 7 is the *Obligations of the Shipper*, so we think language of the provision of 7.2 is not very available herein on the basis of thinking of other provisions of chapter 7.

We suggest that the language of 7.2 should be changed to adapt to other provisions of Chapter 7 or change to other chapter, for example, Chapter 5 Obligation of Carriers alternatively.

Synopsis of the responses to the Consultation Paper

7.4 Delay in providing the information, instructions and documents under articles 7.2 and 7.3 is also likely to cause loss or damage, it is therefore suggested that the first sentence be amended to read *“The information, instructions and documents that the shipper and the carrier provide to each other under articles 7.2 and 7.3 must be accurate, complete and timely provided, so as to enable the other party fully to rely on such information, instructions and documents for the purpose for which it is requested or intended within the scope of the contract of carriage.”*

7.7 In practice, the seller under FOB contracts of sale often, at the request of the buyer, or to comply with the relevant provisions of the commercial credit, naming the buyer as the shipper in the transport document. In such cases, the present wording of this article is likely to deprive such seller of the rights and immunities provided by this chapter and by chapter 14, which, in our opinion, is not reasonable and fair.

7.8 From the present wording of this article, it is not clear whether the liability of the shipper for the person to which it has delegated the performance of any of its responsibilities under this chapter is fault-based or stringent.

We believe these needs shall be clarified and may be harmonized with the liability regime stated in articles 7.5 and 7.6. Our opinion is that the shipper should be liable for the failure of the person who has been authorised by the shipper for the obligations under the articles 7.2, 7.3, and 7.4. Even if the person has actually performed without any fault, while only when the loss, damage or the injury caused by the goods is caused by the non-performance of the obligations under this chapter, the shipper deemed to be taken responsible.

Further, we are of the opinion that the person delegated by the shipper should, as those delegated by the carrier, be entitled to the protection of Himalaya clause. Therefore Himalaya clause is suggested to be incorporated into this chapter.

We further suggest that the following four articles concerning the obligations/liabilities of the shipper should be added in this chapter.

7.9 The contracting shipper shall be liable to the carrier for the whole responsibilities under the contract of carriage, but the consignor shall be liable only for his own parts of responsibility under the contract of carriage. If there is overlap of responsibility under the contract of carriage, both parties shall be jointly and severally liable to the carrier. However, such stipulations shall not affect the rights of recovery between both parties. The contracting shipper and consignor shall not be jointly and severally liable for their respective different obligations and responsibilities at the loading port, which shall be definitely stipulated in the contract.

7.10 At the time of shipment of dangerous goods, the shipper shall, in compliance with the regulations governing the carriage of such goods, have them properly packed, distinctly marked and labelled and notify the carrier in writing of their proper description, nature and the precautions to be taken.

7.11 In case the shipment involves live animals, the shipper itself shall bear the loss of or damage to the live animals arising or resulting from the special risks inherent in the carriage thereof, upon the condition that the carrier

could prove that it has fulfilled the special requirements of the shipper with regard to the carriage of the live animals and that under the circumstances of the sea carriage, the loss or damage has occurred due to the special risks inherent therein.

7.12 In case the goods have been shipped on deck in accordance with the agreement with the shipper or complying with the custom of the trade or the relevant laws or administrative rules and regulations, the shipper itself shall bear the loss of or damage to the goods caused by the special risks involved in such carriage.

CONSULTATIVE MEMBERS AND OBSERVERS

FIATA

An agent (such as another carrier or a performing party) may be acting on behalf of the shipper, identifying himself as the shipper on a transport document. An agent should not be liable for the faults of the principal. See also our commentary on Article 1.4 (definition of Shipper). Article 7.7 should be deleted.

ICS

In our view, Article 7.2 should be deleted in its entirety because the shipper is primarily responsible for providing information peculiar to the cargo to the carrier. Imposing a secondary obligation on the carrier to provide the shipper, on request, with **all** information that the carrier knows or **ought to know** to enable the shipper to discharge its primary obligation would place a considerable burden on carriers and could give rise to litigation. The provision should be omitted and it should be left to the parties to deal with such matters on a case by case basis.

ICS is of the view that a separate provision should be drafted in addition to Article 7.6 to address dangerous and polluting goods. In accordance with internationally accepted principles, the shipper should have strict liability for any loss, damage or injury caused by such goods to persons and cargo on board and to the ship itself.

The principles in 7.7 should not depend upon acceptance. Accordingly, the words “and accepts that document” should be deleted. In addition, if no person is identified in the transport document as the shipper, there should be a presumption that the person delivering the cargo is the shipper.

IG

The IG believes that Article 7.2 should be deleted for the reasons put forward by the ICS.

NITL and WSC

Supplemental Submission

Shipper Misstatements. – The parties agreed that a carrier or ship should

Synopsis of the responses to the Consultation Paper

not be responsible for loss or damage to goods, or otherwise in connection with the goods, if the shipper knowingly and materially misstated the nature or value of the goods in the contract of carriage. This clause would essentially prohibit recovery to a shipper who knowingly fails to provide accurate information to the carrier about the goods. It is not intended to address carrier liability when an inaccurate statement as to the goods is inadvertent or immaterial.

Art. 8 TRANSPORT DOCUMENTS

8.1 Issuance of the Transport Document

8.1.1 Requirement to Issue a Transport Document

After the carrier or a performing party receives the goods, the carrier must issue an appropriate transport document if the shipper [or the person who delivered the goods to the carrier or a performing party] requests one.

8.1.2 Shipper's Entitlement to a Negotiable Transport Document

The shipper and the carrier may agree that the carrier will not issue a negotiable transport document. Such an agreement may be express or implied. In the absence of such an agreement, the shipper is entitled to a negotiable bill of lading or other negotiable transport document.

MEMBER ASSOCIATIONS

Australia and New Zealand

This Association suggests that clause 8.2.1(e) should provide not only for “the identity of the carrier” but also that its place of incorporation and address should be identified.

China

The well-established three functions of bill of lading should be considered in this outline instrument although certain issues therein should be clarified and resolved in this instrument, especially for those negotiable transport documents. We suggest that the third sub-provision shall be added. That is

(c) a carrier undertakes to deliver the goods against surrender of which is negotiable transport document, except in the e-commence thereby that has no need to surrender.

8.1. Issuance of the Transport Document

8.1.1 Requirement to Issue a Transport Document

The consignor or the person who delivered the goods to the carrier or a performing party is in most cases the FOB seller who needs a transport document for the settlement of exchange under L/C and for the performance of contract of sale. It is advisable to stipulate that the consignor be entitled to a transport document. If it occurs that both the shipper and the consignor request transport document, it may make sense to give, by balancing the

interests of the shipper and the consignor, the consignor the right to request transport document.

It is not enough to give the consignor the right to request a receipt, since a receipt cannot serve the purpose of settlement of exchange under L/C.

8.1.2 Shipper's Entitlement to a Negotiable Transport Document

If the consignor is also entitled to a transport document, the right to request a negotiable document should also be given to the consignor.

Italy

In the commentary it is stated that it is not settled whether both the shipper and the consignor have the right to request a transport document and that since no solution was arrived at, it may make sense to give both the contracting shipper and the consignor that right. The obvious solution to the question is that the shipper, as the contracting party, should be entitled to receive the document. This does not cause any problem if the shipper is the seller of the goods, i.e. if the goods are sold on c.i.f. terms. The shipper needs the document in order to present it to the buyer's bank and obtain payment of the price for the goods. The situation, however, differs where the goods are sold at f.o.b. terms and the shipper (who is the person who enters into the contract of carriage with the carrier) is not the consignor (who is the person who delivers the goods to the carrier for transportation). The consignor is the seller and as such he is entitled to receive the transport document in order to present it to the bank and obtain payment of the sale price. Originally the draft Outline Instrument contained a definition of consignor and it was considered that the consignor – and not the shipper – should be entitled to receive the transport document as the person who hands the goods over to the carrier. It is felt, however, that as respects the contract of carriage, the consignor acts as an agent for the shipper and as such he may receive the documents if the shipper has authorized him to do so. Perhaps the solution could be to provide in the draft Outline Instrument that unless otherwise agreed, when the goods are handed over to the carrier by a person other than the shipper, the transport document shall be handed over by the carrier to that person. In such a case the c.i.f. seller being the shipper (and the consignor), the transport document will be delivered to him while in a f.o.b. sale the seller, being the consignor, will be entitled to receive the transport document and will also be entitled to refuse handing over the goods to the carrier should the carrier (pursuant to an agreement with the f.o.b. buyer who will be his contracting party) refuse to do so.

Japan

The bracketed sentence in draft Article 8.1.1 should be deleted. It is not clear what kind of transport document the person who delivered the goods to the carrier (consignor) can require and this may cause unnecessary disputes.

Switzerland

The relationship between articles 8.1.1. and 8.1.2 is unclear. Is the shipper only entitled to ask for 8.1.1. or can he also request 8.1.2.? We read it as if he

could do both unless it is agreed otherwise. Is there a time after which the request is not enforceable anymore?

There also seems to be a logical problem at 8.1.1. in connection with 8.1.2., namely that in 8.1.1. we read that a transport document is only issued if requested, whereas in 8.1.2. we read about an agreement not to issue a transport document and that such an agreement may be even implied. If the rule should be that a document is only issued upon request, then no agreement not to issue a document is necessary.

CONSULTATIVE MEMBERS AND OBSERVERS

ICS

Article 8.1.1 should be redrafted to maintain the distinction between negotiable and non-negotiable transport documents. Carriers often provide evidence of receipt of goods to both shippers and consignors on request where waybills are involved but this is not the practice with bills of lading.

8.2 The Contents of the Transport Document

8.2.1 Required Contents of the Transport Document

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

- (a) show the leading marks necessary for identification of the goods as furnished in writing by the shipper before the carrier or a performing party receives the goods;
- (b) show the number of packages, the number of pieces, the quantity, and the weight as furnished in writing by the shipper before the carrier or a performing party receives the goods;
- (c) describe the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper;
- (d) state the date:
 - (i) on which the carrier or a performing party received the goods, or
 - (ii) on which the goods were loaded on board the vessel, or
 - (iii) on which the transport document was issued.
- (e) adequately identify the carrier; and
- (f) be signed by the carrier in accordance with Article 8.2.3.

8.2.2 The phrase “apparent order and condition of the goods” in this chapter 8 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 shipper delivers them to the carrier or a performing party and (b) any additional inspection that the carrier or a performing party actually performs before issuing the transport document.

8.2.3 Signature

- (a) **The transport document shall be signed by or for the carrier or a person having authority from the carrier. [A transport document signed by or for the master of a ship carrying the goods is deemed to have been signed on behalf of the registered owner or the bareboat charterer of the ship.]**
- (b) **Unless this is inconsistent with the law of the country where the transport document is issued, the signature on the transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, made by any other mechanical means, or done electronically in accordance with chapter 2.**

8.2.4 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 article 8.2.1, or the inaccuracy of one or more of those particulars, does not affect the legal character or validity of the transport document.**
- (b) **If a transport document fails to describe the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper, the transport document is prima facie or conclusive evidence under article 8.3.3 that the goods were in apparent good order and condition at the time the shipper delivered them to the carrier or a performing party.**

MEMBER ASSOCIATIONS

Canada

We expressed concern in Singapore with the phrase “apparent order and condition of the goods” as applied to containerized cargo.

China

It seems some items need be added to the required contents, for examples, description of the goods, the name of consignee or to order. In this regard, reference may be made to the provisions of Article 15 of the Hamburg Rules.

8.2.2 Definition of “apparent order and condition of the goods”

It is advisable that “as packaged” be changed into “whether packaged or not”, because on many occasions goods are unpackaged.

8.2.4 Omission of Required Contents from the Transport Documents

It is fully doubtful where, due to the absence of one or more of the very limited particulars listed in 8.2.1, a transport document does not have the functions defined in 1.7, the legal character or validity of the transport document shall not be affected. In this regard, we suggest that the article 15(3) of the Hamburg Rules be preferred, which stipulates “...provided that it nevertheless meets the requirements set out in para. 7 of Art. 1”.

In paragraph (a), the words of “or the person who delivered the goods” need be added after “shipper”.

Croatia

Article 8.1 (a). The words in the brackets to be retained.

Italy

Article 8.2.4 provides that the absence in the transport document of one or more of the particulars referred to in article 8.2.1 does not affect the legal character or validity of the transport document. It is very likely that the word “particulars” does not include all the required contents of the document as set out in article 8.2.1 and, more specifically, the requirement that the document be signed by the carrier. It is in fact obvious that the lack of signature would indeed affect the legal character of the document. Perhaps the word “information” would be better than “particulars”. In addition, however, doubts may arise as to the consequence of the total omission of any description of the goods. That would probably affect the legal character or the validity of the transport document.

Article 8.2.3 provides that the transport document must be signed by or for the carrier or a person having authority for the carrier (this applies in all cases where the document is signed for the carrier). There follows a bracketed sentence stating that a transport document signed by or for the master is deemed to have been signed by or on behalf of the registered owner or the bareboat charterer of the ship. This provision must be considered together with that of article 8.4.2 pursuant to which if the transport document fails to identify the carrier, then the registered owner shall be deemed to be the carrier, except that he may defeat that presumption if he proves that the ship was under a bareboat charter at the time of the carriage and the bareboat charterer accepts responsibility for the carriage of the goods. There is no doubt that the holder of the document needs protection in case the carrier is not properly identified in the transport document: in such case there must be a person he is entitled to sue, irrespective of whether or not such person actually is the contracting carrier. Such person cannot but be the registered owner, who can always be identified through the ship's register. If the owner is not the contracting carrier, he should know who he is and could take the necessary action in order to ensure that he identifies himself in the transport documents he will issue. It has, however, been deemed proper to allow the owner to prove that he is not operating his ship, in which event he can defeat the presumption that he has acted as carrier, provided, however, the bareboat charterer accepts responsibility. This provision operates only when the carrier is not properly identified in the transport document. From this it follows that the presumption in the bracketed part of article 8.23(a), whereby a transport document signed by or for the master shall be deemed to have been signed by the owner or the bareboat charterer of the ship, is both wrong and unnecessary. It is wrong because if the actual carrier is properly identified in the transport document the presumption cannot operate. It is unnecessary because if the carrier cannot be properly identified in the transport document the presumption of article 8.4.2 operates anyhow.

Switzerland

The name of the shipper and the name of the carrier, should be a required content of the Transport Document because the shipper needs to be identified therein. See 7.3. (c). We do not follow the reasons given at the end of 8.2.1. for not identifying the shipper. The consequences of the shipper not being identified in the transport document do not need to be formulated in the Convention, at least not necessarily. The shipper should be known for various reasons, in particular if an assignment of his rights against the carrier is necessary.

CONSULTATIVE MEMBERS AND OBSERVERS**ICS**

ICS considers that Article 8.2.1 requires the carrier to include too much detail in the transport document. In particular, 8.2.1 (b) requires the carrier to show the number of packages, pieces, quantity *and* weight, whereas the Hague/Hague-Visby Rules require *either* the number of packages or pieces *or* the quantity *or* weight.

The first alternative in the square bracketed language in Article 8.3.3 (b) is preferred i.e. "... if the transport document has been transferred to a third party acting in good faith."

A conclusive evidence rule is not appropriate for non-negotiable transport documents since there is no third party holder to protect.

The words in square brackets in Article 8.2.3 should be deleted because the stated presumption regarding signature of the master will not always be the case.

8.3 Qualifying the Description of the Goods in the Transport Document**8.3.1 Circumstances Under Which the Carrier May Qualify the Description of the Goods in the Transport Document.**

Under the following circumstances, the carrier, if acting in good faith when issuing a transport document, may qualify the information mentioned in article 8.2.1(a) or 8.2.1(b) 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 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 or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container.
- (c) For goods delivered to the carrier or a performing party in a closed 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 neither the carrier nor a performing party weighed the container, and (ii) the shipper and the 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.

MEMBER ASSOCIATIONS

China

8.3.1 In paragraph (b), “the description of goods” need be added as the first item.

Croatia

Article 8.3.1. Should the qualifications be inserted *with or without* reasons or explanations? If, unlike the Hamburg Rules, no specifications for the qualifications are required (which we would prefer) than, for avoidance of doubt, it should be clearly prescribed.

Italy

The two conditions set out in article 8.3.1(c) for the validity of a qualification of a statement of weight of goods carried in a closed container call for some comments. As regards the condition under (i) it seems to be very difficult for the carrier to give a negative proof, viz. the proof that neither he nor a performing party weighed the container. As regards the condition under (ii), it is not clear on whom the burden lies of proving that the carrier and the shipper did not agree in writing that the container would be weighed. Logically, it is the party who invokes the existence of an agreement that should produce such agreement. But the way in which the provision is worded leaves some doubts about this.

Switzerland

This provision should work not just for goods packed in containers, but

for goods delivered to the carrier packed and thereby concealing their content and order (quality and quantity). 8.3.1. only addresses quantity issues. Should not the same apply in relation to quality?

One would want to clarify that the reference to numbers and weight in the transport document would be the applicable information for the purpose of calculating the limitation amounts as per 6.7.2.

Finally, we have debated whether it is wise to include in such a Convention what could be seen as a “users manual” for carriers on how best to (“ab”-)use the advantages of qualifying clauses (8.3.1. and 8.3.4.).

8.3.3 Prima Facie and Conclusive Evidence

Except as otherwise provided in article 8.3.4, a transport document is

- (a) prima facie evidence of the carrier’s receipt of the goods as described in the transport document; and**
- (b) conclusive evidence of the 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].**

MEMBER ASSOCIATIONS

China

The first alternative introduced in the commentary, i.e. “if the transport document has been transferred to a third party acting in good faith” seems more appropriate.

Croatia

Article 8.3.3.(b). Bracketed words after the words “if the transport document has been transferred to a third party acting in good faith” should be omitted, because that part of the provision is too vague and could provoke unnecessary litigation..

Denmark

The conclusive evidence rule should be strictly limited to negotiable documents. There is a need to protect new holders who have acquired negotiable documents.

France

L’Association estime que la “conclusive evidence” doit être limitée aux documents négociables.

Synopsis of the responses to the Consultation Paper

Germany

Because we find that only an acquisition of the goods in good faith can justify the protection of the buyer's confidence, we can accept the provision including the first alternative within the brackets (until the word faith).

Italy

The question whether the conclusive evidence rule should be extended to non negotiable transport documents is linked to the policy decision on whether it is deemed convenient to facilitate the use of such documents in contracts of sale providing for the payment of the sale price against documents. In the affirmative such extension would definitely be useful, even though the conclusive evidence principle is linked to the negotiable nature of the document.

Japan

A non-negotiable transport document is a conclusive evidence between the carrier and the consignee as is provided CMI Uniform Rules for Sea Waybills. Protected third party in bracket of 8.3.3(b) should be the first alternative ("a third party acting in good faith") rather than the second ("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"). Many civil law countries do not require that the third party should have paid value to be protected and neither do Hague-Visby Rules (Article III. 4) nor Hamburg Rules (Article 16).

Netherlands

The basis of the conclusive evidence rule is the protection of the 'innocent' third party holder of the negotiable document. The application of this rule should not be extended to cases where non-negotiable documents are used.

Norway

The Hague-Visby provision in question, Art. III, Rule 4, was introduced by the Visby Protocol in relation to Bills of Lading or similar documents of title at the request of the common law countries. In most, if not all, civil law countries, the provision was not necessary since it follows from the negotiability of the Bill of Lading that information therein can not be rebutted by the carrier as against a third party acting in good faith. In relation to non-negotiable transport documents, on the other hand, we do not see the need for such a provision, neither in common law nor in civil law countries since, in our view, the information contained in such a document should be *prima facie*, rebuttable, evidence, but nothing more, of the quantity and quality of the goods in question.

Peru

It seems clear that a document bound to circulate must contain in it all and any material right entitled to its holder, specially the right to collect the goods from the carrier or a performing party. Therefore document shall be conclusive evidence if it has circulated and holder has acted in good faith, as stated in the first circumstance covered in 8.3.3 (b).

Non negotiable documents and negotiable documents that has not circulated can be *prima facie* evidence, as there is no good faith third party to protect and contractual relation among carrier and shipper may be evidenced by other means or may be subject to other agreements not incorporated to the document.

Spain

Our view is that there is no scope for a conclusive evidence rule in the case of a non-negotiable transport document.

Sweden

We wish to note that there are difficulties in determining certain concepts where there appear to be differences between different legal systems, such as negotiability, transferability and document of title.

In our view, a conclusive evidence principle should be restricted to “negotiable” documents. There is a need to protect new holders who have acquired a negotiable document (i.e. here a Bill of Lading) in good faith.

Switzerland

We are of the opinion that in the case of a non-negotiable transport document, where only two parties (and possibly a consignee) are involved in the transaction, the receipt function of the bill of lading is only marginally important and the added security that the carrier cannot disprove the *prima facie* evidence does not have the importance that it has *vis à vis* third parties relying solely on a negotiable instrument. The special estoppel provision that rules out this rebuttal of the evidentiary value of the clean bill of lading *vis à vis* a *bona fide* third party is, on the other hand, a cornerstone of international trade, and the quantity, quality and particular characteristics of the goods should become conclusive as soon as third parties rely on the document.

United Kingdom

The Consultation Paper seeks views “as to whether in the case of non negotiable transport documents there is any scope for a conclusive evidence rule”. The question raises the whole question of what is meant by a “negotiable” or “non-negotiable” transport document, a question which will be discussed later in this response.

The BMLA believes (see below) that the true distinction is between “transferable transport documents” (i.e. documents the transfer of which operates or is capable of operating to transfer the right to delivery of the goods from one person to another) and “non-transferable transport documents” (i.e.

Synopsis of the responses to the Consultation Paper

documents under which the right to delivery of the goods may be transferred from one person to another otherwise than by transfer of the document).

It is self-evident that a conclusive evidence clause is required where a transferable transport document is issued. Civil Law countries which regard bills of lading as negotiable documents in the true sense (as documents capable of conferring a better right on the endorsee than that of the endorser) may not need such a provision. English law however, does not regard a bill of lading as “negotiable” in this sense. Consequently an estoppel is required if the document is transferred to a third party. If a non-transferable document is issued, then that document does not form part of the mechanism whereby the right of delivery may be transferred from one party to another. The mechanism may be one of assignment or it may be due to the exercise or transfer of the right of control. The view of the BMLA is that, as in such a case the transfer is effected otherwise than by means of the transfer of the document, there is no scope for a conclusive evidence rule.

The BMLA notes that Art III Rule 4 of the Hague Visby Rules does not impose any requirement of reliance, whereas Article 16.3(b) of the Hamburg Rules renders the bill of lading particulars conclusive “if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein”. The BMLA considers that if a conclusive evidence rule were to be introduced for non-transferable documents, it would be necessary to introduce a requirement of reliance.

United States

The U.S. MLA supports the application of Article 8.3.3(b) to non-negotiable transport documents. The justification for the “conclusive evidence” rule is not the nature of the document but the innocent third party’s reliance on it. The U.S. MLA therefore favors the inclusion of the bracketed language. Without the bracketed language, 8.3.3 might be too inflexible and might permit a fraud to be committed against an innocent third party.

Furthermore, the U.S. MLA would support the extension of the “conclusive evidence” rule to govern not only the description of the goods but also statements in the transport document such as “freight pre-paid.” Thus article 9.5(a), for example, should be expanded to cover all transport documents, not just negotiable transport documents, “if a third party acting in good faith has paid value or otherwise altered its position in reliance on the [statement] in the transport document.”

CONSULTATIVE MEMBERS AND OBSERVERS***BIMCO***

On the face of it, there would seem to be no apparent need for a conclusive evidence rule in respect of non-negotiable documents. However, it has to be realised that banks do recognise non-negotiable documents for the purpose of

letter of credit transactions provided certain conditions are fulfilled (See UCP 500, Art. 24(1)). We suspect that where the banks do agree to finance a business transaction on the basis of a non-negotiable document they may have an interest in such a document applying the conclusive evidence rule.

In any event, we have noted that the CMI Rules for Sea Waybills contain a conclusive evidence rule in Clause 5(ii)(b) and we believe there to be a good reason for this.

Institute of Chartered Shipbrokers

The Institute supports the text as drafted, including the bracketed wording in sub-section (b).

IUMI

In our opinion the transport document can only be conclusive evidence of the 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. Such a provision is contained in the CMI Uniform Rules for Seaway Bills.

The second part of the sentence in square brackets should be deleted.

8.3.5 When Qualifying Clauses are Effective

Subject to article 8.3.6, a qualifying clause in a transport document is "effective" for the purposes of article 8.3.4 under the following circumstances:

- (a) For non-containerised goods, a qualifying clause that complies with the requirements of article 8.3.1 will be effective according to its terms.**
- (b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of article 8.3.1 will be effective according to its terms [if the carrier or a performing party delivers the container intact and undamaged and there is no evidence that the container has been opened after the carrier or a performing party received it].**

MEMBER ASSOCIATIONS

China

The content contained in the bracket in paragraph (b) seems appropriate.

Denmark

At the July meeting of the International Sub-Committee, there was a large majority, which saw serious difficulties in accepting the proposal in Article 8.3.5 (b), 2nd part in parenthesis. Inevitably containers may often suffer surface damage, which may have no importance as far as the contents of the containers are concerned. Accordingly, we fully support deletion of the last three lines.

Synopsis of the responses to the Consultation Paper

France

L'Association est favorable à l'introduction des termes entre crochets, qui permet à la réserve de produire effet si le container est délivré intact et sans dommage et s'il n'y a pas de preuve que le container a été ouvert après sa prise en charge. Mais l'Association estime qu'une telle disposition, dans sa formulation actuelle, soulève une difficulté de preuve, liée au fait qu'il n'est pas précisé qui doit rapporter la preuve de l'ouverture éventuelle du container. La charge de la preuve ne devrait pas reposer sur le transporteur.

Germany

We cannot yet express a final opinion as the provision is subjected to Article 8.3.6 which the draft does not contain.

Italy

We believe that there should be a link between the type of loss or damage and the abnormal external conditions of the container. If, for example, the container is indented at delivery but the seals are intact, why should the qualifying clause relating to the number or weight of the packages become ineffective?

Perhaps a wording along the following lines might be preferable:

unless the conditions of the container are such as to indicate that the loss or damage complained of occurred after the carrier or the performing party received the container.

Japan

This Article seems to be problematic. In theory, there is no logical connection between effectiveness of the qualifying clause and the condition of the delivered container. In practice, the rule set out in draft Article 8.3.5 (b) could lead an unreasonable result for the carrier in such a case, for example, where a sealed container was opened by local authority during the carriage. It should be noted that when a delivered container is badly damaged and the goods contained are also damaged, the carrier is *not automatically* relieved from the liability *even if the qualifying clause is effective*. In this case, it is usually assumed that the damage to the goods occurred during the transport at the same time when the container is damaged and the carrier is likely to be held liable. This means that carriers are not unreasonably exonerated from liability even without the requirement of containers being delivered intact, closed and undamaged.

Netherlands

For goods delivered to a carrier in a closed container the presumption applies that the carrier did not inspect the goods, and, consequently, he is allowed to insert a qualifying clause in the transport document (article 8.3.1.(b)). This presumption follows the day-to-day practice in the container trade. We fail to understand why such presumption should no longer apply in cases where the container is damaged or opened. In our view, the effect of

article 8.3.5 is punitive, because precisely in those cases where a carrier needs the presumption, he would not be allowed to rely on it. This, irrespective the cause of the damage to the container or its opening.

For this reason, NMLA regards the prerequisite of the qualifying clause being effective, as expressed in this provision, unacceptable.

Norway

The proposed provision is acceptable in principle. It is believed, however, that the term “undamaged” needs some sort of qualification. A qualifying clause in a Bill of Lading should not be invalid simply because there is e.g. a minor dent in the container in question.

Peru

Article 8.3.5 is subject to article 8.3.6 which does not exist (?).

Bearing in mind that a carrier that receives a closed container is not able to verify its content and the condition of such content the carrier shall not be liable for any loss or damage caused to the carriage if he delivers an intact and undamaged container, as in the bracketed sentence incorporated to 8.3.5 (b). In the other hand, it shall also be explicitly mentioned that a qualifying clause will not be effective whenever it is shown that the container or its sealing marks have been damaged, while the burden of the proof in this cases shall rely in the shipper or the controlling party.

Spain

Article 8.3.5(b) is acceptable, as suggested, though using rather the expression “sealed” instead of “closed”.

Sweden

The proposed provision is acceptable in principle. We think that there is a need of qualifying what is meant by “undamaged”, since there may be surface damages which have no importance for the protection of the goods.

Switzerland

We are of the opinion that the reference of “intact/closed/undamaged” should be deleted, since these elements only raise the issue of an incident door transport, but leave the question of the proof of the pre-existing quality and quantity untouched. The latter should remain the shipper’s risk.

United Kingdom

The BMLA can see no possible logic in the bracketed words in Article 8.3.5(b). Where goods are shipped in a closed container and neither the carrier nor the performing carrier in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container, the carrier should be entitled to rely on a qualifying clause. It is a complete non-sequitur to say that if the carrier does not deliver the container intact and undamaged “it

Synopsis of the responses to the Consultation Paper

appears that the carrier has done at least something wrong". The container may have been opened by the Customs; it may have been pilfered by stevedores employed by the consignee or the port authority. There is no warrant for depriving the carrier of the protection of the qualifying clause in precisely those circumstances where the carrier may reasonably seek to rely on it. The bracketed words would operate most unfairly in such circumstances.

United States

The U.S. MLA would like the bracketed language changed to include the requirement that both the container and the seal be delivered intact. The requirement that the container be delivered "undamaged" should be defined to limit the damage to damage that could have been causally connected to the loss.

CONSULTATIVE MEMBERS AND OBSERVERS***BIMCO***

BIMCO considers it to be a rather strange proposition to make it a prerequisite for the qualifying clause to be effective that the container is in fact delivered intact and undamaged. The right for the carrier to insert qualifying remarks as regards the goods to be carried has been firmly embedded in carriage of goods by sea regimes since the Hague Rules and should not be qualified by making it a condition that the container in which goods may be carried shall be delivered intact and undamaged. Thus, external events, like severe weather conditions encountered during a sea voyage resulting in surface damage to containers, might deprive the carrier from relying on the qualifying clause. This would obviously lead to arbitrary results.

ICS

Article 8.3.5 (b) regarding qualifying clauses in respect of containerised cargo requires further consideration. The carrier should not be deprived of his right to rely on a qualifying clause simply because the container has sustained minor surface damage or the seal has been broken. The words in square brackets should be deleted.

Institute of Chartered Shipbrokers

The Institute supports the retention of Article 8.3.5(b) including the bracketed text.

IUMI

The draft outline instrument does not contain an Article 8.3.6. Therefore, it is difficult to decide whether the provision 8.3.5(b) is acceptable or not. This needs further consideration.

NITL and WSC

Shipper's Load and Count Clauses. – The validity of such clauses should be recognized by adoption of the language in MLA Text Sections 7(e), (f) and (g), provided such language is clarified so that qualifying statements do not lose their effect (1) simply because a container is damaged, or (2) because the container seal was broken, when the seal breakage was for the purpose of inspection, was properly witnessed, and the container was resealed.

Supplemental Submission

The parties agreed that the Instrument should provide for the validity of Shipper Load & Count clauses, which permit a carrier to qualify on a bill of lading or contract of carriage information provided by the shipper as to marks, number, quantity or weight of the goods, in certain cases. When found to be effective, the qualification by the carrier should prevent the statements describing the goods in the bill of lading or other contract of carriage from being prima facie evidence of their accuracy. The parties further agreed that the language in MLA Proposal Sections 7(e), (f) and (g) addressing Shipper Load & Count clauses, should be adopted in the new Instrument with certain clarifications.

8.4.2 Failure to Identify the Carrier

If the transport document fails to identify the 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 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.

MEMBER ASSOCIATIONS***China***

We suggest that the time limits of evidence provided be added in this article, otherwise where the registered owner successfully defeats the presumption, the cargo interests may still file a claim against the bareboat charterer before time-bar.

Denmark

A transport document signed by or on behalf of the master should in our view be deemed to have been signed on behalf of the (contracting) carrier. Thus the second part of Article 8.2.3 (a), which is in parenthesis, is not acceptable to us. In the commentary, it is mentioned that Article 8.2.3 is based on Article 14, 2° and 3° of the Hamburg Rules. This is certainly not the case as far as the parenthesis in Article 8.2.3 (a) is concerned. Under the Hamburg Rules Article 14, 2°, a bill of lading signed by the master is deemed to have been signed by the contracting carrier.

Synopsis of the responses to the Consultation Paper

Furthermore, we cannot support Article 8.4.2, which provides for a presumption of the registered owner being the carrier. If e.g. a time charterer fails to clearly specify in his bill of lading that he is the carrier, it would be rather arbitrary to consider the registered owner liable as carrier in such a situation.

France

L'Association est favorable à l'introduction de la présomption évoquée dans cette disposition, sous réserve de l'existence de problèmes pratiques liés à une éventuelle prescription de l'action récursoire qui pourrait être exercée contre l'affrètement coque-nue par le propriétaire du navire visé par l'article.

L'Association estime qu'il n'est pas nécessaire de définir ce qu'est un document n'identifiant pas le transporteur.

Germany

i) A majority of our Working Group supports the deletion of the provision because they feel that a contractual responsibility should not be imposed on third parties. If the owner is the performing carrier it would become responsible as performing carrier who has taken the goods into possession. In any case the second sentence should be deleted.

ii) We have no indication how the failure to identify the carrier should be defined. Obviously, this would leave much uncertainty.

iii) We feel that it would be impracticable to confine the rule to documents signed by the Master.

Italy

(i) We fully support the inclusion of a presumption along the lines of Article 8.4.2. It is in fact necessary to overcome the present difficulties facing the consignee who must sue the carrier. Nor is such presumption such as to cause difficulties to the owner who does not operate his ship, since he can require the charterer to indicate his name on the transport document and, if the charterer fails to do so, he can sue him.

(ii) The failure to identify the carrier occurs when the name and address of the carrier are not printed on the heading of the transport document or it clearly appears that the name printed is not that of the carrier. It in fact occurs that certain transport documents indicate on the heading the name of an agent or even the name of the shipper as it occurs in the grain trade.

(iii) Article 8.4.2 should apply generally, whether the transport document is signed by the master (this is rather unfrequent) or by an agent. Failing this, Article 8.4.2 would not be very useful. In this connection we would suggest to delete the bracketed part of Article 8.2.3(a) which is not necessary and may be even misleading, if read in conjunction with Article 8.4.2.

Japan

As is repeatedly expressed in the past ISCs, this Association is reluctant

to include provisions along the lines of 8.4.2. The registered owner such as a trust bank who financed the ship owner is not an appropriate person responsible for the carriage of goods.

The rule like draft Article 8.4.2 would also incur ambiguity and uncertainty. It should be noted that there is no consensus about when the transport document fails to identify the carrier. For example, the heading of the bills of lading is regarded as important factor to identify the carrier in some jurisdictions and not in others. It is also well known that there are jurisdictions which recognize more than one “carrier” for one bills of lading or which impose the liability on an “apparent carrier”. It is not clear if and how draft 8.4.2 can be reconciled with these rules. The mere inclusion of draft Article 8.4.2 would introduce additional uncertainty to this confused area of law unless these issue are not clearly solved and we reluctantly have to admit that it is difficult, if not impossible, to have a satisfactory solution until the next meeting.

If Article 8.4.2 or similar provision is included the Instrument despite these problems, the nature of the presumption should be examined more carefully. The present text provides that the registered owner can defeat the 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. It is not perfectly clear that this sentence provides the only way for the registered owner to defeat the presumption or indicates one of several ways to do so. This Association wishes that the latter is the case and that the Instrument clarifies this.

Netherlands

- (i) Such presumption should be included.
- (ii) NMLA prefers a general formula, such as ‘appropriate in the particular case’ or the like.
- (iii) The presumption should be limited to transport documents signed by the master only.

Norway

- (i) Our association would accept a provision along the lines of Art. 8.4.2. only if the presumption is that the registered owner shall be presumed to be the Performing party. We would find it difficult to accept, however, that the registered owner shall be presumed to be the carrier and , as a result, in effect have to accept as its own all the terms and conditions of a transport document/contract of carriage to which is not privy. The unidentified carrier may eg have accepted an ad valorem freight in exchange for higher limits of liability or may have misdescribed the goods in the document or agreed to a completely unrealistic delivery time – all of which the registered owner would normally be unaware of and uncompensated for.

We would also like to suggest the modification in the second sentence that the registered owner should be able to rebut the presumption that it is the carrier if it proves that the ship was under a bareboat charter, which under its

Synopsis of the responses to the Consultation Paper

terms transfers contractual responsibility for the carriage of goods to the bareboat charterer, who shall then be deemed to be the carrier. In other words, it would not be necessary for the bareboat charterer to accept responsibility, which it may or may not be likely to do, but it would suffice for the registered owner to demonstrate that the contract transfers responsibility to the bareboat charterer. It should be considered further to what extent the party identified by the registered owner as the carrier, has to be a “bona fide” party. We would not favour a solution where the registered owner could rebut the presumption, unless the carrier he identifies is proven to be the “real” carrier.

(ii) We would prefer a simple reference to “failure properly to identify the carrier” which would leave it to the courts to decide the details as to what is required in order to identify a carrier. It may for example not be enough for the carrier’s name to be in the bill of lading if it is more or less illegible or put in a place where it can hardly be detected.

(iii) The provision should apply generally.

Peru

It is safer for both carrier and shipper to deal with the consequences of omitting identifying the carrier as the contracting carrier in the mode of a presumption. Registered owner may be allowed to challenge the presumption only by proving the ship was under a bareboat charter at the time of the carriage and turning the charterer as the presumed contracting carrier, despite bareboat charterer accepts responsibility or not.

Spain

(i) We agree with having a presumption along the lines of Article 8.4.2, though to be effective for identifying the “contractual carrier” only. The wording relating to the burden of proof by the registered owner should be omitted in full because the mere production of a B.B. Charter is not acceptable.

(ii) Failure to identify the Carrier should be in place wherever the document of transport does not mention a party within the box allocated to the Carrier’s identity or anywhere else in the front page. Identity of Carrier clauses to that effect should not be admitted, i.e., wherever a party other than the registered owner is mentioned in the front of the transport document.

(iii) Article 8.4.2 should apply generally.

Sweden

(i) The Swedish MLA would favour a solution where a transport document signed by or on behalf of the master should be deemed to have been signed on behalf of the (contracting) carrier. We do not think that there should be a presumption for the registered owner being the carrier.

We also think that a modification should be made in the second sentence, viz. that the registered owner should be able to rebut the presumption that it is the performing party if it proves that the ship was under a bareboat charter, which under its terms transfers contractual responsibility for the carriage of

goods to the bareboat charterer, who shall then be deemed to be the carrier. In other words, it would not be necessary for the bareboat charterer to accept responsibility, which it may or may not be likely to do, but it would suffice for the registered owner to demonstrate that the contract transfers responsibility to the bareboat charterer.

(iii) The provision should apply generally.

Switzerland

(i) We agree that a presumption that the registered owner shall be the contracting carrier, along the lines of Article 8.4.2., should be included.

(ii) The carrier being not clearly named with Address (on the face of the transport document).

(iii) This should apply generally!

Further thoughts are needed to see how such a provision would work in a door-to-door scenario!

United Kingdom

(i) The BMLA considers it important that the presumption specified in Article 8.4.2 should be included in the Convention. This is the only sanction proposed for a breach of Article 8.2.1 (e) which requires a transport document to “adequately identify the carrier”. If the presumption cannot be agreed then some other sanction would have to be devised, e.g. that a carrier who fails to comply with the obligation in Article 8.2.1 (e) will not be entitled to rely on the defences and immunities provided by the Convention.

(ii) It is not necessary to specify what constitutes adequate identification of the Carrier. The words “adequately identify” speak for themselves

(iii) Article 8.4.2 should apply generally and not only to transport documents signed by the Master.

United States

The U.S. MLA thinks that a presumption along the lines of Article 8.4.2 should be included. The problem addressed by Article 8.4.2 has not been a source of great difficulty in the United States, but it has created difficulties in other countries and the final instrument should attempt to solve the problem. Although the solution of Article 8.4.2 is imperfect, it remains preferable to any other potential solution that has been discussed.

The U.S. MLA does not think that a failure to identify the carrier should be precisely defined. Courts should be given the flexibility to determine what constitutes an adequate identification on the facts of individual cases.

The U.S. MLA thinks that Article 8.4.2 should apply generally. It should not be limited to documents signed by the master.

Synopsis of the responses to the Consultation Paper

CONSULTATIVE MEMBERS AND OBSERVERS**ICS**

ICS considers that the presumption in Article 8.4.2 and 8.2.3 that the registered owner of the vessel named in the transport document shall be the carrier if the transport document is ambiguous is controversial because some registered owners are financial institutions who have nothing to do with the operation of the ship. Channelling of liability to the registered owner is a feature of international pollution liability and compensation conventions but is inappropriate for carriage of goods. The shipper should be sure of the identity of his contractual counterpart and those acquiring bills of lading should not in this respect obtain a better position than that of the shipper. (Article 8.2.1 (e) requires the carrier to be adequately identified in the transport document.)

BIMCO

BIMCO notes the proposal that if the transport document fails to identify the carrier then the registered owner of the vessel shall be presumed to be the carrier. As we see it there are two distinct scenarios to consider: 1) where the vessel is under time charter and 2) where the vessel is under bareboat charter.

1) When BIMCO revised its “Conlinebill” it was agreed to delete Clause 17 (Identity of Carrier). This clause provided that the contract evidenced by “Conlinebill” was between the merchant and the owner of the vessel named in the Bill of Lading and that the said shipowner only should be liable for any loss or damage due to any breach or non-performance of any obligation arising out of the contract of carriage. There were two reasons for deleting Clause 17:

- a) Identity of carrier clauses, such as “Conlinebill” Clause 17, are held invalid in most jurisdictions (the UK being one notable exception).
- b) Banks nowadays require that in order to accept bills of lading and other transport documents for letter of credit purposes they must indicate clearly on their face who is the carrier. (See UCP 500 Article 23-26 a(i)).

The banks have never been able to adequately explain why they require the name of the carrier to be specified on the face of the transport document, but it is a firm requirement on their part that the transport document must make clear that the time charterers (or owners, if the vessel is not under time charter) identify themselves as carrier on its face. It is no longer sufficient for the transport document to just show XYZ Shipping Line with accompanying house flag.

Therefore, in our view, commercial practice will probably make sure that transport documents properly identify the carrier as the contractual carrier, if the vessel is under time charter, or the real owner if it is not. However, in those cases where the transport document fails to do so, BIMCO can live with a presumption that the real owner is considered to be the carrier. As the ultimate liability as between the owners and the time charterers is contractual, appropriate indemnity provisions in the time charter will resolve the matter.

2) The proposition that the registered owner can defeat the presumption that he is the carrier by proving that the vessel was under bareboat charter at the time of carriage acknowledges the commercial reality of a bareboat charter i.e. the owners have no involvement with the commercial operation of the vessel. However, we are concerned that it is an unreasonable condition placed upon the registered owner to defeat the presumption that the bareboat charterer also accepts contractual responsibility for the goods since this does not take into consideration the very nature of bareboat chartering.

The main obligation of an owner under a bareboat charter is to deliver the vessel into the charter in accordance with the terms and conditions agreed and to take redelivery. Given the nature of bareboat chartering, all commercial decisions in respect of chartering the vessel rest with the charterers. This is known by the commercial parties who would therefore never think of the need to specify that the charterers accept contractual responsibility for the carriage of goods. In fact we have never come across any executed BIMCO "Barecon 89" Charter (the predominant bareboat charter being used in this market) that specifies that the charterers should accept contractual responsibility for the carriage of goods.

In the light of the above we think that 8.4.2 needs further consideration. In our view, the registered shipowner should be able to defeat the presumption that he is the carrier solely by demonstrating that the vessel is operating under a bareboat charter.

Institute of Chartered Shipbrokers

The Institute broadly supports the tone of this Article but feels that the registered owner should also be able to defeat the presumption of liability for vessels operated under time charter as well as bareboat charter arrangements. We therefore recommend that the final sentence be amended as follows:

"The registered owner can defeat this presumption if it proves that the ship was under a **demise** charter at the time of carriage, **in which case the demise charterer shall be presumed to be the carrier**"

We believe this is a more accurate reflection of current commercial practice, although under time charter, whilst the Master is the employee of the shipowner, he will invariably be acting under the instructions of the time charterers when signing bills of lading.

IUMI

(i) In practice the identification of the carrier is quite often too difficult. The shipper, on the other hand, needs to know the identity of the carrier which should be identified in the transport document. Therefore, a simple rule is needed which guarantees that the party who is liable as carrier. There is some doubt whether it is really justified to presume that the registered owner is the carrier if the transport document does not contain sufficient information. A presumption along the lines of Article 8.4.2 should be included but the provision does not seem to be satisfactory and needs further consideration. Under the new Arrest Convention the vessel can only be arrested if the

Synopsis of the responses to the Consultation Paper

shipowner is the liable carrier. The interpretation of the provisions 8.2.3, 1.2 and Chapter 6 should be re-examined.

(ii) The accurate name and address should be mentioned in the transport document.

(iii) If such a provision is included it should apply generally.

Art. 9 FREIGHT

9.1 For the purpose of this article 9, “freight” shall include dead freight.

9.2 (a) Freight is deemed to be earned upon delivery of the goods to the consignee at the time and location mentioned in article 4.1.3, unless the parties have agreed that the freight shall be earned, wholly or partly, at an earlier point in time.

(b) Unless otherwise agreed, no freight will become due for any goods that are lost before the freight for these goods is earned.

9.3 (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 are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery.

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

9.4 (a) Unless otherwise agreed, the 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 or any other person identified in the transport document as the shipper will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid:

(i) with respect to any liability under chapter 7 of the shipper or a person mentioned in article 7.7; or

(ii) with respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 9.6 or otherwise for the payment of such amounts.

9.5 (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 shipper, 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 a statement puts the consignee on notice that it may be liable for the payment of the freight.

- 9.6 (a)** Notwithstanding any agreement to the contrary, if and to the extent that under national law or otherwise the consignee is liable for the payments referred to below, the 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 due 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 paragraph (a) of this article is not, or is not fully, 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.

MEMBER ASSOCIATIONS

Australia and New Zealand

This Association does not regard the bracketed words at the commencement of clause 9.5(a) to be necessary. We think that the intended object of this provision would be best achieved by commencing it as follows:

“Whether pursuant to the terms of the contract of carriage or any national law applicable to the contract of carriage”

China

As the nature of dead freight is different from freight, we propose to stipulate it separately.

9.4 In our view, it will be better to divide shipper into contracting shipper and consignor. Based on this reason, we suggest that article 9.4 should be modified as following:

- (a) the shipper should be changed to contracting shipper;
- (b) the shipper or any other person identified in the transport document as the shipper should be changed into the contracting shipper or consignor;
- (c) (i) the shipper or a person mentioned should be changed to the contracting shipper or consignor.

Therefore, the whole provision of Article 9.4 shall be:

- (a) Unless otherwise agreed, the contracting shipper is liable to pay the

Synopsis of the responses to the Consultation Paper

freight and other charges incidental to the carriage of the goods.

(b) If the contract of carriage provides that the liability of the contracting shipper or consignor will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid;

(i) with respect to any liability under chapter 7 of contracting shipper in article 7.7; or

(ii) with respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 9.6 or otherwise for the payment of such amounts.

9.6 Dead freight is suggested to be added into (a) (i). Therefore, the revised provision shall be:

(i) the freight, dead freight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods.

Italy

Article 9.3. This article provides that freight is payable when it is earned, unless the parties have agreed otherwise. Perhaps it would be useful to add a provision to the effect that, unless otherwise expressly agreed, provisions relating to the time of payment of the freight do not affect the time when the freight is earned: the consequence would be that the payment made in advance must be returned if the goods are subsequently lost.

Article 9.6. This article provides that the carrier is entitled to retain the goods until payment of the freight, demurrage, etc. “if and to the extent that under national law or otherwise the consignee is liable for the payment”. Two observations may be made on this provision. First, the right of retention is normally exercisable irrespective of the consignee being liable to pay the freight or other charges or not; in fact, prior to requesting delivery he normally is not liable because he is not a party to the contract. Secondly, it would be useful to clarify which is the applicable national law. Is it the law applicable under the private international rules of the country in which the place of delivery is located?

Switzerland

The reference to the national law should specify whether it is the *lex fori* where the goods are returned or the *lex causae* which is applicable (besides the Instrument) to the contract of carriage.

The CHMLA welcomes that the Convention stipulates for which types of costs and freight a right of retention exists and what rights the carrier has in cases where those costs are not borne by the cargo interests, rather than leave this stipulation to national law. However, issues relating to a lien on cargo must, we believe, remain non-mandatory in order to allow for any variations or clarifications to the contract of carriage agreed by the parties. The provision on a right of retention might also contain, as a sort of counterbalance, protection for the consignee insofar as the lien should cease to have any effect once the consignee has deposited the amounts requested by the carrier into a Court's

escrow account, to be released to the rightful party after a court decision has been obtained on this point.

There is no reason to restrict the right to retain and enforce a lien to claims which are directed to the consignee. It must suffice that there are claims relating to both the goods and the contract of carriage. The right to retain has to be independent of the question of whether it is the consignee who has to pay these costs.

CONSULTATIVE MEMBERS AND OBSERVERS

ICS

Insert “immediately” in the second line of 9.6 (b).

Art. 10 DELIVERY TO THE CONSIGNEE

- 10.1** The consignee, who claims the goods from the carrier, shall accept their delivery at the time and location mentioned in article 4.1.3. If during a period after such delivery the goods remain in the custody of the carrier or a performing party, and no express or implied contract has been concluded between the carrier or the performing party 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.
- 10.2** On request of the carrier or the performing party that delivers the goods, the consignee shall provide written confirmation of delivery of the goods by the carrier or the performing party in the manner that is customary at the place of destination.
- 10.3**
- 10.3.1** If no negotiable transport document has been issued:
- (i) The shipper or the controlling party shall advise the carrier, prior to or upon the arrival of the goods at the place of destination, of the name of the consignee.
 - (ii) The carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to the consignee upon the consignee’s production of proper identification.
 - (iii) If the shipper or the controlling party has not advised the carrier of the name of the consignee pursuant to paragraph (i) of this article, or if the consignee named by the shipper or the controlling party does not take delivery of the goods at the place of destination, then the carrier shall advise the shipper or the controlling party accordingly, whereupon the shipper or the controlling party shall take delivery of the goods itself. If the carrier is unable, after reasonable effort, to identify and find the shipper or controlling party, then the person mentioned in article 7.7 shall be deemed to be the shipper for purposes of this article.

10.3.2 If a negotiable transport document has been issued, the following shall apply:

- (i) The holder is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to such holder upon production of the negotiable document. In the event more than one original of the negotiable document has been issued, the production of one original will suffice.**
- (ii) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall advise the shipper or the controlling party accordingly. In such event the latter shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the shipper or the controlling party, then the person mentioned in article 7.7 shall be deemed to be the shipper for purposes of this article.**
- (iii) If 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, who becomes a holder after the carrier has delivered the goods to the consignee, or to a person entitled to these goods pursuant to any contractual or other arrangement other than the contract of carriage, 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 did not have or could not reasonably have had knowledge of such delivery.**
- (iv) If the shipper does not give the carrier adequate instructions as to the delivery of the goods, the carrier is entitled to use its rights under article 10.4.**

10.4

10.4.1 When the goods have arrived at the place of destination and the goods are not actually taken over by the consignee at the time and location mentioned in article 4.1.3 and no contract has been concluded between the carrier or the performing party and the consignee that succeeds the contract of carriage, or the carrier is under 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 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 at the time. After deduction of any costs incurred in respect of the goods and, as the case may be, other amounts as

referred to in article 9.6(a) and due to the carrier, the proceeds of sale must be held for the person entitled to the goods.

10.4.2 The carrier is only allowed to exercise his right referred to in article 10.4 after it has given 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 or the controlling party that the goods have arrived at the place of destination.

MEMBER ASSOCIATIONS

Australia and New Zealand

It is not clear to this Association what confirmation is intended to be sought from the consignee. Is it merely the provision of a receipt? Or is it intended to provide a direction to the carrier by the consignee as to where the goods are to be delivered? We think this provision, if it is to be retained, needs to be more precise as to what is intended.

Italy

Nothing is said in article 10.3.2(ii) about the consequences of the failure by the shipper to give instructions or the consequences of such instructions being ineffective. It is thought, however, that in such case the shipper is responsible for all costs borne by the carrier or must take delivery of the goods himself. The problem that in any case arises is what are the consequences of a delivery without surrender of the transport document in case the holder of such document will consequently claim delivery. Perhaps an alternative solution might be to provide that if the holder of the document will not claim delivery within a reasonable time after notice has been given to the shipper the goods may be sold or, if a sale will not prove possible, will be destroyed and the shipper will be responsible for all costs.

Japan

Draft article 10.3.2 provides for the rule where the goods are delivered without surrender of a transport document. Under this Article, the holder does not acquire any right unless he/ or she did not have or could not reasonably have had knowledge of the delivery. Although, as is explained in the commentary of 10.3.2 (ii), such holders who knowingly acquire the transport documents do not look worth protecting, this rule could cause a problem. Assume, for example, the carrier delivered the goods to the buyer (who qualifies as “a person entitled to these goods pursuant to any contractual and other arrangement other than the contract of carriage”) while a bank is in possession of the negotiable bills of lading. The bank now cannot negotiate the bill to the third party who can reasonably have had the knowledge of delivery. This is a unreasonable limitation for the bank to sell the document. Theoretically, the holder of the negotiable transport document acquires at least

Synopsis of the responses to the Consultation Paper

the same right which the former holder has possessed regardless he/ or she has the knowledge of the defense (shelter principle). Therefore, the draft Article 10.3.2 should be revised to give more protection to the third party who becomes a holder after a delivery was made without surrender of the transport document.

Netherlands

NMLA welcomes any provision that provides for a whole or part solution of the problem of the consignee not taking up the goods from the carrier after the goods have arrived at their place of destination.

Switzerland

Is the consignee the correct party to bear the risk? It is really at the risk and account of the shipper (and possibly, additionally, of the consignee)?

CONSULTATIVE MEMBERS AND OBSERVERS

FIATA

The words “risk and account” may need to be adequately clarified as there could be wide divergences as to the meaning of the phrase under various the jurisdictions.

ICS

ICS firmly believes that the Instrument should include a provision which would allow delivery of cargo without surrender of bills of lading in certain circumstances without carrier liability. A provision to this effect could be included in 10.3.2 (ii) after the second sentence. At present, carriers are hostage to the sales transaction. The shipper or the controlling party should be responsible for ensuring that delivery can be effected on arrival of the goods at the place of destination. If in the circumstances described in 10.3.2 (ii), the carrier receives delivery instructions from the shipper/controlling party and delivers the goods without surrender of a bill of lading he should be free from all liability. In such circumstances, the holder should pursue the shipper or controlling party.

10.3.2 (iii) addresses the problem of delivery without surrender of a negotiable transport document only in limited circumstances. It provides that any person who becomes a holder after delivery will only acquire rights under the contract of carriage if they became holder pursuant to a contractual or other arrangement that existed before delivery. As it says in the explanatory notes, this would protect a bona fide purchaser in a string sale where the passing of the bill of lading has been delayed. It follows that any person who knew or should reasonably have known of delivery and became a holder thereafter would not be protected.

In our view, 10.3.2 (iii) is designed to protect holders – rather than carriers – in situations where cargo is delivered without surrender of a bill of lading.

As suggested above, a provision should be included in 10.3.2 (ii) to protect carriers in certain circumstances.

ICS suggests that the last two lines of 10.3.2 (iii) (i.e. “unless such holder ...”) be deleted.

Insert “immediately” in the sixth line of 10.3.1 (iii).

IG

IG Club Rules exclude cover in the event that a carrier delivers cargo without surrender of the original negotiable document of title under which it is carried. The IG supports the idea of incorporating a provision which would provide protection to a carrier in these circumstances, when he has acted properly and prudently.

It is not clear whether Article 10.3.2 (iii) is intended to achieve this but in the IG’s view it affords little protection to a carrier who delivers goods without the surrender of the transport document (T/D), since the carrier will in almost all cases have no knowledge of the contractual relationships existing between the shipper/ consignee/controlling party and could not therefore run the risk of delivering without surrender of the T/D..

Art. 11 RIGHT OF CONTROL

11.1 The right of control of the goods means the right under the contract of carriage to give the carrier instructions in respect of these goods during the period of its responsibility as stated in article 4.1. Such right to give the carrier instructions comprises a right to:

- (i) give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;**
- (ii) demand delivery of the goods before their arrival at the place of destination;**
- (iii) replace the consignee by any other person including the controlling party;**
- (iv) give any other instruction that constitutes a variation of the contract of carriage.**

11.2 (a) When no negotiable transport document is issued, the following rules apply:

- (i) The shipper is the controlling party unless the shipper and consignee agreed that another person would be the controlling party and the shipper so notified the carrier. The shipper and consignee may agree that the consignee is the controlling party.**
- (ii) The controlling party is entitled to transfer the right of control to another person. The transferor or the transferee shall notify the carrier of such transfer.**
- (iii) When the controlling party exercises the right of control in accordance with article 11.1, it shall produce proper identification to the carrier.**

(b) When a negotiable transport document is issued, the following rules apply:

- (i) The holder of that document or, in the event that more than one original of that document is issued, the holder of all the originals is the sole controlling party.
 - (ii) The holder of that document is entitled to transfer the right of control by passing it to another person in accordance with article 12.1.
 - (iii) In order to exercise the right of control, the holder of that document shall produce it to the carrier. If more than one original of that document was issued, all originals shall be produced.
 - (iv) Any instructions as referred to in article 11.1(ii), (iii), and (iv) given by the holder of that document upon becoming effective in accordance with article 11.3 shall be stated thereon.
 - (c) Upon transfer of the right of control the person who transferred that right shall be discharged of his obligation under article 11.5.
- 11.3 (a)** The carrier shall execute any instruction as referred to in article 11.1(i), (ii), and (iii), 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 a performing party, and does not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage. The person giving any instruction to the carrier shall indemnify the carrier or such other person against any such additional expense, loss or damage, if they nevertheless occur.
- (b)** The execution of an instruction as referred to in article 11.1(iv) is subject to the agreement of the parties to the contract of carriage.
- 11.4** Goods that are delivered pursuant to an instruction in accordance with article 11.1(ii) are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in article 10, are applicable to such goods.
- 11.5** During the period that the carrier holds the goods in its custody, one of the following persons shall give instructions to the carrier upon the carrier's reasonable request:
- (a) the controlling party,
 - (b) the shipper,
 - (c) the person referred to in article 7.7, or
 - (d) the person who delivered the goods to the carrier or to a performing party.

In case of necessity the carrier shall seek and accept instructions from the highest person on this list that it is able, after reasonable effort, to identify and find. The carrier may not seek or accept instructions from a person on the list unless the carrier after reasonable effort is unable to identify or find a person who is higher on the list.

MEMBER ASSOCIATIONS

Japan

Provisions in Chapter 11 of the revised draft Outline Instrument is acceptable except the following. Under the present draft, the shipper or any other controlling party can exercise rights of control until the goods are delivered when no negotiable transport document is issued. This means that rights of control survive longer than under any other existing international rules. For example, Under CMI Uniform Rules for Sea Waybills the shipper is entitled to change the name of the consignee at any time *up to the consignee claiming delivery of the goods after their arrival at destination* (Article 6 (i)). CMR provides basically the same rule (Article 12.2 and 13.1, *see*, cited below). Under Warsaw convention, rights of control (rights of disposal) cease to exist when the goods arrive at the place of delivery (Article 13.1, *see*, cited below). If these international rules, especially CMR and Warsaw Convention, are believed to have not caused serious problems (therefore adopts the same rule under Montreal Convention) and if there is no convincing reason to change them, divergence from CMI Uniform Rules in this respect is not recommendable.

CMR

Article 12

2. This right shall cease to exist when the second copy of the consignment note is handed to the consignee or when the consignee exercises his right under article 13, paragraph 1; from that time onwards the carrier shall obey the orders of the consignee.

Article 13

1. After arrival of the goods at the place designated for delivery, the consignee shall be entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods. If the loss of the goods established or if the goods have not arrived after the expiry of the period provided for in article 19, the consignee shall be entitled to enforce in his own name against the carrier any rights arising from the contract of carriage.

Warsaw Convention

Article 13

1. Except in the circumstances set out in the preceding Article, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

Netherlands

NMLA regards appropriate provisions on the right of control as being essential for the development of e-commerce in maritime transport.

It should be borne in mind that the 1990 CMI Rules for Electronic Bills

Synopsis of the responses to the Consultation Paper

of Lading are based on the electronic transfer of the right of control under the contract of carriage. Therefore, transferability of the right of control (article 11.2) should not be watered down. In particular, the transferability of the right of control should not differ in substance (but only in manner) whether a negotiable, a non-negotiable, or no document at all, has been issued by the carrier. Furthermore, the right of control itself should be defined as a ‘strong’ right, because, in respect of the goods, an electronic transfer of that right should under trade law and applicable national proprietary law have substantially the same consequences as the ‘classic’ transfer of a negotiable paper bill of lading.

However, in view of their nature, not all the provisions on the right of control have to be mandatory law.

Switzerland

In this provision (and in particular under (ii)), the exercise of the right of control could be misunderstood as a “right of stoppage”, which as such can only be exercised when the possibility of giving such an instruction is in line with the transport contract. It would be desirable to make the provisions of Articles 11.1 and 11.3 (a) more precise to ascertain which instructions have to be strictly followed and which are to be followed if “reasonable”.

Regarding the situation contemplated by Article 11.2 (a), we should consider whether the provisions of Article 6 of the CMI Uniform Rules for Sea Waybills would not be more practical..

The proposed provision of Article 11.5 could give to the carrier the possibility of arbitrary conduct and should be limited to cases of clear necessity. The provision should simultaneously regulate the issue of the carrier’s liability for any resulting violation of his duties and obligations.

Further, identification of the shipper and consignee should be a required content of the transport document, as these parties are the primary contacts of the carrier should any difficulty in the delivery of the goods arise.

It would also be convenient to require the inclusion in the transport document of a Notify-Address, and, of course, attempt to define this person and its functions. In context of the issues regulated in 11.5, one could give this “notify person” some authority to give instructions to the carrier in case of emergency.

Finally, the identification of the shipper in the transport document is imperative also on account of the possibility of assignment of rights and of subrogation of Article 13.1.

CONSULTATIVE MEMBERS AND OBSERVERS***FIATA***

The list from (a) to (d) should be a default list rather than a mandatory list. Whilst there may be cases where difficulties arise in identifying the relevant parties, it is in many cases entirely clear and the list could potentially interfere with the contractual arrangements already made.

ICS

ICS takes the view that when no negotiable transport document has been issued, certain instructions may be given to the carrier, such as changing the name of the consignee. This is consistent with current practice and with the CMI Rules for Sea Waybills. However, Article 11.2 (a) is much broader than the CMI Rules for Sea Waybills where transfer of the right of control can only be exercised before the carrier has received the goods and the right of control can only be transferred to the consignee. ICS believes that 11.2 (a) should be aligned with the CMI Rules for Sea Waybills. At the very least, the Article should be redrafted and 11.1 (ii) and (iv) should be deleted.

ICS takes the view that the same rights should not be permitted in respect of bills of lading and is strongly opposed to the principle of cargo interests being given a conventional/statutory "right of control". In our view, any instructions which the holder of the bill of lading might wish to give the carrier should be for agreement between the holder and the carrier at the time the issue arises. We note that the Instrument attempts to provide some safeguards in 11.3, e.g. the carrier can refrain from executing instructions if it is not reasonably possible to do so or it would interfere with normal operations or cause additional expense loss or damage. In addition, 11.3 provides that the person giving instructions indemnifies the carrier against such losses if they nevertheless occur. The indemnity should be backed by security and the provision should be expanded to provide the carrier with a right to request security. Nonetheless, while well intentioned, the various safeguards in 11.3 may give rise to disputes.

IG

The contract of carriage records the terms and conditions under which the carrier has agreed to perform the carriage. To confer on one party (the controlling party) the right to unilaterally demand a variation of the contract, by requiring delivery of goods before their arrival at the place of destination (11.1. (iii)) undermines its very nature and may well expose the carrier to expense and unknown liabilities even where the right can only be exercised on terms, in this case where it is reasonably possible and does not interfere with the normal operations of the carrier or would cause additional expense loss or damage. The carrier for instance might not know at the time the demand was made whether it would cause additional expense. Subsequently if he did not comply the onus would be on him to demonstrate that this was reasonable. The IG does not believe that any provision of this kind should be incorporated in the DOI.

The DOI correctly distinguishes between rights of control in relation to non-negotiable and negotiable T/Ds.

The IG agrees with the ICS that any rights in relation

(a) to non-negotiable T/Ds should be confined to the right to change the name of the consignee as provided for under the CMI Rules for Sea Waybills.

(b) to negotiable T/Ds, should be restricted to the holder of the T/D. In the IG's view if it were not so restricted it is likely that conflicts would arise in relation to aspects of proprietary law in certain jurisdictions.

Art. 12 TRANSFER OF RIGHTS UNDER NEGOTIABLE TRANSPORT DOCUMENTS

- 12.1 If a negotiable transport document has been issued, the holder may transfer the right of delivery, the right of control and any other rights embodied in such 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.**
- 12.2 Without prejudice to the provisions of article 11.6, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder.**

MEMBER ASSOCIATIONS

Italy

Once it has been stated that a negotiable (or transferable) transport document entitles the holder to exercise certain rights (possession of the goods, right to obtain delivery of the goods), it is questionable whether it would not be more correct to speak of the transfer of the document, rather than of the transfer of the rights incorporated in the document: in fact the transfer of such rights is the consequence of the transfer of the document.

Article 12.1 actually sets out, under (i), (ii) and (iii), the manner in which the rights incorporated in three types of negotiable (or transferable) transport document are transferred.

If the document is an “order document” the rights are transferred by passing the document “duly endorsed either to such person or in blank”. That means that the order document is transferred by endorsement to the transferee or by endorsement in blank. The statement that the document is passed in blank is imprecise: the document in fact must be endorsed (i.e. signed) by the holder without mentioning thereon the name of the endorsee. This is stated in (ii), where reference is made to both a bearer document and a “blank endorsed” document. It would be more correct to say that an order document endorsed in blank is transferred in the same manner as a bearer document. The statement that a blank endorsed document is transferred without endorsement is not entirely correct. In fact the person to whom the document is passed with a blank endorsement may also fill in his name above the signature of the previous holder and transfer the document by endorsement.

The third type of document is described as “a document made out to order of a named party”. In certain jurisdictions this would be an order document and the type of documents described under (i) and (iii) would overlap.

It is suggested that this provision should be further considered in order to

ensure actual uniformity. To this effect an investigation should be made on the types of negotiable (or transferable) documents existing in the various jurisdictions and on the manner in which each type is transferred.

CONSULTATIVE MEMBERS AND OBSERVERS

ICS

The Instrument does not explicitly deal with transfer of *obligations* to consignees and indorsees. Article 9.6 clarifies that where national laws provide that consignees are liable for freight, demurrage etc, the carrier has a lien on the cargo until such payments have been made. However, ICS would support the inclusion of an article in Chapter 12 which provided that where the consignee/indorsee has demanded delivery of the goods, they assume any liability imposed by the contract of carriage (with the exception of certain specific shipper's liabilities e.g. in respect of dangerous goods). Such liabilities should be confined to those which are apparent from inspection of the document.

Additional clarification would be helpful in 12.2 to avoid a situation where a carrier is unable to assert contractual liabilities against a consignee who sells cargo from the quay but claims to be relieved of liability as an "intermediate holder".

IG

The IG is again concerned that the provisions of this Chapter may give rise to conflicts with aspects of proprietary law in certain jurisdictions.

If such provisions are to be included the IG believes that the issue of transferring liabilities under the negotiable T/D should also be dealt with. It suggests that any such liabilities should be transferred to any consignee or holder of the T/D who takes or demands delivery of the goods or makes a claim under the T/D.

Art. 13 RIGHTS OF SUIT

13.1 Without prejudice to articles 13.2 and 13.3, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

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

depending on which of the above persons suffered the loss or damage in consequence of a breach of the contract of carriage, or

- (iv) any third party that 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 limitations of

liability that are available to it under the contract of carriage and under this Instrument towards such third party.

- 13.2** 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 or a performing party, without having to prove that it is the party that suffered loss or damage in consequence of a breach of the contract of carriage. If such holder did not suffer the loss or damage itself, it shall be deemed to act on behalf of the party that suffered such loss or damage.
- 13.3** In the event that a negotiable transport document is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage.

CONSULTATIVE MEMBERS AND OBSERVERS

ICS

In our view, a person referred to in Article 13.1 who is not the holder of a negotiable transport document should not be allowed any rights of suit against the carrier or performing carrier as proposed in Article 13.3. The person will have rights under their contract of sale against their contractual counterpart.

IUMI

In our view, the question who has a right to suit should not be dealt with in the new instrument but should be left to the national legislation. Because of the variety of different national regulations such a provision might lead to unnecessary problems and litigation, for example in the Nordic States.

Art. 14 TIME FOR SUIT

- 14.1** The carrier shall in any event be discharged from all liability whatsoever in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of one year. The shipper shall in any event be discharged from all liability under chapter 6 of this Instrument if judicial or arbitral proceedings have not been instituted within a period of one year.
- 14.2** The limitation period commences on the day on which the carrier has completed delivery of the goods concerned or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered. The day on which the limitation period commences is not included in the period.
- 14.3** The person against whom a claim is made at any time during the running of the limitation period may extend that period by a

declaration in writing to the claimant. This period may be further extended by another declaration or declarations.

- 14.4 An action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in this chapter if it is instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against itself.**

MEMBER ASSOCIATIONS

Australia and New Zealand

As there is no definition for the words “limitation period” it might be advisable to amend the opening words of clause 14.2 by saying “The limitation period of one year referred to in Article 14.1 ...”

In clause 14.5, the words “and adequately identifies the bareboat charterer” at the end of this paragraph would seem to be unnecessary since Article 8.4.2 requires the owner, in order to defeat the presumption, to prove that the contractual responsibility for the carriage of the goods has been transferred to an identified bareboat charterer.

Canada

We have no difficulty with the one-year time bar as applied to port to port shipments. With respect to inland transport, there may be statutory provisions which give a longer period in which to institute suit. In some jurisdictions one may contractually shorten time. Under through Bills of Lading some carriers purport to limit time for suit to nine months, which provisions may be valid except when the Hague-Visby Rules compulsorily apply. This is still another application of the through transport with opting out philosophy which is the basis of the Outline Instrument.

China

These provisions are generally as the same as the relevant article of the Hamburg Rules. It should be adopted in principle.

14.4 The provision of commencement of two different limitation periods is prone to raise controversy. Therefore, we suggest that the words “or has been served with process in the action against itself” shall be deleted.

CONSULTATIVE MEMBERS AND OBSERVERS

ICS

We propose that Article 14.1 be amended as follows to clarify that proceedings cannot be instituted anywhere in the world to protect time and for the sake of consistency with Article 14.2:

Synopsis of the responses to the Consultation Paper

*“The carrier shall in any event be discharged from all liability whatsoever in respect of the goods if judicial or arbitral proceedings have not been instituted within **the** period of one year **in a forum provided for in the contract of carriage or otherwise in an appropriate forum.** The shipper shall ... within **the** period of one year.”*

In addition, the phrase “within the period of one year” should be adjusted to “within the **limitation** period of one year”.

In the last sentence of 14.3, change “another” to “further” to facilitate more than one extension of the limitation period.

In order to avoid any misunderstanding about the period for bringing an indemnity action and to improve the drafting, Article 14.4 should be re-written as:

“An action for indemnity against a third person may be brought even after the expiration of one year provided for in the preceding paragraph if the original action was brought within the time allowed by the Court seized of the case. However, unless the Court first seized provides for a longer period, the time allowed for an action of indemnity shall be no more than 90 days commencing from the day when the person bringing such action has been served with valid process in the action against himself.”

Art. 15 GENERAL AVERAGE

15.1 Nothing in this Instrument shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

15.2 With the exception of the provision on time for suit, the provisions of this Instrument relating to the liability of the carrier for loss or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

CONSULTATIVE MEMBERS AND OBSERVERS

ICS

Cargo interests, other than a consignee, might be responsible for General Average contributions due. Article 15.2 should be amended accordingly.

Art. 17 LIMITS OF CONTRACTUAL FREEDOM

17.1 Unless it is specified otherwise in this Instrument, any contractual stipulation that derogates from the provisions of this Instrument shall be null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, the performing party, the shipper, the controlling party, or the consignee under the provisions

of this Instrument. [However, the carrier or a performing party may increase its responsibilities and its obligations under this Instrument.] Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.

17.2 Notwithstanding the provisions of chapters 5 and 6 of this Instrument, the carrier as well as the performing party are allowed by the terms of the contract of carriage to exclude or limit its liability for loss or damage to the goods if

- (a) the goods are live animals;**
- (b) the character or condition of those goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable document is or is to be issued for the carriage of these goods.**

MEMBER ASSOCIATIONS

Australia and New Zealand

This Association sees no reason to insert the bracketed words “or increase” in this provision. We see no harm in retaining the bracketed words commencing “However, the carrier or a performing party may increase its responsibilities”.

China

CMLA is of the opinion that it would be a better choice that the contents of article III Rule 8 of the Hague Rules and article 23.1 of the Hamburg Rules should not be extended to those parties other than the carrier or the performing party. We also suggest the words “, or increase” in the third bracket should be deleted. Further, since the sentence so amended itself leaves open the possibility of any increase of liability of either the carrier or the shipper by contractual stipulation, the bracketed penultimate sentence (However, the carrier or a performing party may increase its responsibilities and its obligations under this Instrument.) seems unnecessary and redundant.

France

L'Association est favorable à la possibilité d'aggraver contractuellement la responsabilité. Par conséquent, l'Association est favorable aux termes mis dans les derniers crochets.

L'Association approuve l'exclusion de l'erreur dans le management du navire (v. article 6.1.2) et admet dès lors la proposition visant à étendre l'obligation de maintien du navire en bon état de navigabilité durant le voyage.

Mandatory Provisions**MEMBER ASSOCIATIONS*****Denmark***

We support the conclusion of the Singapore Conference that the Instrument should take the form of a convention and that “core provisions” should be mandatory including in particular the provisions on carrier or shipper liability for loss or damage. Article 17 therefore is acceptable to us. However, a number of the chapters not dealing with responsibilities and obligations of the parties including Chapter 9 on freight and Chapter 11 on right of control should be of a non-mandatory character. We believe that the mandatory character of the Instrument should be established on a “reciprocal” basis.

The consultation paper asks for comments on a number of important issues. However, we do consider some issues not expressly referred to in the consultation paper to be equally of great importance. In particular, we would like to make the following comments:

- The Instrument covers multimodal transport involving a sea leg. This is one of the great advances of the Instrument compared to the conventions of today. The liability system to be adopted should be the network liability system. Therefore generally speaking, we can support Article 4.4 being based upon the network liability system. It has, however, to be clearly set out which rules in the applicable unimodal conventions/laws fall under the heading “liability”. The aim is not to make all the mandatory provisions of the unimodal conventions/laws applicable, but only those provisions, which have a direct impact on the liability issues. Therefore, the provisions in the Instrument on liability, limitation of liability, should not be applied to the extent an international convention/a national law applicable to a particular leg provides for a different solution.
- Article 11.3 makes it obligatory for the carrier to execute under certain conditions instructions from the shipper/the controlling party. We are very much opposed to giving the shipper/the controlling party such a right. The conditions proposed in Article 11.3 would not in our view give the necessary protections and we could easily imagine dispute between the carrier and the shipper as to whether the conditions in Article 11.3 are fulfilled. We would rather leave it to shippers and carriers to agree upon delivery of the goods at another place than agreed upon originally.
- For a number of years, the shipping industry has suffered enormous problems with delivery of cargo without presentation of the bill of lading. Article 10.3.2 (ii) deals with this problem, but only sets out a half way solution. It is of great importance in Article 10.3 (ii) to add that in case the carrier follows the instructions as to delivery obtained from the shipper or the controlling party there cannot be any question about liability for such delivery. Furthermore, we would suggest that the words “*unless such holder did not have or could not reasonably have knowledge of such delivery*” in (iii) be

omitted from the draft. These words create a lot of uncertainty as to whether the holder does require rights under the contract of the carriage.

- We are opposed to deletion of the provisions of the Hague/Visby and Hamburg Rules on shipper liability for dangerous goods.
- The Instrument should only establish liability for the contracting carrier, vis-à-vis the shipper/consignee. This would correspond to what NITL/WSC have agreed.
- The apportionment provision in Article 6.1.3 should be worded along the line of draft US COGSA, Article 9 (e), which makes it clear which party bears the burden of proof.
- As to the limits of liability, we would favour reasonable limits based upon the Hague/Visby amounts and including an appropriate tacit amendment provision. This would correspond to the NITL/WSC agreement.

Germany

i) We support a mandatory convention because only such a convention can generate the necessary uniformity of law. Therefore, we would expect that bringing a new convention into force would have to result in removing or at least superseding of all existing international instruments (Hague Rules, Hague-Visby Rules, Hamburg Rules) or national legislation (like Scandinavian, Chinese, US, etc).

ii) We feel that Article 17 is adequate.

Italy

(i) We believe it is still premature to express any view as to whether and to which extent the provisions on E-Commerce should be mandatory. As regards the other provisions of the Draft Instrument in our opinion all such provisions should be mandatory, except the following: 6.4.1, 9.2, 9.3(a) and (c), 9.4(a). It could perhaps be clearer if the non-mandatory provisions were expressly indicated.

(ii) We believe that it should be permitted to the carrier to increase its liability. We doubt instead whether the same principle should apply to the shipper.

Japan

(i) This Association support the basic principle suggested in the Consultation. Special attention should be drawn to the liability for consequential loss caused by delay. As is already mentioned in the Comment regarding Article 6.4, parties should be free to opt out the liability for delay, especially when the rule imposes liability for delay on the carrier without express contractual provisions for the time of delivery.

(ii) This Association opposes to extend the mandatory nature of liability to the shipper. Parties should be free either to decrease or exclude shipper's liability.

Synopsis of the responses to the Consultation Paper

Netherlands

The provisions of the Instrument should be mandatory, unless any specific provision in the Instrument indicates that parties may agree otherwise.

This mandatory nature should be two-sided, in the sense that neither the carrier nor the shipper is allowed to increase or decrease its liabilities. Contrary the situation in 1924 when the Hague Rules came into existence, nowadays the economic power as between carriers and shippers is reasonably balanced and no reason exists anymore to protect the one against the other. That being the case, the fact that a two-sided mandatory application may work out beneficially to the uniformity of maritime law, should be decisive.

Norway

(i) We agree with the draftsmen that the provisions should, generally speaking, be mandatory with some exceptions only, such as in Chapter 9.

(ii) Our association has not yet formed a definitive view on this issue, the starting point being that it ought to be possible to contract out of mandatory provisions in favour of the shipper/holder/consignee, as in previous comparable maritime law conventions.

Peru

In the sake of uniformity in transport by sea the draft should have the form of a convention, with mandatory provisions. As mentioned in the introduction the convention arising from this draft shall come in force only after 40 countries representing no less than 25% of world wide carriage have ratified it without any reserve.

While limitation of liabilities and minimum amounts for compensations shall be mandatory, parties should be free to extend their liability and increase the amounts for compensations. Article 26 of Andean Decision and article 49 of Peruvian national law both accepts increasing liability when both parties agreed to it, while banning any agreement in the contrary.

Andean decision also provides that any other applicable convention or national law will prevail to the decision if the former establishes higher liabilities to the carrier.

Spain

(i) The Spanish MLA would support a mandatory Convention. It is thought that non-mandatory rules do not assist the goal of uniformity and that it will be very difficult, in the body of an instrument like this aiming at regulating almost all aspects and relationships flowing from the contract of carriage, to reach a general consensus on which the “core provisions” should be. Alternatively, it is thought that the provision of Article 9 (“freight”) should not be made part of the instrument at all, rather than classifying it as non-mandatory.

Definitely, Article 4.4 is not acceptable as it presently stands since allowances for “national law” are rejected. Also the network liability system is not desirable to the Spanish MLA, thence it should be sought to have a door-

to-door Convention not giving up its ruling in front of any other existing international convention over the mentioned periods. The concept of “minimal network system” is not understood. We would not share the proposition that the present instrument is being prepared for application in the events of non-localized damage only.

(ii) It is our view that Article 17.1 should not be headed as drafted. A provision similar to Article 3(8) Hague-Visby and 23.1 Hamburg is necessary. However, we cannot comment further until the instrument contains a provision of “Jurisdiction and Arbitration”, because in the absence of it the parties shall be free to escape from the spirit intended for under Article 17.1.

Sweden

(i) Even if one would favour a non-mandatory “convention”, since we deal here with a commercial field where mandatory rules should be avoided as far as possible, this would be difficult to achieve. Therefore, we accept that the provisions should, generally speaking, be mandatory in respect of the carrier’s and the shipper’s responsibility and liability. However, *inter alia*, the rules on freight should preferably be of a non-mandatory kind, as well as the rules on the right of control.

Switzerland

The CHMLA in considering the scope of the mandatory nature of the instrument questioned whether and, if yes, why it is necessary to have mandatory rules in the field of international maritime transport. Are the reasons brought forward convincing and, if so, what are the criteria for deciding what parts of the regulation are to be made subject of the mandatory regime and what parts are to be left to the will of the parties?

1. Public Policy

The only traces of justification for the introduction of the mandatory regime found in the history of the Hague Rules (and in particular in the drafting of Art. 3 VIII Hague Rules) are based on public policy: The carrier is not allowed to derogate to the disadvantage of cargo interests from the liability system of the Convention. The foundation of this thought is found, among others, in the US Harter Act of 1893. Though the mandatory nature of the law was always justified in the light of public policy, it is well established that the US Harter Act was a law aimed at protecting the American industry (at that time mainly shippers) from the English shipping industry. The reality of trade has clearly shifted in modern times. Shippers nowadays are often powerful multinational companies who have also gained substantial bargaining power *vis à vis* the shipping industry. To provide for customer/consumer protection in favour of shippers is not justified, particularly when one considers that the law of carriage of goods by sea is an element of commercial law, which should not rely on notions of consumer protection but rather on freedom of contract, on commercial negotiations between commercial entities and on the laws of the markets.

2. Protection from pre-formulated contractual language

An argument which is heard primarily in context of bills of lading is that

Synopsis of the responses to the Consultation Paper

the terms of the contract are dictated by the carrier at a point where the shipper has very few means of contesting the terms or of renegotiating a better basis for the contractual relationship, as the bill of lading is issued only after the contract of carriage has been concluded and after the goods have been loaded on board. This argument is not fully satisfactory since it would apply to all the terms of the contract normally found on the face of the bill of lading, whereas only those few issues covered by the Harter Act and the Hague Rules have been made mandatory. The correct angle would be to put the burden of proof on the party issuing the terms of the bill of lading (i.e., in most cases, the carrier) that the shipper has effectively agreed to the terms of the contract. If this burden of proof is met, (i.e. the shipper has agreed to the terms) there is no need to provide for mandatory rules as a sort of protection from pre-formulated contractual language.

3. Safeguarding the unification process by avoiding superseding contractual practice

One of the traps inherent in any unifying process is to cast the harmonised law into mandatory law with the expectation that the law will then not be superseded by different contractual terms or trade practice. A justification of mandatory law on this basis is far from persuasive. The United Nations Convention on Contracts for the International Sales of Goods, 1980 (Vienna Sales Convention) is a good example of a very successful convention which has been made non-mandatory in many respects. Thus, the aim of achieving uniformity is in itself not a sufficient reason for casting harmonised law in mandatory provisions, especially in an area where freedom of contract should be the prevailing principle.

In any event, the technique used by the current maritime Conventions, i.e. subjecting the rules to mandatory law, would certainly not solve the concerns regarding a protection of unified law by forbidding parties to deviate from the rules and provisions of the convention. As purely one-sided and liability-restricted rules on the mandatory nature, Art. III (8) Hague Rules and Art. 23 Hamburg Rules are not able to avoid disunification of the legal principles governing the contract of carriage and fail to achieve uniformity.

4. Predictability of the terms for third parties benefiting from or relying on terms of the contract of carriage

Another suggested reason for attempting to justify mandatory provisions in the context of bills of lading and the contracts of carriage is that the contract of carriage involves a number of persons other than the two parties negotiating the contract of carriage (i.e. shipper and carrier). To make the provisions of the Convention mandatory to the initial parties would certainly enhance the predictability of the terms for third parties.

Especially in the context of trading with bills of lading, third parties other than the consignee would rely on the terms of the contract (as embodied in the bill of lading) and would normally want to rely on predictable cornerstones which could be changed neither by shipper nor carrier. However, the cornerstones one has in mind when establishing trade mechanisms are those provisions which make the secured transaction of an international sale possible

and give the beneficiaries of this system (banks, consignee) some protection regarding the value of goods shipped at destination. It is, of course, important for a bank or a consignee to be able to rely on a minimal liability level of the carrier for lost or damaged goods. However, reality shows that trade nowadays deals with this fact as an uncertainty since no consignee can, under the current situation, foresee what the applicable limitation amount for the contract of carriage will be, a fact which disproves the absolute reliance of trade on a particular, predictable liability system. Furthermore, a one-sided mandatory regime for the benefit of one-party (the shipper), as provided for by the current Conventions, does not, logically, support the justification of a mandatory law aimed at predictability, since under the current laws the provisions can be altered in favour of the shipper, with the consequence that this one-sided flexibility inevitably renders the applicable rules unpredictable.

5. Protecting crucial points of interfaces between contract of carriage and other contracts involved in the transaction.

A modern transportation regime will have to cover the interfaces which exist among the various contracts involved in the international commercial transaction (sales contract, letter of credit, transport and marine insurance etc. It is important that, before it is suggested that such interfaces be made mandatory for the purposes of safeguarding the interfaces, the drafters of such provisions have at hand persuasive arguments that such interfaces really need to be protected by introducing mandatory law for that purpose. This will be nearly impossible, since the need for such “petrified” interfaces is disproved by the current reality, where the issues affecting such interfaces are mostly left to national law (thereby leaving them open to totally different national solutions) which most of the time are then left to the freedom of contract.

The preceding arguments notwithstanding, the traditional view of the international shipping community on issues of liability is such that it would be inconceivable that the core provisions on the liability of the carrier of goods by sea should be non-mandatory.

Consequently, we are of the opinion that a modern transportation regime will neither be a wholly mandatory regime (particularly because it will contain many new issues) nor a regime pursuant to which the parties will be totally free to derogate from the scheme proposed by the Convention. A possible solution might be that some core provisions, in particular the liability provisions, remain mandatory, and that some areas outside the carrier's liabilities also be cast in the form of a mandatory regime (e.g. liability of the shipper, some aspects of the bill of lading).

Freight and E-Commerce should be non-mandatory. The section on door-to-door requests further study and should be decided only once the structure of the door-to-door application has become clearer.

We believe that depending on the rationale behind the decision to cast a provision in the form of a mandatory rule, the best solution is that where the mandatory regime is provided, its mandatory nature be two-sided, that is, not allowing a derogation merely for one of the parties.

United Kingdom

(i) The BMLA agrees that the “core” provisions of the Instrument should be mandatory and that these should include the carrier’s liability for loss of or damage to goods. The following should not be mandatory:

E-Commerce

This topic cannot be mandatory as it must remain open to the parties to decide to what extent they wish to use electronic communication. It is thought that the existing draft is not mandatory and this is satisfactory. The objective should be to facilitate E-Commerce and not to place it in a straight-jacket, particularly as the technology is rapidly developing and will do so in directions which cannot be foreseen.

Article 4

Some provisions of Chapter 4 are non-mandatory as they are expressed to be subject to the agreement of the parties. The rest should remain mandatory.

Article 4.4 (“Door to Door Transport”)

This should be mandatory in most respects. The only exception is the provision which enables Contracting States to make national laws which may conflict with the Convention. The BMLA has reservations about including any such exception in the proposed Convention and considers that, if this is to be permitted, the right to do so should be more narrowly confined than it is at present.

Article 8

This article has non-mandatory aspects; see Article 8.1.2 which enables the parties to agree that no bill of lading will be issued. Generally, it is mandatory. The BMLA agrees with this.

Article 9 (Freight)

This should clearly be non-mandatory.

Article 10 (Delivery to the Consignee)

It is thought that this should be mandatory.

Article 11 (Right of Control)

(i) It is important that this should be non-mandatory for the following reasons:

(a) Where no bill of lading has been issued it should be open to the parties to agree the extent of any right of control, how that right should be exercised and the extent to which that right may be transferred to a third party.. The aim of Article 11 should be to facilitate (and perhaps to give statutory effect to) any contractual provisions the parties may agree and to provide a “default regime” to apply in the absence of such agreement.

(b) The provisions of Chapter 11, as drafted, are complex and are likely to give rise to unnecessary litigation. Moreover some of its provisions cannot be operated by commercial men without the assistance of lawyers.

(c) There is likely to develop a commercial demand for different ways of

transferring and exercising rights of control. The situation is fluid and it is not possible to cater in advance for all such schemes.

(d) The comments made earlier in connection with E-commerce apply with particular force.

(e) If the parties wish to agree that no third party shall have the right of control or to modify the extent to which that right may be transferred, there is no policy reason why their contractual intention should not be respected.

Accordingly the BMLA considers that *both* Contracting States and also the parties to a contract of carriage should be entitled to contract out of Article II.

(ii) Where provisions of the Convention are mandatory, it is considered that a party should be allowed to increase its responsibilities and obligations but should not be permitted to exclude, limit or decrease them. This should apply to obligations of the shipper as well as to the carrier's obligations.

United States

(1) The U.S. MLA supports the view that the provisions in the Convention that correspond to or supersede mandatory provisions in current conventions or national law should also be mandatory, including any inland extensions of such mandatory provisions. Thus almost all of the Revised Draft Outline Instrument should be mandatory. But the U.S. MLA agrees that those articles in chapter 9 that are currently drafted as non-mandatory provisions should remain non-mandatory.

The U.S. MLA does not support the mandatory application of article 9.6(a), which declares that "the carrier is entitled to retain the goods until [the] payment" of certain expenses, "[n]otwithstanding any agreement to the contrary." To use the common law terminology, this provision seems to be saying that the parties may not agree to waive the carrier's lien over the goods without waiving the consignee's underlying liability. We see no basis for such a rule. Indeed, the carrier's issuance of a "freight pre-paid" bill of lading is essentially a waiver of the carrier's lien. Furthermore, the U.S. MLA objects to the phrase "or otherwise" in this article (particularly if the article were to remain mandatory). Although a consignee may be liable for payments "otherwise" than under national law (e.g., under international convention, including international conventions other than this one), the current drafting is too indeterminate. It could arguably sanction a lien in favor of the carrier if a boilerplate clause in an adhesion contract made the consignee liable for a payment, even if that liability was not enforceable under national law or international convention.

(2) The U.S. MLA supports the inclusion of the second sentence in Article 17.1, which is now in brackets, to permit the carrier or a performing party to increase its responsibilities or obligations.

Synopsis of the responses to the Consultation Paper

CONSULTATIVE MEMBERS AND OBSERVERS***ICS***

ICS has the following responses to the questions posed in paragraph 9 of the Consultation Paper:

The provisions of the Instrument should be mandatory to the greatest extent possible to promote international uniformity and deter forum shopping.

Furthermore, ICS considers that the commercial parties involved in the performance of the contract of carriage should not be allowed to derogate from the provisions of the Instrument and we can support Article 17.1. Carriers and cargo interests should adhere to the defences and limits in the instrument and not be permitted to give up their rights and immunities. Accordingly, the words in square brackets should be removed from the text. Such reciprocity would promote uniformity. (Note: CMR is two-sided mandatory.)

BIMCO

BIMCO fully agrees with the decision of the Singapore Conference that the Revised Draft Outline Instrument should take the form of a convention and that the key provisions should be mandatory. The provisions regarding liability should be mandatory whereas the parties should be free to contract in respect of a number of other provisions. In particular, the provisions relating to freight should be of a non-mandatory nature.

Institute of Chartered Shipbrokers

The Institute believes that the provisions of the Instrument should be completely mandatory. Furthermore, we believe that the parties should be permitted to increase its liabilities.

Whilst not included in the Consultation Document, the Institute would also like to state that subject to our comments on 8.4.2 above, we support the inclusion of the bracketed text in Article 8.2.3-Signature.

IUMI

The provisions of the new instrument should be mandatory, especially the core provisions of Chapter 1 and 3 to 8 as this is the only chance to achieve harmonization of law.

NITL and WSC

Freedom of Contract. – Shipper and Carrier may agree in an Ocean Transportation Contract to cargo liability terms which deviate from the duties, rights, obligations and liabilities and other provisions under the Instrument. Such agreed terms may provide greater or lesser duties, rights, obligations and liabilities than those under the Instrument. An Ocean Transportation Contract means a written contract, other than a bill of lading or a receipt, between one or more shippers and one or more carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the carrier commits to a certain rate or rate schedule and

a service level. The Ocean Transportation Contract shall be binding on the parties thereto (shipper and carrier) and any other person (e.g., consignee, holder) who consents to be bound thereby, except as provided in Paragraph 9.

The parties agree that section 14 of the MLA text is not appropriate for inclusion in a new cargo liability regime.

Supplemental Submission

The parties agreed that a shipper and carrier should have the ability to negotiate alternative cargo liability provisions, by entering into an Ocean Transportation Contract (“OTC”). An OTC was defined by the parties in the Joint Statement. It was further agreed that any cargo liability terms included in an OTC should be binding only on the parties to the contract, unless another person consents to be bound thereby (e.g. consignee, holder of the bill of lading), except for the parties’ agreement as to forum selection, which could be binding on third parties as discussed in item 15 below.

Accordingly, the Instrument would apply absent an OTC or in cases where the OTC was silent as to liability for cargo loss or damage or for delayed deliveries. The parties believed that ensuring the right of freedom of contract was important to shippers and carriers operating in all regions of the world, particularly given the growing use of confidential contracts in recent years.

ADDITIONAL PROVISIONS

JURISDICTION AND ARBITRATION

CONSULTATIVE MEMBERS AND OBSERVERS

NITL and WSC

Forum Selection. – The approach adopted in MLA Text Section 7(i)(2) should be adopted in the Instrument but only with respect to the conditions in Sections 7(i)(2)(B), (C) and (E). With respect to subsection (E), this would permit either litigation or arbitration, depending upon which is specified in a contract of carriage or other agreement, and only in the specific location as specified in such agreement. The parties to an “Ocean Transportation Contract” (as defined below) could contract out of the forum selection provision as per MLA Text Section 7(j); provided that a contractual forum selection would also be binding on nonparties (e.g., a consignee) if the parties to the contract expressly agree to extend the forum selection provision to nonparties and if the nonparty is provided written notice of such agreement (which could be done either through the transport document/bill of lading or by other written or electronic notification).

Supplemental Submission

The parties agreed that the Instrument should include a forum selection provision to assist in determining the location of cargo loss and damage

Synopsis of the responses to the Consultation Paper

actions. Specifically, the parties agreed that, even where a contract of carriage (e.g. bill of lading or transport document) specifies a forum for litigation or arbitration, a party to the contract of carriage may commence such an action (i) at the place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is, or was intended to be; (ii) the principal place of business or habitual residence of the defendant; or (iii) at the place specified in the contract of carriage or other agreement.

However, the parties to an OTC could contractually waive the forum selection clause by agreeing to the place for litigation or arbitration, which shall be binding. Additionally, any agreement as to forum selection included in an OTC could be extended to a non-party to the OTC (e.g. consignee where the carrier contracted with the consignor), as long as the parties to the OTC expressly agree to such an extension of the contract and the non-party is provided written or electronic notice of the place where the action is to be brought (e.g. in the bill of lading or otherwise).

CMI DRAFT INSTRUMENT ON TRANSPORT LAW

TABLE OF CONTENTS

Introduction	Page	532
Chapter 1 Definitions	“	535
Chapter 2 Electronic Communication	“	541
Chapter 3 Scope of Application	“	543
Chapter 4 Period of Responsibility	“	546
Chapter 5 Obligations of the Carrier	“	550
Chapter 6 Liability of the Carrier	“	552
Chapter 7 Obligations of the Shipper	“	564
Chapter 8 Transport Documents and Electronic Records	“	567
Chapter 9 Freight	“	577
Chapter 10 Delivery to the Consignee	“	579
Chapter 11 Right of Control	“	585
Chapter 12 Transfer of Rights	“	590
Chapter 13 Rights of Suit	“	592
Chapter 14 Time for Suit	“	593
Chapter 15 General Average	“	595
Chapter 16 Other Conventions	“	595
Chapter 17 Limits of Contractual Freedom	“	596

INTRODUCTION

Background

A draft Outline Instrument¹ was prepared in advance of the CMI Conference in Singapore in February 2001. This draft was not considered in detail at the Conference, which concentrated on the main issues of principle. The conclusions of the debate at the Conference are included in the Report of Committee A², which was adopted by the Conference at its Plenary Session. In accordance with the Resolution of the CMI Assembly of 16 February 2001³,

1 Published in CMI Yearbook 2000 at pp. 122-171.

2 Published in CMI Yearbook 2001 at p. 182.

3 Published in CMI Yearbook 2001 at p. 188.

the draft was revised in the light of these conclusions and a Revised Draft Outline Instrument dated 31 May 2001 ("the May draft")⁴ was circulated for comment to all national associations and a number of international organisations, including consultative members of the CMI, together with a Consultation Paper⁵ which asked for responses to a number of specific questions. A further meeting of the International Sub Committee on Issues of Transport Law, which had been established in November 1999 ("ISC"), was held in July as part of this consultation process.

Responses and comments were received from fifteen national associations and nine international organisations and a synopsis of these responses and comments has been prepared⁶. These responses and comments, and the views expressed at the ISC meeting in July, were analysed and a provisional draft of this Instrument was prepared. This provisional draft was circulated to all national associations and the international organisation and some further comments were received. It was then considered at a meeting of the ISC in November 2001 and amendments to the bold text were agreed at that meeting.

The bold text of this Instrument is intended to reflect the views of the majority. Where there are differing views on some issues of principle, bracketed text has been included. In other cases views have been referred to in the commentary.

Electronic Commerce

It was resolved at the CMI Assembly in Singapore that the ISC should complete the Outline Instrument to include principles and provisions to facilitate the needs of electronic commerce. The May draft was reviewed by the E-Commerce Working Group and this Instrument includes provisions recommended by that Group.

The Instrument should apply to all contracts of carriage, including those concluded electronically. To reach this goal, the Instrument must be medium neutral as well as technology neutral. This means that it must be adapted to all types of systems, not only those based on a registry such as Bolero. It must be suited to systems operating in a closed environment (such as an intranet), as well as those operating in an open environment (such as the internet). One must also be careful not to be limited by what is currently in use, keeping in mind that technology evolves rapidly and that what appears impossible today is probably already on the current agenda of software developers.

It is recommended that there should be a clear statement in a preamble or in the Instrument that one of the intentions of the Instrument is to remove paper based obstacles to electronic transactions by adopting the relevant principles of the UNCITRAL Model Law on Electronic Commerce, 1996.

4 Published in CMI Yearbook 2001 at p. 357.

5 Published in CMI Yearbook 2001 at p. 379.

6 Published in CMI Yearbook 2001 at p. 383.

One way to achieve this goal would be simply to define the word “document” to include information recorded in any medium. This would cover information recorded by electronic means as well as by written words on paper. Some consider this avenue the better way, but in view of the widespread feeling still existing that “document” means paper, a different expression has been used to deal with contracts concluded electronically or evidenced by messages communicated electronically. The expression “electronic record” has been chosen as a medium neutral expression. “Contract particulars” was found to be a suitable expression that can easily apply to particulars recorded in a transport document or in an electronic record.

Chapter 2 includes general provisions dealing with consent. First, the consent to the issuance and use of an electronic record and second, even when a transport document is issued, consent to communicate by electronic means to exchange information as well as notices, such as, for example, those provided for in articles 6.9.1 or 6.9.2. There is also a provision to deal with cases where a party wishes to opt out of a particular medium either to go from electronic record to paper or vice versa. This should only be allowed if there is mutual consent and under strict conditions. This problem is referred to in the CMI Rules on Electronic Bills of Lading. Finally, Chapter 2 deals with rules of procedure that must be agreed upon and included in the contract particulars that appear in a negotiable electronic record. At this stage, there is no general custom, no uniformity, and not even a predominant system in place. Such a provision is therefore necessary to ensure that there is no misunderstanding as to the functioning of the system used in respect of transfer of the electronic record or as to what needs to be done to obtain delivery as holder of the electronic record.

The Instrument adopts the proposition that negotiability can be achieved and effected by electronic means. The notion of exclusive control over the electronic record ought to be consistent with the notion of negotiability. It is certainly as consistent with it as is the physical possession of a piece of paper. Accordingly, provisions have only been included that would place electronic records on an equivalent basis to transport documents; and this approach is extended to putting negotiable transport documents on an equivalent basis to negotiable electronic records. It is appreciated that differing interpretations of negotiability in different jurisdictions may not enable it to be determined whether in all jurisdictions an electronic record might, at this time, be regarded as being capable of providing what is regarded as true negotiability. Nevertheless, recognizing the rapid advance nationally and internationally of e-commerce and of e-commerce legislation which seeks to introduce parity between paper and electronic means, it is considered that the relevant provisions are acceptable.

Among the representations and ideas which have been considered was one that indicated that there was no more need for negotiable documents, be they on paper or in the form of an electronic record, and that in any event the focus should be on the transfer of rights (to obtain delivery or the right of control) under the contract of carriage without documentation. With respect to the first point, this position is based on the fact that the financing of shipments

carried by air is in no way impeded by the use of air waybills. The increased popularity of sea waybills is also mentioned. This may well be true, but it is believed that there are still some trades where negotiable documents are called for. The Instrument should ensure that nothing prevents the use of electronic records to evidence such contracts of carriage in the future. The Instrument also clearly provides that the transfer of rights under contracts of carriage may be done electronically.

Jurisdiction and Arbitration

The Instrument does not contain any provisions dealing with jurisdiction or arbitration and these topics have not been considered by the ISC. It seemed premature to consider these topics before some conclusions had been reached on the nature of the Instrument, including its mandatory effect, the range of topics which it should cover and the scope of its application. These issues were reviewed at the Singapore Conference and the scope and substance of the Instrument have become clearer, but the time available following the Conference has not permitted the introduction of new topics.

Whilst the Hague and Hague-Visby Rules contain no provisions on jurisdiction and arbitration, provisions are contained in articles 21 and 22 of the Hamburg Rules. The CMR contains provisions on jurisdiction and arbitration in articles 31 and 33, but the Budapest Convention⁷ contains no such provisions.

The CMI International Sub Committee on the Uniformity of the Carriage of Goods By Sea considered that uniform rules should contain a provision on jurisdiction along the lines of article 21 of the Hamburg Rules, but not including the provisions of article 21 which were in conflict with article 7(1) of the 1952 Arrest Convention, and a majority was in favour of a provision along the lines of article 22 of the Hamburg Rules, but with the omission of subparagraph (3)⁸.

These topics give rise to policy issues which require detailed consideration.

1 DEFINITIONS

For the purposes of this Instrument:

1.1 Carrier means a person that enters into a contract of carriage with a shipper.

This definition follows the same principle as laid down in the Hague-Visby Rules and the Hague Rules: the carrier is a contractual person. A carrier may have entered into the contract either on its own behalf and in its own name or through an employee or agent acting on its behalf and in its name. A carrier will typically perform all of its functions through such persons.

⁷ Budapest Convention on the Contract for Carriage of Goods in Inland Navigation 2000.

⁸ The report of the Chairman on the work of the Uniformity Sub Committee is published in CMI Yearbook 1999 at pp 105-116.

1.2 Consignee means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic record.

This definition excludes a person who is entitled to take delivery of the goods on some other basis than the contract of carriage, e.g. the true owner of stolen goods.

1.3 Consignor means a person that delivers the goods to a carrier for carriage.

A consignor may include the shipper, the person referred to in article 7.7 or somebody else who on their behalf or on their request actually delivers the goods to the carrier or to the performing party. See also the commentary to article 7.7.

1.4 Container includes any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

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

This definition includes carriage preceding or subsequent to carriage by sea if such carriage is covered by the same contract.

1.6 Contract particulars means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that appears in a transport document or an electronic record.

1.7 Controlling party means the person that pursuant to article 11.2 is entitled to exercise the right of control.

1.8 Electronic communication means communication by electronic, optical, or digital images or by similar means with the result that the information communicated is accessible so as to be usable for subsequent reference. Communication includes generation, storing, sending, and receiving.

1.9 Electronic record means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or a performing party that

(a) evidences a carrier's or a performing party's receipt of goods under a contract of carriage, or

(b) evidences or contains a contract of carriage,

or both.

It includes information attached or otherwise linked to the electronic record contemporaneously with or subsequent to its issue by the carrier or a performing party.

This definition should cover every type of system actual and future. It follows as much as possible the content of the definition of transport

document. It is apt to include information added after its issuance, for example, under article 11.2 (c)(iii). This will also cover electronic signature logically associated with an electronic record as well as electronic endorsement which could also be attached or otherwise logically associated with the electronic record.

1.10 Freight means the remuneration payable to a carrier for the carriage of goods under a contract of carriage.

1.11 Goods means the wares, merchandise, and articles of every kind whatsoever that a carrier or a performing party received for carriage and includes the packing and any equipment and container not supplied by or on behalf of a carrier or a performing party.

This provision covers substantially the definitions of ‘goods’ in the Hague-Visby Rules and Hamburg Rules. Carriage of goods on deck is dealt with in article 6.6 and live animals in article 17.2(a).

1.12 Holder means a person that (a) is for the time being in possession of a negotiable transport document or has the exclusive [access to] [control of] a negotiable electronic record, and (b) either:

- (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed, or**
- (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof, or**
- (iii) if a negotiable electronic record is used, is pursuant to article 2.4 able to demonstrate that it has [access to] [control of] such record.**

This definition may include the shipper, the consignee, and any possible intermediate holder. An agent of any of these persons acting in its own name may be a holder.

A suggestion was made that paragraph (a) should require a holder to be in “lawful” possession of a negotiable transport document. This suggestion was not adopted. Using the term “lawful” without specifying what is meant by “lawful” possession would invite reference to national law, thus undermining uniformity. Specifying what is meant by “lawful” possession would greatly expand the scope of the Instrument. In any event, paragraph (b)(i) largely addresses the underlying concern for order documents. For bearer documents, it was thought that there is no real problem in practice that needs to be addressed here. If a practical problem did exist, it would not concern bearer documents in a wrongdoer’s hands (a problem for which other remedies exist) but documents in the hands of a good faith purchaser who claims through a wrongdoer. It is thought that such a good faith purchaser deserves protection, and that those who choose to use bearer documents should recognize such risks.

It is believed that paragraph (b)(iii) adequately covers not only register-based systems (such as Bolero) but also systems using PDF format in

conjunction with other technology, systems giving access to the carrier database through a password or other security arrangement, and other systems. The words between brackets are meant as alternatives between which a choice has to be made in the light of ongoing developments. "Access" may have too technical a connotation and "control" a too legal one.

1.13 Negotiable electronic record means an electronic record

- (i) **that indicates, by statements such as "to order", or "negotiable", or other appropriate statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable", and**
- (ii) **is subject to rules of procedure as referred to in article 2.4, which include adequate provisions relating to the transfer of that record to a further holder and the manner in which the holder of that record is able to demonstrate that it is such holder.**

The words "referred to" ensure that the parties can simply incorporate by reference a rule book applicable to their systems, if any, rather than include the full text of the applicable procedures.

1.14 Negotiable transport document means a transport document that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognized as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "non-negotiable" or "not negotiable".

The purpose of this definition is to give indications for identifying a negotiable transport document by scrutinizing its face. Further indications already appear in the definition of "transport document" in article 1.20 below. The rules as to delivery under such a document appear in article 10.3.2. The rules as to transfer of such a document appear in article 12.1. Both of these rely on the definition of "holder" which appears in article 1.12.

The use of the English word "negotiable" has been much discussed, and it is undoubtedly true that in some common law countries the word is not technically correct when applied to a bill of lading. Some would prefer the word "transferable" as being more neutral. It has been thought best to retain "negotiable" on the basis that even if in some legal systems inaccurate, it is well understood internationally (as is evidenced by the use of the word "non-negotiable" in article VI of the Hague Rules), and that a change of nomenclature might encourage a belief that a change of substance was intended.

1.15 Non-negotiable electronic record means an electronic record that does not qualify as a negotiable electronic record.

1.16 Non-negotiable transport document means a transport document that does not qualify as a negotiable transport document.

1.17 Performing party means a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term "performing party" does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.

There is a broad range of views on the "performing party" definition. At one end of the range, some favour including any party that performs any of the carrier's responsibilities under a contract of carriage if that party is working, directly or indirectly, for the carrier. It is felt that such a broad definition would bring into the Instrument's coverage any person that could plausibly be a defendant in a tort, bailment, or other non-contractual action when cargo was lost or damaged. It would thus achieve greater uniformity by reducing the number of actions that could be brought outside of the Instrument. Such a broad definition might be drafted with the following language at the start of the first sentence:

"a person that 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 . . ."

At the other end of the range, some advocate excluding the "performing party" definition entirely. In their view, such a definition is unnecessary because the defined "performing party" should be irrelevant under the Instrument's substantive rules. They argue that the Instrument should govern relations only between the shipper and the carrier, and that it should not govern relations between the shipper and those that are engaged, either directly or indirectly, by the carrier.

Between these two views at either end of the spectrum, any number of intermediate positions are possible. The two views that have attracted the most support are the relatively restrictive definition represented by the current text and a relatively inclusive definition that might be drafted with the following language at the start of the first sentence:

"a person other than the carrier that performs or undertakes to perform any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that ..."

Both of these intermediate positions limit the "performing party" definition to those that are involved in the carrier's core responsibilities — carriage, handling, custody, or storage of the goods. Thus ocean carriers, inland carriers, stevedores, and terminal operators, for example, would be included under either "performing party" definition. In contrast, a security company that guards a container yard, an intermediary responsible only for preparing documents on the carrier's behalf, and a ship yard that repairs a vessel (thus ensuring seaworthiness) on the carrier's behalf would not be

included under either definition.

The difference between these two definitions is in the treatment of intermediate contractors. A basic hypothetical example illustrates the distinction. Suppose that a non-vessel operating carrier (NVO) contracts to carry goods from a port in one country (Rotterdam, for example) to an inland city in another country (Atlanta, for example). The NVO thus qualifies as the "carrier." Suppose that the NVO then contracts with an ocean carrier for the Rotterdam-to-Savannah carriage and with a trucking company for the inland carriage. If the ocean carrier arranges to have the goods carried on a vessel belonging to a different ocean carrier that has been time chartered to the first ocean carrier, and to have that vessel loaded and unloaded by independent stevedores, then both ocean carriers and both stevedores are performing parties under the relatively inclusive definition, but only the second ocean carrier and the stevedores are performing parties under the relatively restrictive definition represented by the current text. Although the first ocean carrier "undertakes to perform" the ocean carriage, it does not "physically" perform the ocean carriage. Similarly, if the trucking company subcontracts with an independent driver who owns his own truck to carry the goods from Savannah to Atlanta, both the trucking company and the truck's owner-driver are performing parties under the relatively inclusive definition, but only the truck's owner-driver is a performing party under the relatively restrictive definition. Although the trucking company "undertakes to perform" the inland carriage, it does not "physically" perform the inland carriage.

All of the possibilities discussed here assume a functional definition, depending on whether a person is performing some of the carrier's duties under the contract of carriage, without regard for any contractual formalities. Under the relatively restrictive definition represented by the current text, several separate contracts may intervene between the carrier and a performing party. Under the relatively inclusive definition, the class of "performing parties" would include not only the carrier's immediate sub-contractors but also the entire line of subsidiary persons that perform the contract (*i.e.*, the sub-contractor's sub-contractors, that party's sub-contractors, and so on down the line to the party that physically performs the carrier's duties).

The second sentence of the definition clarifies that "performing parties" are only those that work, directly or indirectly, for the contracting carrier. If the consignor or consignee has an employee or agent performing a task that would otherwise be the carrier's responsibility under the contract of carriage, that employee or agent would not thereby become a "performing party."

The phrase "or fails to perform in whole or in part" is bracketed because some take the view that it is unnecessary. They argue that a person that fails to perform a task that it was obligated to perform is already covered by the phrase "a person . . . that physically performs." Others take the view that a person that fails to perform a task does not "physically perform," and argue that the bracketed language is necessary to ensure that a person is treated as a "performing party" whether it performs its duties perfectly, performs its duties poorly, or fails to perform its duties at all.

1.18 Right of control has the meaning given in article 11.1.**1.19 Shipper means a person that enters into a contract of carriage with a carrier.**

This definition mirrors the definition of “carrier”. The shipper is a contractual person who may have entered into the contract either on its own behalf and in its own name or through an employee or agent acting on its behalf and in its name. A shipper will typically perform all of its functions through such persons. The shipper may be the same person as the consignee, as is the case in many fob sales. See also the commentary to article 7.7.

1.20 Transport document means a document issued pursuant to a contract of carriage by a carrier or a performing party that

(a) evidences a carrier’s or a performing party’s receipt of goods under a contract of carriage, or

**(b) evidences or contains a contract of carriage,
or both.**

This definition should be read as preliminary to those of “negotiable transport document” and “non-negotiable transport document” in articles 1.14 and 1.16.

Paragraph (a) would include a bill of lading issued to and still in the possession of a charterer, which does not evidence or contain a contract of carriage but functions only as a receipt, and some types of receipt issued before carriage or during transshipment. Paragraph (b) would include a bill of lading when operating as such, and a waybill.

2 ELECTRONIC COMMUNICATION**2.1 Anything that is to be in or on a transport document in pursuance of this Instrument may be recorded or communicated by using electronic communication instead of by means of the transport document, provided the issuance and subsequent use of an electronic record is with the express or implied consent of the carrier and the shipper.**

This provision lays down the general principle of equivalence between electronic and paper communication for the purpose of this Instrument. Further, the emphasis is on the consent of the parties to communicate electronically.

It is felt that it is not necessary to mention the subsequent holder as well. By accepting the transfer of an electronic record a holder agrees to use electronic procedures; otherwise he could not become a holder.

2.2.1 If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic record,

(a) the holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier; and

- (b) the carrier shall issue to the holder a negotiable electronic record that includes a statement that it is issued in substitution for the negotiable transport document,**

whereupon the negotiable transport document shall cease to have any effect or validity.

2.2.2 If a negotiable electronic record has been issued and the carrier and the holder agree to replace that electronic record by a negotiable transport document,

- (a) the carrier shall issue to the holder, in substitution for that electronic record, a negotiable transport document that includes a statement that it is issued in substitution for the negotiable electronic record; and**
- (b) upon such substitution, the electronic record shall cease to have any effect or validity.**

It is expected that for a certain period there is a need for a provision dealing with a switch between a paper document and its electronic equivalent and vice versa. This article sets out a substitution rule and provides that in the case of such substitution no concurrent documents could be in circulation.

2.3 The notices and confirmation referred to in articles 6.9.1, 6.9.2, 6.9.3, 8.2.1 (b) and (c), 10.2, 10.4.2, the declaration in article 14.3 and the agreement as to weight in article 8.3.1 (c) may be made using electronic communication, provided the use of such means is with the express or implied consent of the party by whom it is communicated and of the party to whom it is communicated. Otherwise, it must be made in writing.

This article provides that all communications specifically provided for in this Instrument may be made electronically provided that the parties to the communication so agree.

2.4 The use of a negotiable electronic record shall be subject to rules of procedure agreed between the carrier and the shipper or the holder mentioned in article 2.2.1. The rules of procedure shall be referred to in the contract particulars and shall include adequate provisions relating to

- (a) the transfer of that record to a further holder,**
- (b) the manner in which the holder of that record is able to demonstrate that it is such holder, and**
- (c) the way in which confirmation is given that**
 - (i) delivery to the consignee has been effected; or**
 - (i) pursuant to articles 2.2.2 or 10.3.2(i)(b), the negotiable electronic record has ceased to have any effect or validity.**

In order to achieve equivalence between a paper negotiable document and an electronic negotiable record, the agreed rules governing the use of such record have to include provisions relating to the typical 'document of title' functions of the record. In paragraph (a) it is specified that the rules have to

provide for ‘electronic endorsements’ and in paragraph (b) that they have to provide for the electronic equivalency of the identification function of a paper document of title. (See also the definition of “holder” under article 1.13). In paragraph (c) it is provided that the manner in which it is confirmed that a record is exhausted has to be indicated in the agreed rules as well.

The words “referred to” in this provision ensure that the parties could simply incorporate by reference the agreed rules applicable to their systems rather than include the full text of the applicable procedures.

3 SCOPE OF APPLICATION

3.1 Subject to article 3.3.1, the provisions of this Instrument apply to all contracts of carriage in which the place of receipt and the place of delivery are in different States if

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

Historically, the application of transport conventions has been tied to the issuance of a particular type of transport document, such as a bill of lading. Over time, bills of lading have been increasingly replaced by other, often non-negotiable, documents. Moreover, with the growth of electronic commerce it may be anticipated that traditional documents, perhaps even the electronic records as defined in this Instrument, will also become less relevant. The scope of application of this Instrument has therefore been defined without reference to whether a transport document (of any type) is or is to be issued.

Views are divided as to whether the port of loading should be included in paragraph (a) as a place that invokes the application of the Instrument. For port-to-port shipments, it is agreed that the port of loading should invoke the application of the Instrument, but the port of loading would already be included as the place of receipt. For door-to-door shipments when the port of loading and the place of receipt are in the same State, it would also be unnecessary to mention both. For door-to-door shipments when the port of loading and the place of receipt are in different States, some object that the identity of the port

of loading is an essentially random factor having no necessary connection with the overall (*i.e.*, door-to-door) performance of the contract, and that it should therefore not be included in paragraph (a). Others feel that the identity of the port of loading is not a random factor when it is “specified either in the contract of carriage or in the contract particulars.” On the contrary, the identity of the port of loading is an essential aspect of a predominately maritime contract and should be included in a predominately maritime convention. Furthermore, including the port of loading in paragraph (a) would broaden the scope of application of the Instrument and produce greater uniformity.

The debate on paragraph (b) as to whether the port of discharge should be included mirrors the debate on paragraph (a) concerning the inclusion of the port of loading.

Views are divided as to whether paragraph (c) should be included. Some object that it might be uncertain when the goods were received by the carrier whether the Instrument would apply or not.

Views are also divided as to whether paragraph (d) should be included. Paragraph (d) may give rise to some uncertainty as to where the contract of carriage was entered into or the electronic record issued.

Paragraph (e) is in accord with the provisions of article X of the Hague-Visby Rules, but concern has been expressed that paragraph (e) might have unintended consequences. Some fear that a charter party, for example, might have a choice-of-law clause calling for the law of a country that had ratified the Instrument, and that this might have the effect not only of subjecting the charter party to this Instrument but also of invalidating specific clauses in the charter party that were inconsistent with the Instrument, notwithstanding the parties’ express agreement to those inconsistent terms. It is agreed that this result would be undesirable, but doubt has been expressed that this result would be likely under the current language in paragraph (e).

It has also been questioned how the courts would apply the phrase “the law of any State giving effect to them” in paragraph (e) if a State had enacted a national law based on the Instrument that did not fully conform to the Instrument.

3.2 The provisions of this Instrument apply without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

In order to avoid any doubt, this provision lists certain factors that might otherwise have been thought relevant but that are instead explicitly made irrelevant for determining the application of this Instrument.

3.2.1 The provisions of this Instrument do not apply to charter parties, [contracts of affreightment, volume contracts, or similar agreements].

The wide applicability of this Instrument under article 3.1 implies that certain exceptions should be made. Some contracts may qualify as “contracts of carriage” for which it is neither necessary nor desirable to apply mandatory law. Moreover, some provisions of this Instrument may be less suitable for application to certain contracts of carriage. Charter parties, for example, have

long been excluded from mandatory law. Widespread support exists for similarly excluding contracts of affreightment, volume contracts, towage contracts, and similar agreements. But opinions are divided as to whether the term “charter parties” should be defined, and as to the extent to which other similar contracts should also be excluded.

Efforts to define charter parties have been troublesome for generations. The lack of a definition in prior conventions has not caused great difficulties in practice, and some feel that it might be risky to attempt a definition at a time when commercial practices were changing rapidly. Others feel that a definition is necessary because the charter party exclusion is assuming increased importance in the Instrument.

If it is ultimately concluded that a definition is necessary, something along the following lines might be suitable: “contracts for the [use] [disposal] [provision] of a ship, or part thereof, to be employed in the carriage of goods, whether on time- or voyage basis, such as a charter party, or a slot- or space-charter.” The three bracketed terms, “[use] [disposal] [provision],” are meant as alternatives. One of the three should be chosen. Some preference has been expressed for the term “use.”

The issue as to the exclusion of other similar contracts is unresolved. Although there is general support for the proposition that some contracts similar to charter parties should receive the same treatment as charter parties, it remains unclear how far the exclusion should be extended. Towage contracts were first mentioned fairly late in the consultation process, and thus they are mentioned only here in the commentary rather than in the text.

One suggestion is to extend charter party treatment to modern equivalents of the charter party, such as slot charters and space charters, but to recognise a different sort of freedom of contract for negotiated contracts between sophisticated parties that less closely resemble traditional charter parties, such as contracts of affreightment and volume contracts. The suggestion has been made that contracts of affreightment should be subject to the Instrument as a default rule, but that the parties to these contracts should have the freedom to derogate from the terms of the Instrument. Such derogations, however, would only be binding on the immediate parties to the contract. Transport documents issued under these contracts would still need to comply with the terms of this Instrument when they were passed to a third party who was not bound by the original parties’ agreement.

If it is ultimately concluded that a definition of these additional terms is necessary, something along the following lines might be suitable:

“A volume contract is a written contract between one or more shippers and one or more carriers in which the shipper or shippers agree to provide a certain volume or portion of cargo over a fixed period of time and the carrier or carriers agree to a certain freight rate or rate schedule and service level. A towage contract is a contract for the towing or pushing of floating objects, whether on time or voyage basis.”

Some consider that it would be valuable to stress that in cases in which the Instrument did not apply as a matter of law it would still be open to the parties to incorporate the terms of the Instrument into their agreement as a

matter of contract. This contractual incorporation could be done in whole (incorporating the entire Instrument) or in part (incorporating selected provisions of the Instrument).

3.3.2 Notwithstanding the provisions of article 3.3.1, if a negotiable transport document or a negotiable electronic record is issued pursuant to a charter party, [contract of affreightment, volume contract, or similar agreement], then the provisions of this Instrument apply to the contract evidenced by or contained in that document or that electronic record from the time when and to the extent that the document or the electronic record governs the relations between the carrier and a holder other than the charterer.

Whether the bracketed language is included in this provision will turn on whether similar bracketed language is included in article 3.3.1. If the bracketed language is included, then the reference to the “charterer” at the end of the article will need to be redrafted. Including volume contracts in this provision may make article 3.4 unnecessary.

3.4 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 articles 3.1, 3.2, and 3.3 so specify.

This provision may need to be revised or deleted in light of the resolution of the issue discussed in the commentary to article 3.3.1.

4 PERIOD OF RESPONSIBILITY

4.1.1 Subject to the provisions of article 4.3, the responsibility of the carrier for the goods under this Instrument covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.

4.1.2 The time and location of receipt of the goods is the time and location agreed in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and location of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.

Because of their legal consequences, it is considered important that the beginning and the end of the period of responsibility of the carrier should be specified as precisely as possible.

The provision emphasises that receipt is primarily a contractual matter. As an example: if it is agreed that the carrier will receive a cargo of oil ‘when passing ship’s manifolds’, then the responsibility of the carrier for the oil starts at such place and point in time. Of course, often the agreed place and time of delivery of the goods to the carrier and their actual taking into custody will coincide. But they may differ, in which case the *agreed* time and place prevails.

When no express or implied agreement has been made about the time and place of receipt, but certain customs, practices or usages of the trade, including those at the place of receipt, exist, then such customs, practices or usages apply. If no agreement, customs, practices or usages are applicable a general fall back provision applies. In such case the actual taking of the goods into the custody of the carrier is the relevant time and place of receipt.

4.1.3 The time and location of delivery of the goods is the time and location agreed in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and location of delivery is that of the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.

Articles 4.1.2 and 4.1.3 together secure that when tackle-to-tackle transport is agreed (as will often be the case in bulk trades), the responsibility of the carrier does not extend beyond tackle.

4.1.4 If the carrier is required to hand over the goods at the place of delivery to an authority or other third party to whom, pursuant to law or regulation applicable at the place of delivery, the goods must be handed over and from whom the consignee may collect them, such handing over will be regarded as a delivery of the goods by the carrier to the consignee under article 4.1.3.

4.2.1 Carriage preceding or subsequent to sea carriage

Where a claim or dispute arises out of loss of or damage to goods or delay occurring solely during either of the following periods:

- (a) from the time of receipt of the goods by the carrier or a performing party to the time of their loading on to the vessel;
- (b) from the time of their discharge from the vessel to the time of their delivery to the consignee;

and, at the time of such loss, damage or delay, there are provisions of an international convention that

- (i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective whether the issuance of any particular document is needed in order to make such international convention applicable], and
- (ii) make specific provisions for carrier's liability, limitation of liability, or time for suit, and
- (iii) cannot be departed from by private contract either at all or to the detriment of the shipper,

such provisions shall, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this Instrument.

4.2.2 Article 4.2.1 applies regardless of the national law otherwise applicable to the contract of carriage.

The great majority of contracts of carriage by sea include land carriage, whether occurring before or after the sea leg or both. It is necessary therefore to make provision for the relationship between this Instrument and conventions governing inland transport which may apply in some (particularly European) countries. This article deals with that problem, and provides for a network system, but one as minimal as possible. The Instrument is only displaced where a convention which constitutes mandatory law for inland carriage is applicable to the inland leg of a contract for carriage by sea, and it is clear that the loss or damage in question occurred solely in the course of the inland carriage. This means that where the damage occurred during more than one leg of the carriage, or where it cannot be proved where the loss or damage occurred, this Instrument will prevail during the whole door to door transit period.

The Instrument leaves it open for countries adhering to this Instrument to exclude it wholly or in part from the inland carriage by giving any future international convention mandatory status, whether for a particular mode of inland transport, or for the inland part of any contract for carriage by sea which includes such transport. It could also be argued that provisions of the national law of a contracting state relating to inland carriage should prevail over the corresponding provisions of this Instrument, but this would further restrict the uniform applicability of the Instrument.

The essence of such a network system is that the provisions mandatorily applicable to inland transport apply directly to the contractual relationship between the carrier on the one hand and the shipper or consignee on the other. If the inland transport has been subcontracted by the carrier, they apply to the relation between carrier and subcarrier also. But in respect of the first relationship the provisions of this Instrument may supplement the provisions mandatorily applicable to the inland transport; whereas as between carrier and subcarrier the inland provisions are alone relevant (supplemented as necessary by any applicable national law). If a cargo claim is directed by a third party against a performing party by virtue of the provisions of article 6.3.1, that party is liable to the claimant in the same way as the carrier, that is to say, under the provisions of this Instrument, subject to mandatory provisions governing the inland leg of the transport.

It should also be noted that the proposed limited network system only applies to provisions directly relating to the liability of the carrier, including limitation and time for suit. Provisions in other conventions that may indirectly affect liability, such as jurisdiction provisions, should be disregarded. Also many other legal provisions mandatorily applicable to inland transport are not superimposed on the contract regulated by this Instrument because they are directed specifically to inland transport rather than to a contract involving carriage by sea, and their application to a contract of the latter type would be inappropriate and even sometimes cause confusion. Two examples may be given. The first is the requirements of the CMR Convention relating to the

consignment note. These may apply between carrier and subcarrier, but their application to the main contract of carriage regulated by this Instrument would be inconsistent with the document (or electronic record) required by this Instrument for the whole journey. The second example is the provisions of the CMR relating to the right to give instructions to the carrier (articles 12-14). These again can only be applied to the relation between carrier and subcarrier (in which relation the carrier is “sender”): for the main contract of carriage, chapter 11 of this Instrument must apply.

For the limited network system to apply, the damage must have occurred during the precarriage or oncarriage. In this respect a choice can be made between the place where the damage is caused, where it occurs and where it is detected. The time of detection is often after delivery and, thus, would not produce a balanced result. The place where the damage is caused may be before the voyage begins, e.g. in case of the damage caused by the shipper having the cargo badly stowed in a container. The most serious objection against the place where the damage is caused is that the question of proper causation according to the applicable law has to be resolved before it can be determined whether the provisions of this Instrument or of another convention are applicable. The place where a damage has occurred is a factual matter, is usually relatively easy to establish and may be expected to produce fair results. Therefore, the place of occurrence must be regarded as the proper choice within the scope of the network system and article 4.2.1 so provides.

It is intended that article 4.2.2 should make article 4.2.1 mandatory whatever law governs the contract of carriage (as under article 7.2 of the Rome Convention on the Law Applicable to Contractual Obligations). As an example may be taken a contract of carriage from Singapore to Antwerp, Belgium, under which the goods are to be shipped through a Dutch port of discharge, Rotterdam, and carried thence by land. The contract is governed by Singapore law, whether by express choice of the parties or by operation of other principles of the conflict of laws. Before a court in a country adhering to this Instrument, Singapore law would be displaced to the extent that mandatory provisions of an international convention governing road haulage, also adopted by that country, are applicable to the inland leg of the journey.

The bracketed language in article 4.2.1(i) reflects the situation under the 1980 COTIF Convention, where the applicability of the Convention is tied to the issue of a railway bill. If at the time that this Instrument enters into force the 1980 COTIF Convention has already been replaced by the 1999 Convention, the bracketed language may be deleted, unless other international mandatory law makes it necessary.

4.3 Mixed contracts of carriage and forwarding

4.3.1 The parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as agent, will arrange carriage by another carrier or carriers.

4.3.2 In such event the carrier shall exercise due diligence in selecting the

other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract.

This is the first of several articles in which it is provided that the parties may “expressly agree” on some issue. This phrase implies something beyond a pre-printed clause in the standard terms and conditions in the fine print on the back of a transport document (or the electronic equivalent). Rather, there should be some indication that the issue was the subject of discussion between the parties, and that each party in fact agreed to it. At the very least, a term that has been “expressly agreed” (both under this article and under other articles in which the same phrase is employed) should be stated separately on the transport document or electronic record. For example, declarations of higher value for the purpose of avoiding package limitations of current conventions are customarily indicated in a separate box on the face of the bill of lading. Similar treatment would be appropriate in this context.

These mixed contracts are a common feature in the liner trade. However, their legal character is not always well understood and, in practice, many create ambiguities. They may refer to “connecting carrier” arrangements. Such arrangements may apply where a carrier is able to carry out only part of the voyage with a vessel under its own control and has agreed with the shipper to take care that the other part(s) are carried out by other carrier(s) with whom it may have an arrangement to do so. Occasionally the connecting carrier may be an inland carrier.

Article 4.3.1 is intended to make clear that this type of contract is perfectly legitimate. If a transport document or an electronic record is issued, the mixed character must be reflected in such document or record, so as to protect third parties relying on the contents of such documents or records. Article 4.3.2 puts some basic obligations on the carrier, when acting in its capacity as agent, and is meant to protect the shipper and/or the consignee.

5. OBLIGATIONS OF THE CARRIER

5.1 The carrier shall, subject to the provisions of this Instrument and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

This provision states the basic obligation of the carrier. The reference to the provisions of this Instrument makes clear that the terms of the contract do not stand alone.

5.2.1. The carrier shall during the period of its responsibility as defined in article 4.1, and subject to article 4.2, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.

5.2.2 The parties may agree that certain of the functions referred to in article 5.2.1 shall be performed by or on behalf of the shipper, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.

5.3 Notwithstanding the provisions of articles 5.1, 5.2, and 5.4, the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely during its period of responsibility to become, a danger to persons or property or an illegal or unacceptable danger to the environment.

5.4 The carrier shall be bound, before, at the beginning of, [and during] the voyage by sea, to exercise due diligence to:

- (a) make [and keep] the ship seaworthy;**
- (b) properly man, equip and supply the ship;**
- (c) make [and keep] the holds and all other parts of the ship in which the goods are carried, including containers where supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.**

5.5 Notwithstanding the provisions of articles 5.1, 5.2, and 5.4, the carrier in the case of carriage by sea [or by inland waterway] may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving other property involved in the common adventure.

The above provisions state the obligations of the carrier as positive duties, and are similar in effect to articles II and III.1 of the Hague and Hague-Visby Rules. A body of opinion exists that the general liability regime of article 6.1 below makes a positive provision such as this unnecessary, but the majority view has favoured the retention of such a provision. It spells out not only the carrier's obligations with regard to the carriage, but also those with respect to the ship, which are consistent with its public law obligations regarding safety and the preservation of the environment. Including such a provision would also preserve the benefit of much existing case law.

As regards article 5.4 the words in square brackets “and during” “and keep”, if inserted, would make the seaworthiness duty continuous throughout the voyage, which is not so under the Hague and Hague-Visby Rules. The change has received support on the basis that it would seem somewhat out of tune with the ISM Code and safe shipping requirements for the law to be stated otherwise. Some think however that if the ship becomes unseaworthy during the voyage, the duty to put matters right may, depending on the circumstances, be part of the duty to care for the goods, already contained in article 5.2.1; this is particularly so if the defence of nautical fault is abolished (as to which see below). It is also said that a continuing duty may impose harsh and sometimes impracticable duties on the carrier while at sea and hence significantly broaden its responsibilities; and that it would also require the generating of new case law to work out its meaning and implications.

As regards containers, the wide definition in article article 1.4 should be borne in mind.

Article 5.2.2 is intended to make provision for fio(s) clauses and the like, which are rare in the liner trade but common in the charter party trade. The applicability of this Instrument to negotiable transport documents issued under a charter party makes this provision desirable.

The provision as to sacrifice in article 5.5 is confined to sea (or water) transport because the notion of sacrifice for the preservation of the common adventure is a maritime one, linking with general average. The opinion has been expressed that it is not necessary to deal with this point in the Instrument.

There has been a proposal for a specific provision requiring carriers in refrigerated trades to make available temperature data on request. It was thought that this was too specific for a general Instrument such as this. If it were to be thought appropriate it might be considered in connection with article 6.9.4.

6 LIABILITY OF THE CARRIER

6.1 Basis of liability

6.1.1 The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier's responsibility as defined in article 4, unless the carrier proves that neither its fault nor that of any person referred to in article 6.3.2(a) caused or contributed to the loss, damage or delay.

This provision constitutes the basic rule of liability. The overall result is similar to that of article 5.1 of the Hamburg Rules and the technique to that of article IV.2(q) of the Hague Rules. The actual wording is however not the same as either.

The Hamburg Rules require that the carrier prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. Article IV.2(q) of the Hague Rules requires that the carrier show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. This article refers to the fault of the carrier itself or that of persons performing its functions, the latter being incorporated by the reference to article 6.3.

The question of carrier's liability for delay is provided for and commented on in article 6.4.

6.1.2 [Notwithstanding the provisions of article 6.1.1 the carrier shall not be responsible for loss, damage or delay arising or resulting from

- (a) act, neglect or default of the master, mariner, pilot or other servants of the carrier in the navigation or in the management of the ship;**
- (b) fire on the ship, unless caused by the fault or privity of the carrier.]**

These are the first two of the carrier's traditional exceptions, as provided in the Hague and Hague-Visby Rules. There is considerable opposition to the retention of either. As regards paragraph (a) there is little support for the "management" element, which is simply productive of disputes as to the difference between management of the ship and the carrier's normal duties as to care and carriage of the goods. The general exception is however justified

by some on the basis that should it be removed, there would be a considerable change to the existing position regarding spreading of the risks of sea carriage, which would of course impact on the insurance position. It would not be possible to retain this exception as part of the modified “presumption” regime which is set out in article 6.1.3 below, since it is a direct exoneration for negligence: it must either be an exoneration or fall. The exception is therefore preserved here in its original form to make the position clear.

There is also a view that even if this exception is removed, an exception should remain for “act, neglect or default of a compulsory pilot in the navigation of the ship”, on the ground that this covers a situation in which the carrier can justifiably feel aggrieved at being expected to answer. Such an exception would most naturally be a genuine exoneration. It could alternatively be included under the presumption regime set out below, though since by its wording it relates to loss caused not by the negligence of the carrier it would be slightly less appropriate there.

As regards paragraph (b), the Hague and Hague-Visby Rules not only reduce the circumstances in which the carrier might be liable in respect of fire (by requiring actual fault or privity, and probably also some form of management failure by the carrier) but can also be taken to impose a burden of proof on the claimant. The Hamburg Rules do not appear to require management failure but specifically impose the burden of proof on the claimant. The above provision follows the Hague and Hague-Visby Rules. The fire exception has however been modified to make clear that the fire must be on the carrying vessel: the Hague and Hague-Visby Rules wording gives no indication in this respect.

The exception is usually justified on the ground that accidents by fire raise serious problems of proof, and it is preserved here in its Hague and Hague-Visby Rules form in view of that opinion. It is not however necessary that this exception appears as a direct exoneration: the phrase “fire on the vessel” could if desired be placed within the events listed under the “presumption” regime set out below for the remaining Hague and Hague-Visby Rules excepted perils. That would necessitate removing the restriction to the actual fault or privity of the carrier. The result would then be very similar to that created by the Hamburg Rules by reason of the conjoined effect of article 6.3.2, under which the carrier is responsible for the acts of those carrying out its responsibilities under its control. The claimant’s burden of proof would not be increased.

It is of course possible to take the view that no special exception is required, and that fire can be dealt with under the general rule of article 6.1.1.

6.1.3 Notwithstanding the provisions of article 6.1.1, if the carrier proves that loss of or damage to the goods or delay in delivery has been caused by one of the following events it shall be presumed, in the absence of proof to the contrary, that neither its fault nor that of a performing party has caused or contributed to cause that loss, damage or delay.

This provision represents a much modified (but in some respects extended) version of most of the remaining excepted perils of the Hague and

Hague-Visby Rules: in particular they appear here only as presumptions. The consultation indicated a division of opinion as to whether the traditional excepted perils should be retained as exonerations from liability or whether they should appear (in so far as possible) as presumptions only. The basis for the second approach is that certain events are typical of situations where the carrier is not at fault; and that it is justifiable, where the carrier proves such an event, for the burden of proof to be reversed.

A body of opinion would however prefer to retain all the excepted perils, whether with or without the nautical fault exception, as genuine exonerations, i.e. exceptions from liability. Certainly the nautical fault exception would only be effective as such, and it is for that reason preserved in article 6.1.2 above as a direct exoneration.

Another view is that since most of the exceptions are usually interpreted as not applying where the carrier is negligent, there is not a great deal of difference in practice between the two approaches.

A quite different approach however is that the exceptions should be deleted completely, since the events to which they refer are covered by the general principle of liability. This is opposed on the grounds that in some countries the complete deletion of the catalogue might be taken by judges inexperienced in maritime law as indicating an intention to change the law. It is said that even if the list is not needed in some countries, it is useful in others and does no harm in those countries that do not need it.

For expository purposes the matters concerned are referred to in this commentary as “exceptions”, though there is obviously a substantial difference, in theory at least, between them as exonerations, and as events raising a presumption only.

What follows is therefore a new presentation of the exceptions (mostly, but not all, the traditional ones) as part of a presumption-based regime. In accordance with a view frequently expressed in the consultation, these exceptions are listed in approximately the familiar order in which they appear in the Hague and Hague-Visby Rules. Their preservation can be justified in part on the basis that they have generated valuable case law over the decades since 1924.

It has been mentioned above that many of the exceptions are usually interpreted as only applicable where the carrier has not been negligent in incurring the excepted peril. But there are at least two other exceptions which are, at least in some jurisdictions, specifically defined in terms requiring the absence of negligence on the carrier's part. They are Act of God and perils of the sea. To establish these excepted perils at present, it would, at least in some jurisdictions, be necessary for the carrier to prove by way of defence that it was not negligent in getting into the situation involved. Both an Act of God and a peril of the sea can be defined as acts occurring without a carrier's negligence which could not reasonably have been guarded against. To define them for a “presumption” regime without reference to absence of fault is not so easy. New definitions might have to be evolved, referring only to serious external events which could raise a (rebuttable) presumption of non-liability. This might involve loss of existing case law in some jurisdictions. For this reason these two excepted perils are listed in brackets at the end. They would not sit well in a presumption-

based regime and it seems likely that situations which might attract either of them could fairly easily be dealt with under the basic rule of article 6.1.1.

(i) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

These are basically traditional exceptions, but “hostilities, armed conflict, piracy and terrorism” have been added to expand on the word “war”, which might or might not at present be interpreted to cover some of the other matters. They will of course require interpretation. “Act of God” appears in brackets because, though traditional, it is usually defined by reference to the absence of negligence, which means that, as suggested above, it does not sit easily as creating a presumption.

(ii) quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];

This is a survival of the old “restraint of princes” exception. There may be doubt as to what the English phrase “public authorities” is taken to cover in various countries. It may therefore be prudent to retain a reference to judicial restraints.

(iii) act or omission of the shipper, the controlling party or the consignee;

“Controlling party” is defined in article 1.7.

(iv) strikes, lock-outs, stoppages or restraints of labour;

This is similar to the Hague Rules, except that it omits “whether partial or general”.

(v) saving or attempting to save life or property at sea;

(vi) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(vii) insufficiency or defective condition of packing or marking;

The English version of the Hague Rules used the words “insufficiency or inadequacy” (French “imperfection”). The words “defective condition” may make it clearer that the provision covers marks which fade, are washed out in rain, etc.

(viii) latent defects not discoverable by due diligence.

The meaning of this Hague Rules exception is notoriously unclear. In particular, it gives no indication as to in what the defect must be, whether in the ship, the goods or shore equipment. It appears that in some jurisdictions reliance on it may have advantages connected with the burden of proof. The matter could be clarified by referring to the ship, its apparatus and equipment.

(ix) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

The purpose of this provision, which is new, is to make provision for situations where article 5.2.2 permits functions to be performed by these parties.

(x) acts of the carrier or a performing party in pursuance of the powers conferred by article 5.3 and 5.5 when the goods have become a danger to persons, property or the environment or have been sacrificed;

[(xi) perils, dangers and accidents of the sea or other navigable waters;]

If the exceptions are retained as exonerations this provision should be restored somewhere nearer its original position as exception (iii). If however the presumption technique is adopted, for the reasons given above it is doubtful whether this exception could effectively be retained at all.

Most of the above exceptions relate to carriage by sea. It is for consideration whether further exceptions should be introduced to cover typical incidents of land carriage, or whether these would be adequately dealt with by the general provision in article 6.1.1.

6.1.4 [If loss, damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.]

[If loss, damage, or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, then the carrier is

(a) liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and

(b) not liable for the loss, damage, or delay in delivery to the extent the carrier proves that it is attributable to one or more events for which the carrier is not liable.

If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.]

These alternative provisions deal with concurrent and consecutive causes of damage, and apply regardless of whether any of the provisions of articles 6.1.2 and 6.1.3 are adopted: a provision would be required even if article 6.1.1 formed the sole liability regime.

The first alternative is intended to be much the same in effect as article 5.7 of the Hamburg Rules (as well as current law in many countries), but it has been sought to simplify the wording and make clear where the burden of proof lies.

The second alternative is intended to introduce an entirely new approach in which the burden of proof is shared, and each party bears the risk of non-persuasion in certain respects. The consultation process revealed some support for such a new approach. Most significantly, the second alternative would relieve the carrier of the burden of having to prove a negative. Several delegates

and industry representatives report that the practical effect of the current regimes that are similar to the first alternative is to impose full liability on the carrier whenever there are multiple causes of loss or damage.

The final sentence at the end of the second alternative is a fall-back provision to cover the rare situations in which adequate proof is lacking. It is intended as a last resort when a court is entirely unable to apportion the loss. Such a provision would be unnecessary under the first alternative. The fall-back rule under the first alternative would be to impose full liability on the carrier whenever the carrier is unable to discharge its burden of proof.

6.2 Calculation of compensation

6.2.1 If the carrier is liable for loss of or damage to the goods, the compensation payable shall be calculated by reference to the value of such goods at the place and time of delivery according to the contract of carriage.

6.2.2 The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

6.2.3 In case of loss of or damage to the goods and save as provided for in article 6.4, the carrier shall not be liable for payment of any compensation beyond what is provided for in articles 6.2.1 and 6.2.2.

This provision follows the principle apparently reflected in the Hague-Visby Rules article IV.5(b). It clarifies what is believed to be the intention of the Hague-Visby language to include a decrease in the value of the goods and to exclude consequential damages. Loss or damage due to delay is dealt with in article 6.4.

6.3 Liability of Performing Parties

6.3.1

- (a) A performing party is subject to the responsibilities and liabilities imposed on the carrier under this Instrument, and entitled to the carrier's rights and immunities provided by this Instrument (i) during the period in which it has custody of the goods; and (ii) 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.**
- (b) If the carrier agrees to assume responsibilities other than those imposed on the carrier under this Instrument, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods shall be higher than the limits imposed under articles 6.4.2, 6.6.4, and 6.7, a performing party shall not be bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits.**

Paragraph (a) imposes liability on “performing parties” – those that perform the carrier’s core obligations under the contract of carriage. This provision does not define the extent of the performing parties’ liability. That is determined under other provisions. In particular, the extent of the liability is specified in part by article 4.2, which establishes a “network” system that also applies to performing parties (such as inland carriers).

It is important to distinguish the performing party’s liability from the carrier’s liability. The carrier is liable (subject to the terms of this Instrument) under the contract of carriage for the entire period of responsibility under article 4.1. 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 burden is on the cargo claimant to show that the loss or damage occurred under circumstances that are sufficient to impose liability on the relevant performing party.

Paragraph (b) provides that each performing party is entitled to its own liability determination. A carrier’s agreement to assume higher liability (an agreement for which the carrier alone has presumably been compensated) does not bind a performing party that did not assume the same agreement. Thus a performing party may safely rely on the terms of this Instrument in the absence of its own express agreement to the contrary.

Views have been expressed that this article should be deleted and that claims under the Instrument should be directed solely to the carrier with which the shipper contracted. The majority view, however, is that the performing party should be separately defined under the Instrument but that its liability should be limited to the part of the carriage that it performed.

The principal debate on this provision is reflected in the “performing party” definition. Those who argue for a broader liability regime favour a more inclusive definition of “performing party,” while those who argue for a narrower liability regime favour a more restrictive definition. The basic hypothetical example in the commentary to article 1.17 once again provides a useful illustration. Those who argue for a broader liability regime contend that the trucking company that sub-contracts its obligations to an independent owner-driver should be liable directly to the cargo claimant if the truck’s owner-driver negligently damages the cargo. The trucking company would be liable to the carrier under its contract, and thus the cargo claimant could reach the trucking company indirectly (unless the carrier could not be sued for some reason). In many jurisdictions, the trucking company would also be liable to the cargo claimant directly in tort. Providing a direct action under this Instrument would simplify the process, better protect the cargo claimant’s interests, and achieve greater uniformity. Those who argue for a narrower liability regime contend that the trucking company that sub-contracts its obligations to an independent owner-driver should not be liable under this Instrument. A consignee that seeks to recover for damage negligently caused by the truck’s owner-driver should be able to recover only from the NVOC that entered into the contract of carriage or from the negligent owner-driver.

Protecting the trucking company that entrusted the cargo to the negligent owner-driver protects the independence of its sub-contract with the carrier.

6.3.2

(a) Subject to article 6.3.3, the carrier shall be responsible for the acts and omissions of

(i) any performing party, and

(ii) any other person, including a performing party's sub-contractors and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control,

as if such acts or omissions were its own. A carrier is responsible under this provision only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency, as the case may be.

(b) Subject to article 6.3.3, a performing party shall be responsible for the acts and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its sub-contractors, employees, and agents, as if such acts or omissions were its own. A performing party is responsible under this provision only when the act or omission of the person concerned is within the scope of its contract, employment, or agency, as the case may be.

Article 6.3.2 confirms that the carrier is responsible for the acts and omissions of all those who work under it (when they act within the scope of their contract, employment, or agency, as the case may be). A performing party is similarly responsible for the acts and omissions of all those who work under it.

6.3.3 If an action is brought against any person, other than the carrier, mentioned in article 6.3.2, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this Instrument if it proves that it acted within the scope of its contract, employment, or agency, as the case may be.

6.3.4 If more than one person is liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for in articles 6.4, 6.6 and 6.7.

6.3.5 Without prejudice to the provisions of article 6.8, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Instrument

6.4 Delay

6.4.1 Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within any time expressly agreed upon [or, in the absence of such agreement, within the

time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage].

The first part of the above provision has widespread support; the second part in brackets is more controversial. The phrase “the terms of the contract” provides for situations where the carrier expressly does not guarantee arrival times.

6.4.2 If delay in delivery causes loss not resulting from loss of or damage to the goods carried and hence not covered by article 6.2, the amount payable as compensation for such loss shall be limited to an amount equivalent to [...times the freight payable on the goods delayed]. In addition, the total amount payable under this provision and article 6.7.1 shall not exceed the limit that would be established under article 6.7.1 in respect of the total loss of the goods concerned.

Where delay causes loss of or damages to the goods a limit on damage is contained in the general limitation of article 6.7.1. The present provision creates a special limit for other loss caused by delay. This can be called “economic” or “non-physical” loss, and is sometimes referred to as “consequential” loss. But none of these terms has agreed meanings: all loss is economic, the loss in itself is not non-physical, and the meaning of the English phrase “consequential loss” is not agreed between legal systems. It has been thought best therefore to put forward the formulation above.

As to the amount, an example of a limitation for this type of loss exists in Australia where the amount payable is the lowest of the actual amount of the loss, or 2^{1/2} times the sea freight payable for the goods delayed; or the total amount payable as sea freight for all of the goods shipped by the shipper concerned under the contract of carriage concerned.

The second sentence ensures that the overall limitation on amount contained in article 6.7.1 is not exceeded by any operation of this provision.

6.5 Deviation

- (a) The carrier is not liable for loss, damage, or delay in delivery caused by a deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.**
- (b) Where under national law a deviation of itself constitutes a breach of the carrier’s obligations, such breach only has effect consistently with the provisions of this Instrument.**

The intention of this provision is that the Instrument is not displaced by deviation, whether geographical or otherwise. Under some legal systems a misperformance by the carrier which can be described as a deviation has been held to displace the exceptions, especially the package or unit limitation of the Hague and (possibly) Hague-Visby Rules. It is intended that this should no longer be possible: like the Hague-Visby Rules, this Instrument contains (in article 6.8) its own provisions for loss of the right to limit.

6.6 Deck cargo

6.6.1 Goods may be carried on or above deck only if

- (i) such carriage is required by applicable laws or administrative rules or regulations, or**
- (ii) they are carried in or on containers on decks that are specially fitted to carry such containers, or**
- (iii) in cases not covered by paragraphs (i) or (ii) of this article, the carriage on deck is in accordance with the contract of carriage, or complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.**

6.6.2 If the goods have been shipped in accordance with article 6.6.1(i) and (iii), the carrier shall not be liable for loss of 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 or above deck pursuant to article 6.6.1 (ii), the carrier shall be liable for loss of or damage to such goods, or for delay in delivery, under the terms of this Instrument without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under article 6.6.1, the carrier shall be liable, irrespective of the provisions of article 6.1, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.

6.6.3 If the goods have been shipped in accordance with article 6.6.1(iii), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier shall have the burden of proving that carriage on deck complies with article 6.6.1(iii) and, if a negotiable transport document or a negotiable electronic record is issued, is not entitled to invoke that provision against a third party that has acquired such negotiable transport document or electronic record in good faith.

6.6.4 If the carrier under this article 6.6 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 articles 6.4 and 6.7; however, if the carrier and shipper expressly have agreed that the goods will be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods that exclusively resulted from their carriage on deck.

6.7 Limits of liability

6.7.1 Subject to article 6.4.2 the carrier's liability for loss of or damage to or in connection with the goods is limited to [...] units of account 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 has been declared by the shipper before shipment and included in the contract particulars, [or where a higher amount than the amount of limitation of liability set out in

this article had been agreed upon between the carrier and the shipper.]

6.7.2 When goods are carried in or on a container, the packages or shipping units enumerated in the contract particulars 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.

6.7.3 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 that 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 that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

It is considered that it would not be appropriate to insert any figures for units of account in the Instrument at this stage. However there is support for the view that the Hague-Visby limits should be the starting point for future discussion.

In the final provisions of this Instrument it would be appropriate to include an article providing for an accelerated amendment procedure to adjust the amounts of limitation, such as article 8 of the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims. However the level of the limits ultimately agreed to be inserted in article 6.7.1 would have a bearing on support for an accelerated amendment procedure.

The last part of article 6.7.1 is bracketed because it has to be decided whether any mandatory provision should be one-sided or two-sided mandatory, that is whether or not it should be permissible for either party to increase its respective liabilities.

6.8 Loss of the right to limit liability

Neither the carrier nor any of the persons mentioned in article 6.3.2 shall be entitled to limit their liability as provided in articles [6.4.2,] 6.6.4, and 6.7 of this Instrument, [or as provided in the contract of carriage,] if the claimant proves that [the delay in delivery of,] the loss of, or the damage to or in connection with the goods resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

The provision for “breaking” the overall limitation is of a type common in international conventions and corresponds to article IV.5(e) of the Hague-Visby Rules. The necessity for personal fault would require some form of

management failure in a corporate carrier, but it is not thought appropriate to seek to specify this in any greater detail. The square brackets indicate that it is for consideration whether the limit should be breakable in cases of delay. It seems likely that it would rarely be appropriate to do so, and the point can be made that the possibility of its being done might create insurance difficulties.

6.9 Notice of loss, damage, or delay

6.9.1 The carrier shall be presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars 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 to the carrier or the performing party who delivered the goods 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. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.

6.9.2 No compensation shall be payable under article 6.4 unless notice of such loss was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.

6.9.3 When the notice referred to in this chapter is given to the performing party that delivered the goods, it shall have the same effect as if that notice had been given to the carrier, and notice given to the carrier shall have the same effect as notice given to the performing party that delivered the goods.

6.9.4 In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods.

The giving of prompt notice is of practical importance. It enables the parties immediately to carry out a survey of the goods (preferably jointly) and to take 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 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 too harsh a sanction for physical damage to the goods. Under the Hague Rules, taken over in this provision, 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 a 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 Budapest 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 which delivers the goods to the consignee. Obviously, in that case notice may be properly given to the contracting carrier as well.

6.10 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 or a performing party 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.

7 OBLIGATIONS OF THE SHIPPER

7.1 Subject to the provisions of the contract of carriage, the shipper shall deliver the goods ready for carriage and in such condition that they will withstand 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 container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand 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 must be brought by the shipper in the proper condition for the intended voyage, e.g. packing must be sound, dangerous goods must be properly marked and labelled, temperature controlled goods must be delivered at the right temperature for carriage, etc. For reasons 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.

7.2 The carrier shall provide to the shipper, on its request, such information as is within the carrier's knowledge and instructions that are reasonably necessary or of importance to the shipper in order to comply with its obligations under article 7.1.

It should be a two-way street. Anything that a shipper does not know, he should ask for, whereupon the carrier should assist the shipper in meeting its responsibilities. A minority view criticises this provision as being superfluous.

7.3 The shipper shall provide to the carrier the information, instructions, and documents that are reasonably necessary for:

- (a) the handling and carriage of the goods, including precautions to be taken by the carrier or a performing party;**

- (b) 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 compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 8.2.1(b) and (c), the name of the party to be identified as the shipper in the contract particulars, and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the carrier.**

7.4 The information, instructions, and documents that the shipper and the carrier provide to each other under articles 7.2 and 7.3 must be given in a timely manner, and be accurate and complete.

A safe and successful carriage of the goods may depend to a large extent on the co-operation between the parties. It is of primary importance that the information etc. which the parties reasonably require for the voyage is accurate and complete. Each party must be able to rely on the information given by the other party without first having to examine whether it is accurate and complete. It is also a matter of safety that the information not only is correct in the objective sense, but also appropriate in relation to the known intended purpose. As an example: an otherwise correct description of the goods to be carried is not accurate and complete if the goods qualify as dangerous goods and their dangerous character cannot be detected from the description as given by the shipper. In an information society, time and money is often not available to make checks on the accuracy or completeness of information

7.5 The shipper and the carrier are liable to each other, the consignee, and the controlling party for any loss or damage caused by either party's failure to comply with its respective obligations under articles 7.2, 7.3, and 7.4.

The liability of the parties for wrong or incomplete information is a strict one. In principle, no excuses are available to either party for not adhering to this obligation.

7.6 The shipper is liable to the carrier for any loss, damage, or injury caused by the goods and for a breach of its obligations under article 7.1, unless the shipper proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent.

The majority view is that the shipper's liability for damage caused by the goods (and for non fulfilment of its obligations under article 7.1) should be based on fault with reversed burden of proof. There is however a minority view that the strict liability for damage caused by dangerous goods, as in the Hague-Visby Rules article IV.6, and Hamburg Rules article 13, should be maintained. The majority view is 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 majority feel that the essence of a shippers' liability regime should be that the risk of any damage attributable to the nature of the cargo should be on the shipper 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 that 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 regard to liabilities. This matter is dealt with in articles 5.3 and 6.1.3(ix). Whether the goods are carried with or without the carriers' consent (see Article IV rule 6 of the Hague-Visby Rules) has become irrelevant under these articles. Article 13.4 of the Hamburg Rules does not make this distinction either.

7.7 If a person identified as "shipper" in the contract particulars, although not the shipper as defined in article 1.19, accepts the transport document or electronic record, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter and under article 11.5, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 13.

This article should be read in relation to the definitions of carrier, shipper, consignor and to the provisions of article 8.1.

The shipper and the carrier are defined as the persons who are the parties to the contract of carriage. In that capacity they have certain rights and assume certain liabilities. Such definition of shipper leaves the question of how to deal with the position of (1) the fob seller, (2) the agent, not being the shipper, who nevertheless is mentioned as the shipper in the transport document, and (3) the person who actually delivers the goods to the carrier in cases where such person is a person other than those mentioned under (1) and (2).

As to (3) the definition of "consignor" includes this person. He has no liabilities under this article 7.7 or under article 11.5. His only right is to obtain a receipt pursuant to article 8.1 from the carrier or performing carrier to whom he actually delivers the goods.

The fob seller usually complies with the requirements of this article 7.7 in that he is mentioned as shipper in the document and has accepted the document. Such an fob seller, therefore, will be subject to the provisions of this article. In addition, if a negotiable document is issued, he becomes the first holder and has all the rights and liabilities of a holder, including the right of control. If a non-negotiable document is issued, such an fob seller has the right of suit as per article 13 and has the right of control if the fob buyer (being the consignee as well as the shipper) so notifies the carrier.

The situation of the agent, not being the shipper (as defined), but mentioned as the shipper in the document, can only arise when such agent, expressly or impliedly, is authorised by the shipper (as defined) to be such 'documentary shipper'. If such agent accepts the document, his position is the

same as outlined above with respect to the fob seller. His alternative course is not to accept the document.

7.8 The shipper shall be responsible for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, agents, and any other persons who act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Responsibility is imposed on the shipper under this provision only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency, as the case may be.

The substance of this provision is based on article 8.2 of the Budapest Convention, but the drafting has been conformed to article 6.3.2(b).

8 TRANSPORT DOCUMENTS AND ELECTRONIC RECORDS

8.1 Issuance of the Transport Document or the Electronic Record

Upon delivery of the goods to a carrier or performing party

- (i) the consignor is entitled to obtain a transport document or, if the carrier so agrees, an electronic record evidencing the carrier's or performing party's receipt of the goods;**
- (ii) the shipper or, if the shipper so indicates to the carrier, the person referred to in article 7.7, is entitled to obtain from the carrier an appropriate negotiable transport document, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document, or it is the custom, usage, or practice in the trade not to use one. If pursuant to article 2.1 the carrier and the shipper have agreed to the use of an electronic record, the shipper is entitled to obtain from the carrier a negotiable electronic record unless they have agreed not to use a negotiable electronic record or it is the custom, usage or practice in the trade not to use one.**

The first paragraph specifies that the consignor, as defined in article 1.3, is entitled to a receipt confirming the actual delivery of the goods to the carrier or to the performing party. If the consignor is not the shipper or the person referred in article 7.7, it may need such a receipt in its relations with any of these persons.

The second paragraph follows the Hague Rules and the Hamburg Rules, which require the carrier to issue a negotiable bill of lading to the shipper on demand. Differing views were expressed as to whether the "shipper" (the carrier's contractual counterpart) or the "consignor" (the person actually delivering the goods to the carrier) should be entitled to the transport document or electronic record issued under this paragraph. In many cases, of course, the two will be the same, and the current issue will not arise. But in the case of an fob shipment in which the consignor pays the freight on the consignee-

shipper's account, the two would be different. If the relationship between the consignor and the shipper breaks down, both may demand a transport document or electronic record issued under paragraph (ii). 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, giving a negotiable transport document to the shipper may undermine the consignor's ability to receive payment for the shipment. The current text adopts the former argument, but it may be appropriate to give further thought to this issue. Some have suggested, for example, that the carrier should not issue a negotiable transport document or electronic record under paragraph (ii) except on surrender of the receipt issued under paragraph (i). Others have observed that this solution would not solve the underlying problem; it would simply shift it forward (and elevate the importance of the receipt issued under paragraph (i)).

The second paragraph also provides that the shipper and carrier may agree not to use a negotiable transport document or electronic record. In addition, it clarifies that such an agreement may be implied, thus enabling a carrier to offer a service in which the shipper may not require a negotiable transport document. Furthermore, in some trades it is highly unusual for shippers to request a negotiable document, or a negotiable document would be useless, *e.g.*, on short ferry voyages. Therefore, if there is a custom, usage, or practice in the trade not to use negotiable documents, the carrier is not required to do so (even if the shipper demands such a document).

The reference is deliberately to a custom, usage, or practice "in the trade" rather than "at the place where the transport document or electronic record is issued." It is often difficult to know where a transport document or electronic record has been issued, and it is easy to manipulate the place of issuance. Transport documents or electronic records could be issued in a distant office at a place having no other connection with the contract simply to take advantage of favourable customs, usages, or practices.

8.2 Contract Particulars

8.2.1 contract particulars in the document or electronic record referred to in article 8.1 must include

- (a) a description of the goods;**
- (b) the leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;**
- (c)**
 - (i) the number of packages, the number of pieces, or the quantity, and**
 - (ii) the weight**
 - as furnished by the shipper before the carrier or a performing party receives the goods;**

- (d) a statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;**
- (e) the name and address of the carrier; and**
- (f) the date**
 - (i) on which the carrier or a performing party received the goods, or**
 - (ii) on which the goods were loaded on board the vessel, or**
 - (iii) on which the transport document or electronic record was issued.**

Article 8.2.1(a) introduces a requirement that does not explicitly appear in current international conventions, but it conforms to virtually universal practice in the industry. As a practical matter, it is in both parties' interest to include a description of the goods in the contract particulars.

Article 8.2.1(b) and (c) generally correspond to existing law and practice in most countries, and to the current international regimes. The provisions do alter the existing law in one respect: The carrier's obligation to include the information furnished by the shipper is not qualified by any exception when the carrier has no reasonable means of checking the information. Under current law, the carrier may (in theory) simply omit this information from the contract particulars if it has no reasonable means of checking its accuracy. Under article 8.2.1(b) and (c), the carrier must include the information furnished by the shipper in the contract particulars even if it has no reasonable means of checking its accuracy (but the carrier may protect its interests with a qualifying clause under article 8.3).

Article 8.2.1(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 article 8.3. This change is unlikely to make any difference in practice.

With respect to article 8.2.1(b) and (c), the shipper must furnish the necessary information in writing *before* the carrier receives the goods; it is not sufficient to furnish the information before the carrier issues the transport document or electronic record. With respect to 8.2.1(c), the contract particulars must include all of the listed information furnished by the shipper (*e.g.* the number of pieces and the weight); it is not 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.

Article 8.2.1(d) confirms the understanding that is clearly expressed in

the *travaux préparatoires* of the Hague Rules and carried forward in subsequent international conventions. The courts in some countries have departed from this principle.

Article 8.2.1(e) gives effect to the view that the carrier should be identified in the transport document.

Article 8.2.1(f) gives the carrier three choices of date that may be included in the contract particulars.

8.2.2 The phrase “apparent order and condition of the goods” in article 8.2.1 refers to the order and condition of the goods based on (a) a reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party and (b) any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic record.

Article 8.2.2 provides both an objective and a subjective component to the phrase “apparent order and condition of the goods.” Under article 8.2.2(a), the carrier has no duty to inspect the goods beyond what would be revealed by a reasonable external inspection of the goods as packaged at the time the consignor delivers them to the carrier or a performing party. If the goods are unpackaged, the contract particulars will need to describe the order and condition of the goods themselves. But if the goods are packaged, the contract particulars’ 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 contract particulars’ statement of order and condition is highly unlikely to relate to the goods themselves if the shipper delivered a closed container that the carrier did not open before issuing the transport document.

Under article 8.2.2(b), however, if the carrier or a performing party 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 should have revealed.

8.2.3 Signature

- (a) A transport document shall be signed by or for the carrier or a person having authority from the carrier.**
- (b) An electronic record shall be authenticated by the electronic signature of the carrier or a person having authority from the carrier. For the purpose of this provision such electronic signature means data in electronic form included in, or otherwise logically associated with, the electronic record and that is used to identify the signatory in relation to the electronic record and to indicate the carrier’s authorisation of the electronic record.**

Article 8.2.3 gives effect to the non-controversial view that a transport document should be signed, and that an electronic record should be comparably authenticated. The definition of electronic signature is taken from the UNCITRAL Model Law on Electronic Signatures 2001, as specifically adjusted to bring its intended meaning within the scope of this provision.

8.2.4 Omission of Required Contents from the Contract Particulars

The absence of one or more of the contract particulars referred to in article 8.2.1, or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic record.

Article 8.2.4 gives effect to the non-controversial view that the validity of the transport document or electronic record 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. Article 8.2.4 also extends the rationale behind that non-controversial view to hold that the validity of the transport document or electronic record does not depend on the *accuracy* of the contract particulars that should be included. Under this extension, for example, a misdated bill of lading would still be valid, even though a bill of lading should be accurately dated.

Article 8.4.3 deals with the consequences of failing to comply with article 8.2.1(d).

8.3 Qualifying the Description of the Goods in the Contract Particulars

8.3.1 Circumstances Under Which the Carrier May Qualify the Description of the Goods in the Contract Particulars.

Under the following circumstances, the carrier, if acting in good faith when issuing a transport document or an electronic record, may qualify the information mentioned in article 8.2.1(b) or 8.2.1(c) with an appropriate clause therein 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) if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may include an appropriate qualifying clause in the contract particulars, or**
 - (ii) if the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.**
- (b) For goods delivered to the carrier in a closed container, the carrier may include an appropriate qualifying clause in the contract particulars 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 the container,**

unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container.

- (c) For goods delivered to the carrier or a performing party in a closed 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 neither the carrier nor a performing party weighed the container, and (ii) the shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars.

Article 8.3.1 generally corresponds to existing law and practice in most countries. Although current law generally permits the carrier to protect itself by omitting from the contract particulars 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 or electronic record 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 article 8.3.1(a) and (b) are generally similar to those under the proviso to article III.3 of the Hague and Hague-Visby Rules and to article 16.1 of the Hamburg Rules, except that this article 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. 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, article 8.3.1(c) specifically addresses the issue in unique fashion. It 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 carrier and the shipper did not agree in writing prior to the shipment that the container would be weighed and the weight would be included in the contract particulars. Article 8.3.1(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 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 carrier 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.

Article 8.3.1(a)(ii) and article 8.3.1(b) also recognise that the carrier may also provide accurate information if it considers the information furnished by the shipper to be inaccurate.

8.3.2 Reasonable Means of Checking

For purposes of article 8.3.1:

- (a) a “reasonable means of checking” must be not only physically practicable but also commercially reasonable.**
- (b) a carrier acts in “good faith” when issuing a transport document or an electronic record if**
 - (i) the carrier has no actual knowledge that any material statement in the transport document or electronic record is materially false or misleading, and**
 - (ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic record is materially false or misleading because it believes that the statement is likely to be false or misleading.**

The burden of proving whether a carrier acted in good faith when issuing a transport document or an electronic record is on the party claiming that the carrier did not act in good faith.

Article 8.3.2(a) 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 or electronic record 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 description of the goods.

Article 8.3.2(b) clarifies the meaning of "good faith," and imposes the burden of proving a lack of good faith on the party claiming that the carrier did not act in good faith.

8.3.3 Prima Facie and Conclusive Evidence

Except as otherwise provided in article 8.3.4, a transport document or an electronic record that evidences receipt of the goods is

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

Article 8.3.3(a) simply confirms the widely recognised rule that, as a general matter, a transport document or electronic record that evidences a carrier's receipt of the goods is prima facie evidence that the goods were as described in the contract particulars.

Article 8.3.3(b) recognises that, in order to protect innocent third parties who rely on the descriptions in transport documents and electronic records, a transport document or electronic record is in some circumstances not simply prima facie evidence but conclusive evidence. There is broad support for article 8.3.3(b)(i), which protects the holder of a negotiable transport document or electronic record.

There is weaker support for article 8.3.3(b)(ii), which protects any person acting in good faith that pays value or otherwise alters its position in reliance on the description of the goods in the contract particulars, whether or not the transport document or electronic record is negotiable. For example, if an fob seller arranges carriage for the account of the fob buyer, the buyer is the shipper. The carrier, however, may issue a non-negotiable transport document to the seller, and the buyer may pay the purchase price to the seller in reliance on the description of the goods in the transport document.

8.3.4 Effect of Qualifying Clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 8.3.1, then the transport document will not constitute prima facie or conclusive evidence under article 8.3.3 to the extent that the description of the goods is qualified by the clause.

Article 8.3.4 simply describes the effect of a qualifying clause that complies with the requirements of article 8.3.1. 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.

Under this provision, every qualifying clause is effective according to its terms if it complies with the requirements of article 8.3.1. This conclusion is generally accepted with respect to non-containerised goods, but views are divided on whether the carrier should have such extensive rights with respect to containerised goods.

Some take the view that sharp distinctions exist between commercial expectations with respect to containerised and non-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 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 damaged in a way that may have caused the loss of or damage to the goods, or a container that has been improperly opened during the voyage), the equities shift. At this point the carrier can no longer establish the same chain of custody. Moreover, it appears that something wrong was done while the container was in the carrier's custody. The consignee's entitlement to rely on the description of the goods in the contract particulars accordingly becomes much stronger. A draft reflecting these views might revise the current article to provide:

"If the contract particulars include a qualifying clause, then the transport document will not constitute *prima facie* or conclusive evidence under article 8.3.3, to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under article 8.3.5."

It would then be necessary to add a new article 8.3.5, which might provide:

"A qualifying clause in the contract particulars is effective for the purposes of article 8.3.4 under the following circumstances:

- (a) For non-containerised goods, a qualifying clause that complies with the requirements of article 8.3.1 will be effective according to its terms.
- (b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of article 8.3.1 will be effective according to its terms if
 - (i) the carrier or a performing party delivers the container intact and undamaged, except for such damage to the container as was not causally related to any loss of or damage to the goods; and
 - (ii) there is no evidence that after the carrier or a performing party received the container it was opened prior to delivery, except to the extent that (1) a container was opened for the purpose of inspection, (2) the inspection was properly witnessed, and (3) the container was properly reclosed after the inspection, and was resealed if it had been sealed before the inspection."

8.4 Deficiencies in the Contract Particulars

8.4.1 Date

If the contract particulars include the date but fail to indicate the significance thereof, then the date will be considered to be:

- (a) if the contract particulars indicate that the goods have been loaded on board a vessel, the date on which all of the goods indicated in the transport document or electronic record were loaded on board the vessel; or**
- (b) if the contract particulars do not indicate that the goods have been loaded on board a vessel, the date on which the carrier or a performing party received the goods.**

Article 8.4.1 specifies the consequences of including a date in the contract particulars without indicating its significance. For an “on board” bill of lading or a similar document or electronic record indicating that the goods have been loaded on board a vessel, the ambiguous date is considered to be the date on which the goods were loaded on board the vessel. In contrast, for a “received for shipment” bill of lading or other document or electronic record that does not indicate that the goods have been loaded on board a vessel, the ambiguous date is considered to be the date on which the carrier or a performing party received the goods.

8.4.2 [Failure to Identify the Carrier]

If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named vessel, then the registered owner of the vessel is presumed to be the 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 which transfers contractual responsibility for the carriage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]]

This provision attempts to deal with the problem facing a person seeking to exercise rights of suit against the carrier under chapter 13 if the name and address of the carrier is not stated in the contract particulars as required by article 8.2.1(a). Although it has been the subject of considerable discussion, the issue remains controversial. Views are very much divided on the desirability of any presumption affecting the registered owner. Even some supporters of the current provision consider it a problematic solution but the best that can be accomplished under the circumstances.

The article permits the registered owner to defeat the presumption by proving that the ship was under a bareboat charter at the time of the carriage and adequately identifying the bareboat charterer. The limitation period for an action against the bareboat charterer is addressed in article 14.5

Under the final sentence of this article, the bareboat charterer is presumed to be the carrier “in the same manner that the registered owner was presumed

to be the carrier.” This means, among other things, that the bareboat charterer would have the option of proving that there was a further bareboat charter at the time of the carriage. This second presumption may not be universally acceptable to the extent that it is irrebuttable save in respect of a subsequent bareboat charterer.

When door-to-door transport is involved, this provision could make the owner of the vessel performing the sea leg the “carrier” for the entire journey. Because the bill of lading may have been issued by a person owning no means of transport, this could subject that vessel owner to unexpected liability. The suggestion was made that this result should be avoided by exempting the vessel owner in respect of damage occurring before loading on or after discharge from the vessel. To draft such protection would not be easy. If the owner of each means of carriage were made the carrier for the part of the carriage performed by it, there would be scope for considerable problems if loss or damage occurred while the goods were being moved from one mode of transportation to another. If only some of the means of carriage were adequately specified, then no one would qualify as the carrier for parts of the carriage.

8.4.3 Apparent Order and Condition

If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper, the transport document or electronic record is either prima facie or conclusive evidence under article 8.3.3, as the case may be, that the goods were in apparent good order and condition at the time the shipper delivered them to the carrier or a performing party.

9 FREIGHT

- 9.1 (a) Freight is earned upon delivery of the goods to the consignee at the time and location mentioned in article 4.1.3, unless the parties have agreed that the freight shall be earned, wholly or partly, at an earlier point in time.**
- (b) Unless otherwise agreed, no freight will become due for any goods that are lost before the freight for those goods is earned.**
- 9.2 (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.**
- (b) If subsequent to the moment at which the freight has been earned the goods are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery.**
- (c) Unless otherwise agreed, payment of freight is not subject to set-off, deduction or discount on the grounds of any counterclaim**

that the shipper or consignee may have against the carrier, [the indebtedness or the amount of which has not yet been agreed or established].

- 9.3 (a) Unless otherwise agreed, the 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 or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid:
- (i) with respect to any liability under chapter 7 of the shipper or a person mentioned in article 7.7; or
 - (ii) with respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 9.5 or otherwise for the payment of such amounts.
 - (iii) to the extent that it conflicts with the provisions of article 12.4.
- 9.4 (a) If the contract particulars in a transport document or an electronic record contain the statement “freight prepaid” or a statement of a similar nature, then neither the holder, nor the consignee, shall be liable for the payment of the freight. This provision shall not apply if the holder or the consignee is also the shipper.
- (b) If the contract particulars in a transport document or an electronic record contain the statement “freight collect” or a statement of similar nature, such a statement puts the consignee on notice that it may be liable for the payment of the freight.
- 9.5 (a) [Notwithstanding any agreement to the contrary,] if and to the extent that under national law applicable to the contract of carriage the consignee is liable for the payments referred to below, the carrier is entitled to retain the goods until payment of
- (i) freight, deadfreight, 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 due 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 paragraph (a) of this article is not, or is not fully, 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 balance remaining from the proceeds of such sale shall be made available to the consignee.

10 DELIVERY TO THE CONSIGNEE

The subject of delivery is only to a limited extent dealt with in the existing maritime transport conventions. This article only makes limited provisions on this subject. It does not pretend to solve all the problems in connection with the subject of delivery.

The main problem is that often the goods arrive at their place of destination without someone there to receive them. In particular, problems arise if a negotiable transport document or negotiable electronic record has been issued. The proper functioning of the bill of lading system is based on the assumption that the holder of the document presents it to the carrier when the goods arrive at their destination and that subsequently the carrier delivers the goods to such holder against surrender of the document. However, frequently the negotiable document is not available when the goods arrive at their destination. This may be caused by all kinds of business reasons, such as the credit term of the financing arrangements in respect of the goods being longer than the voyage, or it may be the result of remoteness of the place of destination or bureaucratic obstacles. Despite this, a carrier must be able to dispose of the goods at the end of the voyage. He cannot be compelled to bear the additional costs and risks connected with continued custody of the goods. Also, it may be the case that no suitable storage facilities are available at the place of destination. If in these cases the carrier delivers the goods to someone who is not (yet) the holder of the negotiable document, he is at risk, because his promise made by the bill of lading is to deliver the goods to the holder of that document. On the other hand, a holder must be able to count on the security that a negotiable document provides. He may have paid for the goods or may have provided finance for the goods in exchange for a pledge on the document. He rightfully may regard the negotiable transport document as the 'key to the goods'.

This article tries to strike a balance between these two legitimate interests. The article does not impose a duty on the holder to receive the goods. Nor does it impose a duty on the carrier to deliver the goods only against surrender of the document. The current practice deviates too much from either of these two duties to make them obligatory.

Instead, the article takes into account the double function of a negotiable transport document: it is both a contract of carriage in the true sense and it is a document of title. Both functions have to be respected by either party. Which function should prevail may depend on the circumstances of the case. This article provides only some general rules.

10.1 When the goods have arrived at their destination, the consignee that exercises any of its rights under the contract of carriage shall accept delivery of the goods at the time and location mentioned in article 4.1.3. If the consignee, in breach of this obligation, leaves the goods in the custody

of the carrier or the performing party, such carrier or performing party will act in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.

Pursuant to article 5.1 the carrier is obliged to deliver the goods to the consignee. A corresponding provision that the consignee is obliged to take delivery is not included, because under current practice it is accepted that a consignee need not take delivery. Only if a consignee exercises any rights under the contract of carriage, is he obliged to do so. If the consignee does not do anything, he has no obligation to take delivery. See also article 12.2.

The consequence of not taking delivery, when there is a duty on the consignee to do so, is that a carrier in practice is no longer liable for loss or damage to the goods. The consequence of not taking delivery, while there is no obligation to do so, is worked out in the articles 10.3 and 10.4.

10.2 On request of the carrier or the performing party that delivers the goods, the consignee shall confirm delivery of the goods by the carrier or the performing party in the manner that is customary at the place of destination.

In practice, many carriers request some form of written evidence from the consignee that the carrier 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

10.3.1 If no negotiable transport document or no negotiable electronic record has been issued:

- (i) The controlling party shall advise the carrier, prior to or upon the arrival of the goods at the place of destination, of the name of the consignee.**
- (ii) The carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to the consignee upon the consignee's production of proper identification.**

This provision applies when no negotiable document or electronic record is issued and when no document at all, whether under a paper communication system or an electronic one, is used. In these cases, there is no 'double function' of the contract of carriage. In principle, it is up to the party with whom the carrier made his contract, or up to the controlling party if he is a different person from the contracting party, to take care that the goods can be delivered.

10.3.2 If a negotiable transport document or a negotiable electronic record has been issued, the following provisions shall apply:

- (i) (a) Without prejudice to the provisions of article 10.1 the holder**

of a negotiable transport document is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals will cease to have any effect or validity.

(b) Without prejudice to the provisions of article 10.1 the holder of a negotiable electronic record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to such holder if it demonstrates in accordance with the rules of procedure mentioned in article 2.4 that it is the holder of the electronic record. Upon such delivery, the electronic record will cease to have any effect or validity.

- (ii) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall advise the controlling party or, if it, after reasonable effort, is unable to identify or find the controlling party, the shipper, accordingly. In such event such controlling party or shipper shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person mentioned in article 7.7 shall be deemed to be the shipper for purposes of this paragraph.
- (iii) Notwithstanding the provision of paragraph (iv) of this article, a carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (ii) of this article, shall be discharged from its obligation to deliver the goods under the contract of carriage [to the holder], irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic record has demonstrated, in accordance with the rules of procedure referred to in article 2.4, that he is the holder.
- (iv) If 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 or without the demonstration referred to in paragraph (i) (b) above, a holder who becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to these goods pursuant to any contractual or other arrangement other than the contract of carriage will only acquire rights under the contract of carriage if

the passing of the negotiable transport document or negotiable electronic record was effected in pursuance of contractual or other arrangements made before such delivery of the goods, unless such holder at the time it became holder did not have or could not reasonably have had knowledge of such delivery.

- (v) If the controlling party or the shipper does not give the carrier adequate instructions as to the delivery of the goods, the carrier is entitled, without prejudice to any other remedies that a carrier may have against such controlling party or shipper, to use its rights under article 10.4.**

The problems referred to in the introductory commentary arise particularly if a negotiable document or electronic record has been issued. This article works out the balance of interest.

The first sentence of article 10.3.2(i)(a) has limited scope. According to current practice, a holder, that did not exercise any right under the contract of carriage, is entitled but not obliged to claim delivery. Further, this paragraph does not exclude the possibility that a person other than the holder is entitled to claim delivery. It only provides that *if* a holder claims delivery, the carrier is *obliged* to deliver and, consequently must be held discharged from his obligation under the contract of carriage to deliver the goods at the place of their destination. The provision does not solve the problem of goods having a negative value at the place of destination.

Further, paragraph (a) follows the normal practice that the negotiable document has to be surrendered by the holder to the carrier. This practice also protects the carrier, because the document identifies the person entitled to take delivery. Contrary to the case of early delivery, to which article 11.2 (b) (iii) refers, the surrender of one original suffices. At that point any other becomes void.

Article 10.3.2(i)(b) mirrors (a) for the negotiable electronic record. Under an electronic communication system, some of the reasons that a negotiable record is not available at delivery may be taken away. But in cases, e.g. where the credit terms are extended beyond the duration of the voyage, the problems are the same under any e-commerce system as under a paper bill of lading system.

In article 2.4 it is provided that the contractual rules applicable to the use of negotiable electronic records must provide for the manner in which the holder should be able to identify itself to the carrier. If these rules did not make such provision, an essential feature of any negotiable document, whether in electronic or in paper form, is missing. The consequence must be that the record is not negotiable.

Paragraphs (ii) to (v) deal with the situation where a holder does not make use of its right to obtain delivery of the goods. Here the proper functioning of the bill of lading system is at stake. Parties may elect to follow a more risky course.

Because it is the cargo side that decides not to pay due regard to the contract function of the negotiable document, it is provided in paragraph (ii)

that, if a holder does not appear, the carrier must first seek instructions from any of the persons mentioned in this paragraph. These persons are obliged to give the carrier proper instructions, unless a valid cesser clause has released any of them from this obligation. Without such cesser clause, these persons might be held liable for not giving the carrier proper instructions to dispose of the goods. It is not provided that any of such persons should take delivery themselves. Here, without any proper instruction, a carrier has no option but to make use of its rights under article 10.4: storing and selling the goods. In fact, paragraph (ii) follows the widespread practice that a charterer is contractually entitled to instruct a carrier in respect of delivery of the goods.

Paragraph (iii) provides for the consequences when a carrier has complied with instructions given under the previous paragraph. In such a case, he is discharged from his general obligation to deliver the goods to the consignee. To avoid any doubts, he may not be discharged from *all* of his obligations under the contract of carriage, such as that to pay compensation where the goods are delivered in damaged condition.

The alternative would be that the carrier would not be discharged but should be entitled to obtain a proper indemnity from the shipper or the controlling party. However, such alternative would remain open ended if no proper indemnity could be obtained by the carrier.

Under all circumstances it is desirable that the holder of a negotiable document be vigilant and, in principle, should take steps on the arrival of the ship in order to protect its security.

Paragraph (iv) gives a rule for cases where no negotiable document has been surrendered when the carrier has delivered the goods, such as under paragraphs (ii) and (iii). First, it should be noted that in such a case the main rule of paragraph (i) prevails: the ‘innocent’ third party bill of lading holder may still be held entitled to claim delivery. The last part of paragraph (iv) confirms this rule again. This remains a carrier’s risk and forms an essential part of the balance that this whole article 10.3.2 tries to strike.

Frequently, however, a holder knows or should reasonably have known of the delivery without production of a negotiable document. In that event, and if he becomes holder after such a delivery, there is no longer any reason for protecting him. In such a case he only acquires rights under the bill of lading (such as the right to claim for damages to the goods) if he had become holder pursuant to a contractual or other arrangement that already existed before the delivery. Otherwise, the bill of lading must be regarded as exhausted. Consequently, this rule covers the bona fide cases where the passing of the bill of lading within the string of sellers and buyers is delayed. It does not exclude the possibility that after delivery certain rights under the exhausted bill of lading may be transferred to a third party, but this has to be effected by specific agreement and not by mere endorsement of the bill.

It has nevertheless been argued that provisions such as those of paragraphs (ii) and (iii) are likely to facilitate fraud. If the carrier is unable to locate the holder and takes instructions from the shipper, the shipper may (for instance) be able to destroy the security of a bank holding the documents by directing delivery elsewhere. And in general the bank’s security is much

reduced in effect if the goods can easily be delivered other than against the document or documents they hold.

On the other hand it can be said that in many parts of the world it is simply impossible for the carrier always to insist on surrender of a bill of lading against delivery, and that to put the carrier who parts with the goods otherwise always (or usually) in the wrong simply does not reflect the realities of delivery in many places and circumstances. Rather, a consignee or indorsee must be vigilant to seek delivery on arrival of the ship; and a bank holding a bill of lading as security must act positively in its own interests and be vigilant to watch for and takes steps on the arrival of the ship whose bill of lading represents its security. It is then argued that provisions such as (ii) and (iii) facilitate modern trade.

Paragraph (v) refers to the general fall back position under article 10.4

10.4.1 (a) If the goods have arrived at the place of destination and

(1) the goods are not actually taken over by the consignee at the time and location mentioned in article 4.1.3 and no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage; or

(2) the carrier is not allowed under applicable law or regulations to deliver the goods to the consignee,

then the carrier is entitled to exercise the rights and remedies mentioned in paragraph (b).

(b) Under the circumstances specified in paragraph (a), the carrier is entitled, at the risk and account of the person entitled to the goods, to exercise some or all of the following rights and remedies:

(1) to store the goods at any suitable place;

(2) 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 reasonably may require; or

(3) 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 located at the time.

(c) If the goods are sold under paragraph (b)(3), the carrier may deduct from the proceeds of the sale the amount necessary to

(1) pay or reimburse any costs incurred in respect of the goods; and

(2) pay or reimburse the carrier any other amounts that are referred to in article 9.5(a) and that are due to the carrier.

Subject to these deductions, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods.

10.4.2 The carrier is only allowed to exercise the right referred to in article 10.4.1 after it has given notice to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper that the goods have arrived at the place of destination.

10.4.3 When exercising its rights referred to in article 10.4.1, the carrier or performing party acts as an agent of the person entitled to the goods, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.

Occasionally, it happens that at the place of destination the carrier is not able or entitled to deliver the goods. The consignee may not appear 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, the carrier often has to do something in order to dispose 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 need not necessarily be a party to the contract of carriage, but may be an owner of the goods or an insurer.

11 RIGHT OF CONTROL

Unlike under other transport conventions, the subject of the right of control is not dealt with in maritime conventions. Practices that have developed under the bill of lading system may have been the reason that in the past no urgent need was felt. Today, the situation in maritime transport is different. In many trades the use of negotiable transport documents is rapidly decreasing or has entirely disappeared. Furthermore, a well defined and transferable right of control may play a useful role in the development of e-commerce systems, where no electronic record as defined in this Instrument is used.

11.1 The right of control of the goods means the right under the contract of carriage to give the carrier instructions in respect of these goods during the period of its responsibility as stated in article 4.1.1. Such right to give the carrier instructions comprises rights to:

- (i) give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
- (ii) demand delivery of the goods before their arrival at the place of destination;

(iii) replace the consignee by any other person including the controlling party;

(iv) agree with the carrier to a variation of the contract of carriage.

This provision defines the right of control. It makes a distinction between instructions that constitute a variation of the contract of carriage and instructions that do not. Paragraph (i) relates to ‘normal’ instructions within the scope of a contract of carriage, such as to carry the goods at a certain temperature. Paragraphs (ii) and (iii) are important for an unpaid seller that may have retained title to the goods or may wish to exercise a right of stoppage under its contract of sale. Paragraph (ii) may enable the seller to prevent the goods from arriving in the jurisdiction of the consignee, while paragraph (iii) enables the controlling party to have the goods delivered to itself, its agent, or to a new buyer. Paragraph (iv) underlines that, for all practical purposes, the controlling party is the carrier’s counterpart during the carriage. This article gives the controlling party full control over the goods.

11.2 (a) When no negotiable transport document or no negotiable electronic record is issued, the following rules apply:

(i) The shipper is the controlling party unless the shipper and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party.

(ii) The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor or the transferee shall notify the carrier of such transfer.

(iii) When the controlling party exercises the right of control in accordance with article 11.1, it shall produce proper identification.

(b) When a negotiable transport document is issued, the following rules apply:

(i) The holder or, in the event that more than one original of that negotiable transport document is issued, the holder of all originals is the sole controlling party.

(ii) The holder is entitled to transfer the right of control by passing that negotiable transport document to another person in accordance with article 12.1, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control.

(iii) In order to exercise the right of control, the holder shall, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of that document was issued, all originals shall be produced.

(iv) Any instructions as referred to in article 11.1(ii), (iii), and (iv)

given by the holder upon becoming effective in accordance with article 11.3 shall be stated on the negotiable transport document.

(c) When a negotiable electronic record is issued:

(i) The holder is the sole controlling party and is entitled to transfer the right of control to another person by passing the negotiable electronic record in accordance with the rules of procedure referred to in article 2.4, upon which transfer the transferor loses its right of control.

(ii) In order to exercise the right of control, the holder shall, if the carrier so requires, demonstrate, in accordance with the rules of procedure referred to in article 2.4, that it is the holder.

(iii) Any instructions as referred to in article 11.1, (ii), (iii), and (iv) given by the holder upon becoming effective in accordance with article 11.3 shall be stated in the electronic record.

(d) Notwithstanding the provisions of article 12.4, a person, not being the shipper or the person referred to in article 7.7, that transferred the right of control without having exercised that right, shall upon such transfer be discharged from the liabilities imposed on the controlling party by the contract of carriage or by this Instrument.

Paragraph (a) applies in all cases except when a negotiable document has been issued. The principle is that the shipper is the controlling party, but that he may agree with the consignee that it should be otherwise. The second principle included in this paragraph is that the controlling party is entitled to transfer its right to any third party.

Unlike the position under, for instance, the CMR Convention, where a certain copy of the non-negotiable road consignment note has to be transferred in order to transfer the right of control, under paragraph (a) the document does not play any role. The controlling party remains in control of the goods until their final delivery. Also, there is no automatic transfer of the right of control from the shipper to the consignee as soon as the goods have arrived at their place of delivery, as is the case under the CMI Uniform Rules for Sea Waybills. If there were such automatic transfer, the most common shipper's instruction to the carrier, namely not to deliver the goods before he has received the confirmation from the shipper that payment of the goods has been effected, could be frustrated. This, obviously, would raise serious practical concern.

When a negotiable transport document has been issued, paragraph (b) applies. Here, it is provided that the holder of such document is the sole controlling party. If through endorsement the negotiable document is passed to another party, the right of control automatically is transferred as well. Further, the presentation rule applies if the holder wants to exercise its right of control. In order to protect third party holders, any variation of the contract of carriage has to be stated on the negotiable document.

A complication may arise if the negotiable document has been issued in

more than one original. The provision follows the current practice that only holding the full set of originals entitles the holder to exercise the right of control. The consequence is that, if a person has parted with one (or more) originals and has kept one or more other originals, nobody is in control of the goods.

Paragraph (d) follows the principle laid down in article 12.1.2.

11.3 (a) Subject to the provisions of paragraphs (b) and (c) of this article, if any instruction mentioned in article 11.1(i), (ii), or (iii)

- (i) can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;**
- (ii) will not interfere with the normal operations of the carrier or a performing party; and**
- (iii) would not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage,**

then the carrier shall execute the instruction. If it is reasonably expected that one or more of the conditions mentioned in subparagraphs (i), (ii), and (iii) of this paragraph is not satisfied, then the carrier is under no obligation to execute the instruction.

- (b) In any event, the controlling party shall indemnify the carrier, performing parties, and any persons interested in other goods carried on the same voyage against any additional expense, loss, or damage that may occur as a result of executing any instruction under this article.**

(c) If a carrier

- (i) reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and**
 - (ii) is nevertheless willing to execute the instruction,**
- then the carrier is entitled to obtain security from the controlling party for the amount of the reasonably expected additional expense, loss, or damage.**

In article 11.1 the distinction is made between instructions that constitute variations of the contract of carriage and instructions that do not. In this article, the distinction is between instructions that a carrier, in principle, has to execute and instructions that are subject to agreement between the carrier and the controlling party. The line of distinction is not the same in both articles. It is obvious that variations of the contract of carriage are fully subject to agreement between the carrier and the controlling party. However, that does not apply to the two variations mentioned under article 11.1 (ii), and (iii). These two, in principle, have to be executed by the carrier, because either may be needed for a seller to resume control over the goods under its contract of sale, e.g. when the goods are not paid for by the buyer.

For the carrier to be under an obligation to execute the instructions, it needs the protection of certain conditions precedent. These are also

addressed in this article. Other transport conventions include similar protections. A carrier is entitled to decline the execution of an instruction, *inter alia*, if the execution interferes with its normal operations. That means that it may never be forced to call at other ports than the ports in its normal itinerary, or to discharge cargo that is overstowed with other cargo. Also, the carrier may decline the instruction if it would incur additional costs.

The view has been expressed that these provisions, insofar as they give a right to a controlling party in situations where the carrier does not agree to the instruction, i.e. a right to vary what would otherwise be contract terms, are likely to create extensive uncertainties in return for very small advantage. It is also argued that, in respect of the right of control, maritime carriage cannot be compared with other transportation modes. The contrary view is that similar safeguards under other transport conventions do not create any difficulty. Further, the point has been made that the right of control should not be diluted too far, because of its potential role in the development of e-commerce in maritime transport.

11.4 Goods that are delivered pursuant to an instruction in accordance with article 11.1(ii) are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in article 10, are applicable to such goods.

11.5 If during the period that the carrier holds the goods in its custody, the carrier reasonably requires information, instructions, or documents in addition to those referred to in article 7.3(a), it shall seek such information, instructions, or documents from the controlling party. If the carrier, after reasonable effort, is unable to identify and find the controlling party, or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the obligation to do so shall be on the shipper or the person referred to in article 7.7.

The provision addresses the issue that a carrier needs instructions from the party interested in the goods during the carriage. Examples are: the goods cannot be delivered as envisaged, additional instructions are needed for the care of the goods, etc. The principal person to give the carrier instructions is the controlling party, because it may be assumed to have the interest in the goods. The obligation to provide instructions also applies to an intermediate holder if it is the controlling party. In article 11.2 (c) it is provided that such intermediate holder is discharged from this obligation as soon as he is no longer holder.

However, a controlling party may not always exist or is not always known to the carrier. Then, the obligation is on the shipper or on the person referred to in article 7.7. If the controlling party elects not to give (appropriate) instructions, it may become liable to the carrier for not giving them.

11.6 The provisions of articles 11.1 (ii) and (iii), and 11.3 may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article

11.2 (a) (ii). If a transport document or an electronic record is issued, any agreement referred to in this paragraph must be stated in the contract particulars.

This provision underlines that these essential elements of the right of control are not part of mandatory law. A controlling party may have reasons for insisting that its right of control should not be transferable. Carriers may wish to exclude the possibility that delivery of the goods might be claimed during the voyage. However, see also the commentary to article 12.3.

12 TRANSFER OF RIGHTS

12.1.1 If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such 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 current law and practice.

12.1.2 If a negotiable electronic record is issued, its holder is entitled to transfer the rights incorporated in such electronic record, whether it be made out to order or to the order of a named party, by passing the electronic record in accordance with the rules of procedure referred to in article 2.4.

12.2.1 Without prejudice to the provisions of article 11.5, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder.

The only obligation that an intermediate holder may incur, is to give a carrier instructions relating to the goods during the carriage when such intermediate holder is a controlling party. Giving instructions may be regarded to be in the interest of such intermediate holder. According to article 11.3.(c) such intermediate holder is discharged from this obligation as soon as it is no longer holder.

12.2.2 Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record.

A later holder is not allowed to pick and choose. If it exercises any of its

rights, it automatically also assumes all of a later holder's liabilities. However, such liabilities must, first, be "imposed on it under the contract of carriage". This means that not necessarily *all* liabilities under the contract of carriage are assumed by a later holder. There may be certain liabilities that are only the shipper's liabilities, such as liabilities under the articles 7.1 and 7.3. Further, the carrier and the shipper may have expressly or impliedly agreed that certain liabilities should be shipper's liabilities only, such as demurrage incurred in the loading port. Second a later holder must be able to ascertain from the negotiable document itself that such liabilities exist. This may be particularly important if the carrier and shipper have agreed that certain liabilities, which otherwise would have been the shipper's liabilities, shall (also) be assumed by a later holder.

It may be that under this article the later holder assumes liabilities which also remain liabilities of the shipper. Whether in such a case these liabilities are joint and several is not provided for in this article, but is left to the terms of the contract of carriage, as evidenced by the negotiable transport document.

12.2.3 Any holder that is not the shipper and that (i) under article 2.2 agrees with the carrier to replace a negotiable transport document by a negotiable electronic record or to replace a negotiable electronic record by a negotiable transport document, or (ii) under article 12.1 transfers its rights, does not exercise any right under the contract of carriage for the purpose of the articles 12.2.1 and 12.2.2.

12.3 The transfer of rights under a contract of carriage, pursuant to which no negotiable transport document or no negotiable electronic record is issued, cannot be effected by passing a transport document or electronic record, but shall be effected in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights. Such transfer of rights may be effected by means of electronic communication. A transfer of the right of control cannot be completed without a notification of such transfer to the carrier by the transferor or the transferee.

It is appreciated that, generally, an express referral to national law is not necessary in any international instrument. The purpose of doing so in this provision is to make clear that a transfer of rights under a contract of carriage is possible without the use of a document, or, if a non negotiable document has been issued, without such a document becoming a negotiable one. Further, this provision includes two obligations for states parties to this Instrument. The first is to provide in their national law that any transfer of rights under a contract of carriage can be done electronically. This is regarded as beneficial to the development of e-commerce in transport. Commercial parties may wish to develop e-commerce systems without the use of an electronic record as defined in this Instrument, but based on a simple electronic transfer of a right of control only. The second requirement is to provide that such (electronic) transfer of the right of control cannot be completed without a notification of such transfer to the carrier. Then, a situation *may (eventually)* arise that national law may attach to an (electronic) transfer of a right of control proprietary rights, comparable

with those that national law attaches to the transfer of a paper negotiable transport document.

12.4 If the transfer of rights under a contract of carriage, pursuant to which no negotiable transport document or no negotiable electronic record has been issued, includes the transfer of liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities.

Article 12.3 does not deal with the transfer of liabilities under a contract of carriage (for which no negotiable document has been issued). However, it may be that national law relating to transfer of rights provides that such transfer includes (or may include) liabilities associated with the right transferred. It is fair to provide that the liability of the transferor and transferee in such cases is joint and several, because normally a carrier is only able to judge the solvency of the shipper, as the original party to the contract of carriage, and not the solvency of other parties.

13 RIGHTS OF SUIT

13.1 Without prejudice to articles 13.2 and 13.3, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

- (i) the shipper,**
- (ii) the consignee,**
- (iii) any third party to which the shipper or the consignee has assigned its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage,**
- (iv) any third party that has acquired rights under the contract of carriage by legal subrogation under the applicable national law, such as an insurer.**

In case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this Instrument.

This provision applies to any contract of carriage, whether or not a document or electronic record may have been issued and, if so, irrespective of its nature. A contracting shipper and a consignee can only assert those rights that belong to it and if it has a sufficient interest to claim. This means that in the case of loss of 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, if possible, assert a claim against the carrier outside the contract of carriage.

13.2 In the event that a negotiable transport document or negotiable electronic record is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, without having to prove that it itself has suffered loss or damage. If such holder did not suffer the loss or damage itself, it shall be deemed to act on behalf of the party that suffered such loss or damage.

It seems that under many legal systems claimants under a bill of lading are not confined to claiming for their own loss. This article does not provide that *only* such holder has the right of suit. Therefore, the second sentence is needed in order to avoid the possibility that a carrier might have to pay twice.

13.3 In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage.

A person mentioned in article 13.1 should not be dependent on the cooperation of the holder of a negotiable document if it and not the holder is the person who has suffered the damage. It might be that the holder, being a seller/shipper, has already received the full purchase price of the goods and is no longer interested in lodging a claim. Or it might be that the holder, being a purchaser/consignee, rejects the (damaged) goods and does not pay for them, in which case the seller/shipper must be entitled to claim the damage from the carrier. In order to protect the position of the holder against the loss of the right of suit, it seems fair that in this type of case the claimant proves that the holder did not suffer the damage.

14 TIME FOR SUIT

14.1 The carrier shall in any event be discharged from all liability whatsoever in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of one year. The shipper shall in any event be discharged from all liability under chapter 7 of this Instrument if judicial or arbitral proceedings have not been instituted within a period of one year.

The first sentence of this provision is loosely based on article 20.1 of the Hamburg Rules and the fourth paragraph of article III.6 of the Hague and Hague-Visby Rules. The second sentence reflects the view expressed at the Singapore Conference that actions against the shipper under chapter 7 should also be subject to a time-for-suit provision.

The limitation period specified here follows the Hague and Hague-Visby Rules. Under the Hamburg Rules, the limitation period is two years. Those delegates who addressed the issue at the Singapore Conference appeared to believe that a one-year limitation period would be adequate.

To avoid ambiguity, the article clarifies that the carrier or the shipper, as

the case may be, is discharged from all liability on the expiration of the limitation period. On the expiration of the limitation period the potential claimant loses the right, not simply the remedy.

14.2 The limitation period mentioned in article 14.1 commences on the day on which the carrier has completed delivery of the goods concerned pursuant to article 4.1.3 or 4.1.4 or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered. The day on which the limitation period commences is not included in the period.

This provision is generally based on article 20.2 and 20.3 of the Hamburg Rules and the fourth paragraph of article III.6 of the Hague and Hague-Visby Rules. Although defining “delivery” has caused problems in some national legal systems, the clarifications in chapters 4 and 10 of the present Instrument should provide greater clarity and predictability than exists under current law.

14.3 The person against whom a claim is made at any time during the running of the limitation period may extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

This provision is based on article 20.4 of the Hamburg Rules and the fourth paragraph of article III.6 of the Hague-Visby Rules.

14.4 An action for indemnity by a person held liable under this Instrument may be instituted even after the expiration of the limitation period mentioned in article 14.1 if the indemnity action is instituted within the later of

- (a) the time allowed by the law of the State where proceedings are instituted; or**
- (b) 90 days commencing from the day when the person instituting the action for indemnity has either**
 - (i) settled the claim; or**
 - (ii) been served with process in the action against itself.**

This provision is substantially based on article 20.5 of the Hamburg Rules and the sixth paragraph of article III.6 of the Hague-Visby Rules. It clarifies that the limitation period may be extended for indemnity actions in either of two ways, and that the person instituting the indemnity action may rely on whichever alternative provides the longer extension.

14.5 [If the registered owner of a vessel defeats the presumption that it is the carrier under article 8.4.2, an action against the bareboat charterer may be instituted even after the expiration of the limitation period mentioned in article 14.1 if the action is instituted within the later of

- (a) the time allowed by the law of the State where proceedings are instituted; or**
- (b) 90 days commencing from the day when the registered owner both**

(i) proves that the ship was under a bareboat charter at the time of the carriage; and

(ii) adequately identifies the bareboat charterer.]

This provision addresses the concern that the limitation period may have expired before a claimant has identified the bareboat charterer that is responsible as “carrier” under article 8.4.2. It was felt that the claimant should have an extension comparable to the extension under article 14.4 for bringing an indemnity action.

15 GENERAL AVERAGE

15.1 Nothing in this Instrument shall prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

15.2 With the exception of the provision on time for suit, the provisions of this Instrument relating to the liability of the carrier for loss or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

The wording is identical to article 24 of the Hamburg Rules. It reflects the principle that first the general average adjustment has to be made and the general average award has to be established, whereafter liability matters may be considered.

16 OTHER CONVENTIONS

16.1 This Instrument does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of [seagoing] ships.

16.2 No liability shall arise under the provisions of this Instrument for any loss or damage to or delay in delivery of luggage for which the carrier is responsible under any convention or national law relating to the carriage of passengers and their luggage by sea.

16.3 No liability shall arise under the provisions of this Instrument for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

- (a) under either the Paris Convention of July 29, 1960, on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of Jan. 28, 1964, or the Vienna Convention of May 21, 1963, on Civil Liability for Nuclear Damage, or**
- (b) by virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.**

These provisions are based on article 25(1), (3), and (4) of the Hamburg Rules. They will need to be updated at a later stage.

17 LIMITS OF CONTRACTUAL FREEDOM

17.1

- (a) Unless otherwise specified in this Instrument, any contractual stipulation that derogates from the provisions of this Instrument shall be null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee under the provisions of this Instrument.**
- (b) [Notwithstanding paragraph (a), the carrier or a performing party may increase its responsibilities and its obligations under this Instrument.]**
- (c) Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.**

The Hague Rules adopted the one-sided policy of prohibiting the carrier from reducing its liability, although a carrier may increase its liability. There are no explicit restrictions with respect to the shipper's liability. The Hamburg Rules do not permit any derogation from its provisions, and this may include a prohibition on increasing the shipper's liability. But increasing the carrier's liability is explicitly permitted.

The basic thrust of this article prohibits any reduction of liability below what is prescribed by the Instrument, but it should be noted that this general rule applies to the liability not only of the carrier but also of performing parties, the shipper, the controlling party, and the consignee.

The variants in square brackets deal with the possible prohibition of increasing liabilities and responsibilities. It would be possible to render unenforceable any increase of liabilities outside the Instrument (on either side or on one side). The present Instrument contains detailed rules about the responsibilities of the various parties, and the effect of preventing any reduction of them, or any increase of them, requires careful analysis.

The resolution of the issues identified in the commentary to articles 3.3 and 3.4 will affect at least the practical impact of this article. To the extent that modern equivalents of a traditional charter party (such as a slot or space charter), volume contracts, and towage contracts are excluded from the Instrument's scope of application, there will be a greater scope for freedom of contract. The resolution of these issues may also require a revision of the text of this article. For example, if the suggestion is accepted to subject volume contracts to the terms of this Instrument (at least as a default rule) but to permit the parties to a volume contract to derogate from the terms of this Instrument (at least as between the immediate parties to the volume contract), then this article will need to be revised to reflect this conclusion.

17.2 Notwithstanding the provisions of chapters 5 and 6 of this Instrument, both the carrier and any performing party may by the terms of the contract of carriage exclude or limit their liability for loss or damage to the goods if

- (a) the goods are live animals, or**
- (b) the character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic record is or is to be issued for the carriage of the goods.**

In the Hague and Hague-Visby Rules live animals are excluded in the definition of goods. It is felt, however, that the exclusion of live animals is only justified for carriers' liability purposes. Other provisions, such as those dealt with in chapters 7 and 11, are relevant to the carriage of live animals. Accordingly, the better place to deal with live animals is in this provision.

Paragraph (b) covers in simplified wording the seldom-applied escape possibility of article VI of the Hague and Hague-Visby Rules.

Dated 10th December 2001

MODEL NATIONAL LAW ON ACTS OF PIRACY AND MARITIME VIOLENCE

FINAL REPORT OF THE JOINT INTERNATIONAL WORKING GROUP

Following the CMI Singapore International Conference, Dr Menefee undertook to prepare a redraft of the Model Law taking into account the observations and suggestions made during the Conference Committee's discussion of the text.

The Joint International Working Group met in London on Monday, December 3rd 2001 for its final current session, at the offices of Ince & Co., 11 Byward Street. The Group carefully considered the points made in Singapore as well as specific written comments and suggestions received from UN OLA/DOALOS for better harmonization of parts of the text with the 1982 United Nations Convention on the Law of the Sea. As a consequence the Group made a number of changes in and a reorganization of its draft text of the Model National Law.

The final text of the Model National Law proposed by the Joint International Working Group is set forth as Annex A to this Report, and the individual representatives participating in the work of the Group over its five sessions are identified in Annex B.

Respectfully submitted,

FRANK L. WISWALL
Chairman of the Group
SAMUEL P. MENEFEE
Rapporteur

ANNEX A

MODEL NATIONAL LAW ON ACTS OF PIRACY AND MARITIME VIOLENCE

Preamble

The following Model National Law on Acts of Piracy and Maritime Violence is the result of deliberation by the Joint International Working Group on Uniformity of Law Concerning Acts of Piracy and Maritime Violence.¹ 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 ideas designed to achieve greater uniformity in the body of various national legal traditions rather than producing a standardized 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.²

¹ 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 (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).

² 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 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 Code of

Section I: Definitions

1. **Piracy** is committed when any person or persons:
 - 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.³
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 held to constitute piracy by a decision of the (*name of the highest judicial court of the enacting State*) currently in force; or
 - c) engages in an act deemed piratical under customary international law.
3. The crime of **maritime violence** is committed when, for any unlawful purpose, any person or persons, intentionally or recklessly:
 - a) injures or kills any person or persons in connection with the commission or the attempted commission of any of the offences 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

Practice / Instruments/Guidance Note for the Investigation of the Crime of Piracy and Armed Robbery Against Ships (2001), developed by the Maritime Safety Committee, and 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).

³ The act of piracy defined in sub-Section I (2) and the acts of maritime violence as defined in sub-Sections I (3), (4) and (5) are separate offences; neither one includes piracy as defined in sub-Section I (1).

- 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 offence under Article 3 of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; or
- j) engages in an act constituting an offence 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 installations or facilities, or related interests.

5. An attempt to commit any of the offences 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 offences, or threats to commit any of them, shall constitute **maritime violence**.⁴

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.⁵
- 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

- 1. Jurisdiction to prosecute piracy as defined in sub-Sections I (1) (a) and (b) shall lie as set forth in the relevant Convention.

⁴ As applied in respect of an offence under sub-Section I (1), an act of *maritime violence* as defined in sub-Section I (5) is an act separate from “inciting” or “intentionally facilitating” an act of *piracy* as defined in sub-Section I (1).

⁵ It is suggested that seaplanes when afloat and hovercraft in the marine environment should fall within this definition.

Model National Law on Acts of Piracy and Maritime Violence

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 archepelagic 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 or against a ship registered in or entitled to fly the flag of *(name of enacting State)*, wherever located; or
 - b) on or against an offshore installation licensed by or operating within the jurisdiction of *(name of enacting State)*.
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 a foreign national 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 a foreign national resident in *(name of enacting State)*, or is a stateless person.
6. Trial of an alleged offender *in absentia* shall be allowed as permitted under the law of *(name of enacting State)*.

Section III: Extradition

1. Extradition from *(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 under appropriate circumstances.
2. If another State claims jurisdiction with regard to an incident of piracy or an act of maritime violence, and the alleged offender is not promptly 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 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.

Section IV: 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

Final Report of the Joint International Working Group

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)*.⁶

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)*.⁶

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)*.⁶

4. In cases where any person is injured or killed, or property is lost or damaged, in connection with an incident of piracy or maritime violence, the person found guilty of the crime shall *also* be liable to whatever criminal penalties exist under *(relevant national law(s) of enacting State)*⁶ for the injury, death, loss or damage.

5. In cases where any person is injured or killed, or property is lost or damaged, in connection with an incident of piracy or maritime violence, the person found guilty of the crime shall *also* be liable to whatever civil remedies are available.

6. Where ships, cargo, goods, or equipment have been employed in or were the subject of acts of piracy or maritime violence, such property shall be liable to forfeiture to the State. However, in the case of stolen or misappropriated property, any person having title to or legal custody of the property may assert a claim under *(relevant national law(s) of enacting State)* for return of the property. Any mortgagee of the property may likewise assert a claim under *(relevant national law(s) of enacting State)* for payment of the current mortgage obligation.

7. Where ships, cargo, goods, or equipment employed in or the subject of acts of piracy or maritime violence are liable to forfeiture to the State, such property shall be restored as expeditiously as possible to the person having lawful title to or custody of the property, unless the State proves the wilful complicity of such person in the act of piracy or maritime violence. If such person is denied return of such property, any mortgagee of the property shall be entitled to recover payment of the current mortgage obligation out of the proceeds of sale of the property at a public judicial sale under *(relevant national law(s) of enacting State)*, with the remaining balance being forfeit to

⁶ 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.

Model National Law on Acts of Piracy and Maritime Violence

the State, unless the State proves the wilful complicity of such mortgagee in the act of piracy or maritime violence.

8. Where ships, cargo, goods or equipment wrongfully taken by person(s) convicted of piracy or maritime violence have *not* been employed in such crime(s):

- a) Such property if unconverted shall be returned to its owners or custodians upon proof of ownership or lawful custody.
- b) Converted property shall be sold at public judicial sale and the proceeds distributed to the lawful claimants according to admiralty/maritime law, with any balance remaining being forfeited to the State.
- c) Items not claimed within the period established by law may be subject to public judicial sale, or transfer to a fund for financing State or regional action to fight piracy or maritime violence.

9. Owners of ships or cargo shall not be charged for port expenses incurred during investigation or prosecution for piracy or acts of maritime violence.

10. Nothing in sub-Sections IV (1) through (9) 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 V: Reporting of Incidents

1. Any incident which may constitute piracy or maritime violence shall be reported by the following, as applicable: (a) the Master,⁷ (b) shipowner or manager, (c) the crew representative, (d) 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.⁸

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

⁷ 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.

⁸ 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.

Final Report of the Joint International Working Group

to make reports without delay and in the required formats to the International Maritime Organization (IMO) ⁹ and the International Criminal Police Organization (INTERPOL).¹⁰

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.¹¹

⁹ Refer to IMO MSC/Circ.622/Rev.1, Annex, Appendix 4, and MSC 59/33, paragraph 19.22.

¹⁰ The Working Group encourages inclusion of the obligation to report to appropriate non-governmental organizations such as the ICC International Maritime Bureau (ICC-IMB).

¹¹ 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 – 5, 1998 – 2001****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 MENEFFEE (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

Detective Superintendent Suzanne WILLIAMS, Head of Piracy & Kidnapping Unit, Metropolitan Police, London

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, Esq., 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

GENERAL AVERAGE

REPORT OF THE CHAIRMAN OF THE JOINT INTERNATIONAL WORKING GROUP ON ISSUES IN GENERAL AVERAGE TO THE EXECUTIVE COUNCIL

1. At its post-Assembly meeting in Singapore on 17th February 2001, the Executive Council appointed the undersigned to organize and chair an international group of concerned maritime industry organizations for the purpose of discussing a wide range of issues and proposals related to general average, with the objective of determining which of these should – from the perspective of industry – be considered by the CMI Working Group on General Average appointed by the Executive Council under the Chairmanship of Bent Nielsen, which is to begin its work in 2002.

2. At the invitation of the Comité Maritime International, the Joint International Working Group met on two occasions at Ince & Co., Knollys House, 11 Byward Street, London. The First Session on 8th May commenced at 10:00 o'clock a.m. and concluded at 3:50 p.m.; the Second Session on 5th December commenced at 10:30 a.m. and concluded at 2:55 p.m. On both occasions the meeting included a brief interval for a “working” sandwich lunch. Participating were:

– *for the CMI*

Dr. F. L. WISWALL, Vice-President and Chairman of the Group;
Patrick J. S. GRIGGS, Esq., President;
Bent NIELSEN, Esq., Titulary Member and designated Chairman of the International Sub-Committee on General Average; and
Richard A. A. SHAW, Esq., Titulary Member and designated Rapporteur of the International Sub-Committee on General Average.

– *for the Average Adjusters*

Richard CORNAH, AAA;
N. Geoffrey HUDSON, AAA;**
Jean KNUDSEN, Chairman, AAAUS;*
John Macdonald, Chairman, AIDE;
Howard MCCORMACK, Esq., Chairman, AAAUS;**
Tim J. W. MADGE, Chairman, AAA;
Howard MYERSON, AAAUS;

Report of the Chairman of the Joint International Working Group

Rucemah PEREIRA, BAAA;* and
John WILSON, AAA.

- *for the Hull and Cargo Insurers*
Ben BROWNE, Esq., Shaw and Croft, for IUMI;
Nicholas GOODING, IUMI;*
Eamonn MAGEE, IUMI;*
Matthew MARSHALL, IUMI; and
Fred ROBERTIE, AHIS. **
- *for the P&I Insurers*
Hugh HURST, Esq., IGP&I,** and
Charles MAWDSLEY, Esq., IGP&I
- *for the Shipowners*
Donald CHARD, UKCS;
Linda HOWLETT, Legal Adviser, ICS;* and
Grant HUNTER, BIMCO.**
- *for the Shippers*
Neil JOHNSON, FTA / ESC*

(* = attended First Session only; ** = attended Second Session only)

Invitations were also issued to FIATA, IAPH and IICL, but their representatives were unable to attend.

3. Prior to substantive discussion at the Second Session, the Chair distributed a guidance sheet entitled “*Considerations for Application to Proposals*”; a copy is attached to this Report. All of the issues discussed at the First Session were re-visited at the Second Session.

4. At the outset of the First Session, Matthew Marshall of IUMI made a statistical presentation of insurance liabilities based upon some 2,000 general average adjustments over the previous decade, approximately 200 being post-1995. The figures involved were generally acceptable to the representatives of average adjusters.

5. The conclusion drawn by cargo interests from that statistical presentation is that cargo’s share of GA expenses is unfairly burdensome – on the order of 60% to 65% of losses – and has been so for many years. It is contended by some that the problem is partly a consequence of sub-standard ship operations. The expenses and sacrifices incurred on behalf of the ship by sub-standard operators are in many instances relatively greater than those incurred on behalf of cargo, though this is also dependent upon the circumstances of the case and the relative values of ship and cargo at the conclusion of the venture. The value of ships employed in sub-standard operations will usually depreciate more rapidly. Shippers and cargo

underwriters are united in their determination to resolve the problem of imbalance, especially as this may relate to sub-standard ship operations.

6. It was at first suggested from the average adjusters that, rather than amend the York-Antwerp Rules, the better solution might be for the cargo underwriters to re-write their policies re cargo cover, assuming that hull underwriters also agreed that the problem was serious. On behalf of the underwriters it was stated that IUMI did not seek to resolve the problem of sub-standard ship owners and operators, but confined its interest to the reduction of GA costs to the insurers. IUMI did not seek the abolition of GA, but to reform it.

7. It was stated on behalf of the average adjusters that GAs were actually declining at present – a diminishing target. The real problem as seen by IUMI appeared to lie in expenses that were of common benefit to ship and cargo, and generally this problem could best be dealt with by GA adjustment.

8. On behalf of both IUMI and the average adjusters it was stated that a major problem was the failure of hull underwriters to insist upon the use of the 1994 York-Antwerp Rules; at present the 1994 Rules were employed in only 50% of adjustments – the other half were done in accordance with the 1974 or older versions.

9. It was suggested from the underwriters that “port of refuge” expenses were another aspect of their problem; such expenses were being allowed even though the vessel was no longer in a state of peril. It was pointed out by the average adjusters that if in respect of all sacrifices in GA the liability were allowed to lie where it fell, one result would be that cargo underwriters would pick up the costs of transhipment from a port of refuge. For IUMI, the underlying issue at present was whether claims in GA should be based on “Common Benefit” or “Common Safety”. For example, should *any* expenses be allowed once the vessel was no longer in imminent peril? Transhipment costs should be disallowed, as should the costs of temporary unloading and reloading. The test of *The Makis* should be applied. Many such expenses would obviously move over to the hull underwriters, or move under a new extension of hull cover. From the average adjusters it was suggested that the means of dealing with the range of port of refuge expenses needed to be established before any changes were made to the York-Antwerp Rules.

10. To IGP&I the IUMI proposal gave the appearance of an attempt to shift liability. For IUMI that was not the objective and was incidental to the reduction of GA costs to the cargo underwriters. From CMI it was observed that the elimination of the nautical fault defence in a new transport convention would have an obvious impact.

11. For IUMI the proposal was, in essence, to make the change from GA to a series of Particular Averages on port of refuge claims. To the FTA / ESC

Report of the Chairman of the Joint International Working Group

there were analogies to be drawn from air transport, where GA does not exist. From CMI it was asked what recourse the container lessors would have in such case, as they do not declare a GA.

12. It was pointed out that if port of refuge claims were not adjusted, the actual expenses would continue to be incurred and disputed. For the average adjusters, it was not always easy to determine the point at which a voyage became frustrated; likewise, the adjustment of post-peril expenses would pose considerable difficulties. It was recognized, however, that while certain port of refuge expenses such as fuel might properly be allowed, others such as wages should be excluded as expenses in GA. There was a consensus that issues in respect of certain port of refuge expenses should be considered by the GA Working Group.

13. On behalf of ICS and BIMCO it was noted that the latter was now in the process of drafting “absorption” clauses in the context of bills of lading and charterparties. The suggestion was made that sacrifices in GA should be excluded from such clauses. There was a consensus that the CMI WG on GA should further examine absorption clauses when BIMCO had concluded its current work, even though this might not have implications for amendment of the York-Antwerp Rules.

14. It was stated on behalf of IUMI that in salvage cases there had already been an apportioned award, so the GA adjustment was in actuality an unnecessary re-apportionment. IUMI proposed that salvage claims be excluded from GA, and it was suggested that this would substantially reduce costs; likewise the exclusion of differentials in salvage settlements and lawyers’ fees and security costs. It was noted that at the CMI Singapore Conference a majority of those indicating an opinion concerning GA adjustments in salvage cases viewed the issues arising in this regard as deserving of consideration in the context of the York-Antwerp Rules.

15. For IUMI it was proposed to eliminate commission and interest expenses in order to reduce GA costs. From the average adjusters it was pointed out these were inducements to ‘finance’ a GA. It was generally agreed that one aspect deserving particular consideration was the fixed rate of interest stated in the York-Antwerp Rules.

16. IUMI wondered why “ballast GAs” were allowed; it was pointed out by the average adjusters that this was actually a hull insurance contract issue, unrelated to GA. There was no other support for an examination of this issue by the GA Working Group.

17. The problem of “temporary repairs” to remove a vessel from a position of peril was raised by IUMI. On behalf of average adjusters it was suggested that while the problem in and of itself did not warrant amendment of the York-Antwerp Rules, if they were otherwise to be amended, then the

General Average

matter should be considered; temporary repairs should not be allowed as an expense in GA, but should be treated as a “substituted expense”. On behalf of the CMI it was observed that even if temporary repairs were first dealt with by changes in the insurance contract, a solution to the GA problem could only be achieved by eventual amendment of the Rules.

18. The issue of time bar was raised by IUMI, who suggested that in order to strive for uniformity and to speed up the handling of claims, including adjustments in GA, appropriate time-bar periods should be inserted into the York-Antwerp Rules. It was pointed out from the CMI that such contractual time bars could only be effective if the applicable national law gave effect to them, or if they fell within the period of any statutory time bars applicable under national law. It would require a questionnaire addressed to the Member Associations in order to make a catalogue of such time bars – a daunting task. Nonetheless it was the feeling of IUMI that if the Rules contained time bars the commercially-minded States would eventually bring their national law into line with the Rules. IUMI has proposed a model time-bar clause.

19. The matter of “deductibles” was raised from the average adjusters. The most common application would be in the case of engine repairs, where in the absence of a deductible clause costs of repair in the course of a voyage were presently being allowed as expenses in GA and gave rise to the adjustment of relatively small claims. It was pointed out that it would be very difficult to apply such a clause to actual circumstances, and in the course of discussion a consensus emerged that the difficulties probably outweighed the benefits.

20. It was suggested by IUMI that damage consequential upon error in management of the ship, such as breaches of the ISM or STCW Codes, or Classification Society Rules, should be excluded from GA. From CMI it was pointed out that the draft Convention on International Transport Law that would shortly be presented by CMI to UNCITRAL abandons entirely the defence of error in management, and that it would be inconsistent for CMI to propose abolition of the concept in one context while assuming its long-term retention in another.

21. From the average adjusters the issue was raised whether, at least in cases of sacrifice of property in GA (which might include, *e.g.*, damage to cargo during discharge in a port of refuge), the liabilities should not properly lie where they fall. It was proposed that this should be studied by the CMI Working Group on GA, and this appeared to be the consensus.

22. It was suggested that the Rule 11(d) exclusion in respect of pollution damage added to the York-Antwerp Rules in 1994 ought to be deleted; that this amendment of the Rules had been an unprincipled compromise. Discussion established the general view that the time was not yet ripe for a return to this issue.

23. From IUMI it was proposed that adjusters' fees be excluded from GA. From CMI it was observed that, realistically, this proposal had little to no chance of success.

24. The allowance of "substituted expenses" in mitigation of damage was raised on behalf of IUMI. It was proposed that these expenses be disallowed if the concept of "Common Safety" were accepted as a basis for revising the York-Antwerp Rules.

25. With the exception of nos. 20 and 23 above, all of the foregoing proposals and points were discussed as fully as desired by any of the participants, and no other proposals were made or points raised for discussion. Based upon the discussions taking place at both Sessions of the JIWG, I conclude that:

The following issues **should** be taken up by the CMI Working Group on General Average, though not in each case directly related to possible amendment of the York-Antwerp Rules:

- **Port-of-refuge expenses** – to consider whether certain expenses currently allowed (such as wages) should be excluded, and whether such an incremental approach is preferable to a blanket exclusion of all such expenses;
- **Absorption Clauses** – (exclusion of sacrifices in GA) to be considered when BIMCO completes its current work;
- **Salvage claims** – to consider as set out in § 14 above;
- **Interest expense** – to consider the rate of interest stated in the YAR, and how this might be governed by a formula rather than a set figure;
- **Temporary repairs;**
- **To let liability lie where it falls in sacrifices of property;**
- **Time bar** – with a low priority for consideration, in view of the amount of research required in order to fashion any truly useful solution; and
- **"Substituted expenses"** – as one part of the consideration of the "Common Safety" vs. "Common Benefit" approach; this would be a fundamental change in the philosophy of GA, and should not be taken up until all the specific issues and proposals have been decided upon.

The following issues should **not** be taken up by the Working Group, either because they are not yet ripe for consideration, were withdrawn from consideration, or would be a complete waste of the Group's time:

- **Commission expenses;**
- **"Ballast GA";**
- **Deductible clauses;**
- **"Error in management" exclusions;**
- **Reversal of the 1994 Rule 11 (d) compromise; and**
- **Exclusion of adjusters' fees.**

Respectfully submitted,

FRANK L. WISWALL

ATTACHMENT TO THE REPORT

CONSIDERATIONS FOR APPLICATION TO PROPOSALS

1. Best Means of Accomplishment

Is the best means of accomplishing the objective

- (a) by changes in the York-Antwerp Rules?
- (b) by changes in the contract(s) of insurance?
- (c) by both means?
- (d) Why?

2. Effects upon Cost

- (a) What cost burdens will be shifted by the proposal?
- (b) What costs may be increased by the proposal?
- (c) What costs may be decreased by the proposal?

3. Collateral Effects

- (a) What positive collateral effects, if any, will this proposal have?
- (b) What negative collateral effects, if any, will this proposal have *apart from* increases in cost for one or more of the parties?

4. Other Considerations Unique to this Proposal

Are there any?

SALVAGE

UNESCO DRAFT CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE

REPORT BY JOHN D. KIMBALL TO THE MEMBERS OF THE CMI IWG ON SALVAGE OF HISTORIC WRECKS

I am writing to report more fully on the last sessions of the Fourth Meeting of Governmental Experts which were held at UNESCO Headquarters in Paris from July 1-8, 2001, as well as developments since the Meeting ended. I attended the meeting as a member of the United States delegation.

1. The final session of the Fourth Meeting ended around 12:30 a.m. on July 8 with the approval of a draft Convention by a majority vote. A copy of the “final” text of the draft Convention, which was circulated on July 25, 2001, is annexed as Ex. 1. The “final” text has already been slightly amended and copy of a corrigendum is enclosed as Ex. 1(a). The draft Convention will be submitted to the General Congress of UNESCO for approval during its meetings from October 15 to November 3, 2001. Although a draft Convention was approved by the meeting of Governmental Experts, it is noteworthy that a vote was required at all and that the draft was not supported by a large number of major maritime countries which participated in the meetings. Norway, Russia, Turkey and Venezuela voted against the draft. Although it is an observer at UNESCO and has no vote, the USA made a strong statement opposing the draft Convention. Eight countries abstained from voting, including Chile, China, France, Germany, Greece, Netherlands, Sweden and United Kingdom.

2. At the time the vote was taken, the text of the draft Convention was not available for review and had been through a first reading only. The hour was very late, UNESCO’s photocopier was broken and no interpreters were available to work so late, and, as a result, there was no second reading of the draft before it was approved. Because the text of the draft Convention was not available, the Chairman asked the delegates to vote on faith that the Drafting Committee, working with himself and the Secretariat, would correctly incorporate all of the many bits and pieces of text which the Chairman deemed had been “agreed” during the sessions. The Chairman made this request notwithstanding the fact that the Drafting Committee had indicated it had

numerous questions to be resolved by the Plenary. The Chairman stated that the text would be circulated as soon as possible so that delegates could send comments to the Secretariat before the final draft is sent to the General Congress. A draft was circulated by UNESCO on July 16, along with comments from the Secretariat. (Ex. 2) A report of the Drafting Committee was circulated by UNESCO on July 23. (Ex. 3) The final draft Convention was circulated on July 25. (Ex. 1)

3. Given the “no” votes and abstentions, it can be expected that efforts will be made before the General Congress meets to attempt to find compromises to make the draft acceptable to countries which have not yet supported it.

4. The session from July 1-8 followed a two week session which took place from March 26 to April 6, 2001. Substantial progress was made during the March/April session, including in particular the adoption by consensus of Article 4 (which was then numbered Article 5). Article 4 is of particular interest to our sub-committee and provides:

Article 4 – Relationship to law of salvage and law of finds

Any activity relation to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

- a) is authorised by the competent authorities, and
- b) is in full conformity with this Convention, and
- c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

5. The main accomplishment of the March/April sessions was the adoption by consensus of the Annex Rules. Annexed as Ex. 6 is a report of the UNESCO Secretariat outlining all of the provisions which were approved by consensus at the March/April sessions.

6. The two major issues left unresolved at the end of the March/April sessions concern coastal state jurisdiction over UCH and warships. In a nutshell, the jurisdiction issue concerns the power of coastal states over UCH on the continental shelf, including the contiguous zone and EEZ. The debate on this key point focused heavily on reporting and notification requirements, as well as which state has final decision-making power with respect to any discoveries of UCH. The warships issue concerns the basic issue of whether such vessels which otherwise meet the definition of UCH should enjoy any special status under the Convention and what the respective rights of the flag and coastal states should be.

7. An informal meeting to discuss the continental shelf issue was held by numerous delegates in Paris on May 25 and 26. An informal meeting to discuss the warships issue was held in Paris on June 15 and 16. These meetings led to a paper produced by Chairman Lund to attempt to achieve a consensus. A copy of the Chairman’s original “May Paper” is annexed as Ex. 7.

8. Further informal meetings were held on the jurisdiction and warships issues at UNESCO’s headquarters on July 1.

9. Various “non-papers” and working papers were submitted by delegations at the March/April sessions and prior to the start of the July 2-8 session. I am appending as Ex. 8 a copy of all of the Working Papers I was able to collect.¹

10. I am annexing as Exs. 9 and 10 copies of various “non-papers” which were distributed by some delegations.

11. The meetings which began on July 2 were attended by 96 national delegations. There were 2 observers and several Intergovernmental and non-government organizations participated. A provisional list of participants is annexed as Ex. 11.

12. From the outset, the common goal of the meeting was to achieve a draft Convention which could be approved by consensus among the Government Experts. This approach had been approved at the Third Meeting held in July 2000 and was re-affirmed at the March/April sessions of the Fourth Meeting. Nonetheless, the possible need for voting was anticipated and the UNESCO Secretariat had distributed a paper on voting procedures. (Ex. 12) Towards the goal of achieving a consensus, there were both informal and formal working sessions throughout the week of July 2-8. As time grew tight on Friday and Saturday, July 6 and 7, it became obvious that it was going to be exceedingly difficult to achieve a consensus on the jurisdiction and warship issues, as well as related points. Indeed, it was the undersigned’s conclusion very early in the week that no consensus could be achieved on these critical points.

13. The undersigned made extensive notes of the sessions attended, but I do not believe the details of every point discussed need to be included for purposes of this report. The sessions were lengthy. From Tuesday through Friday, the sessions went until at least midnight and the final session on Saturday, July 7, ended around 12:30 a.m. on July 8.

14. The atmosphere of the meetings was very political. The Group of 77 countries held to their positions en bloc and appeared to have organized in advance a sort of “good guy/bad guy routine” whereby certain delegates would appear to be adamant about positions and others would appear to act as “conciliators.” It was clear from the opening statement by the Chairman of the Group of 77 on July 2, however, that the group would vote as a bloc and would command a majority.

15. In addition to the main issues, there were a large number of subsidiary points which required discussion, some of which were time consuming. For example, there was lengthy and emotional debate concerning proposals for dealing with human remains and, in particular, the remains of military personnel. The important question of how many ratifications would be needed for the Convention to enter into force was also heavily debated, the end result

¹ Certain of the papers distributed in March/April were no longer available in July. In addition, I was told there is no WP 55.

being what the Chairman deemed a consensus on the requirement that 20 states ratify for the treaty to enter into force.

16. Many of the provisions which were finally adopted on July 6 or 7 can be said to have enjoyed a consensus only to the extent they commanded the support of the Group of 77 countries. One aspect of the debate which the undersigned found especially noteworthy and troubling was the concept of “constructive ambiguity.” Numerous Group of 77 delegates argued that it was desirable and constructive to ensure that the language used in some of the most hotly debated clauses would be deliberately ambiguous so that states could then interpret the provisions as they wished.

17. As the meetings were nearing an end on Saturday night, July 7, there was supposed to be a “second reading” of the complete text which had been adopted. Throughout the week, sections of the draft Convention were approved piecemeal in the first reading, but the text was to be reviewed as a complete document in the second reading. The Annex was reviewed and approved and the text is included in Ex. 1. Around 11:30 p.m. on July 7, the Chairman informed the meeting of two problems: first, UNESCO’s large photocopier had broken, so that it was impossible to reproduce and collate the text for a second reading. Second, the Secretariat had not arranged for translation services past midnight. The Chairman then sought the concurrence of the meeting to the adoption of the text by consensus without voting notwithstanding the fact that there was no unified text to review. The United States’ delegate made a strong statement outlining its reasons for not supporting the draft. Russia then demanded a vote. Despite strong pleas by the Chairman to withdraw its demand, Russia stood firm and effectively left the Chairman no choice but to have a vote. This was a development which clearly surprised some delegations and led to angry statements by some of the delegates.

18. A vote was held, however, with the result noted above.

General Observations

19. I have several observations concerning the meeting:

- a) The draft convention is flawed in many respects which should make it unacceptable to the CMI. Some of the main problem areas are as follows:
 1. The draft convention is at variance with the Law of the Sea Convention in creating greatly expanded coastal state jurisdiction over shipwrecks on the Continental shelf. Articles 9-12 are especially problematic in this respect.
 2. The draft convention is at variance with the Law of the Sea Convention to the extent it may abrogate the law of salvage. In this respect, Article 4 of the draft convention is intentionally ambiguous and, depending upon the manner in which it is implemented by States, it could be read as allowing for salvage activities of a limited scope in conformity with the convention. This clause is an example of what was frequently referred to during the negotiations as “constructive ambiguity”.

3. The scope of the convention is exceedingly broad and applies to all matter which fits the definition of underwater cultural heritage, without regard to its archaeological, historical or cultural significance. It is debatable whether this is good or bad. Some critics take the view that the broad scope of the draft convention will make it unenforceable. Those who favor the broad scope of the convention take the position that including a significance requirement would make implementation of the convention problematic.
- b) Although efforts will be made between now and October to find compromise language on the continental shelf and warships issues, I do not expect a compromise will emerge that will be acceptable to the other countries which opposed the treaty or abstained. It will be especially interesting to see how the countries which abstained on July 8 will vote at the General Congress. Clearly, by abstaining these delegations may have gained some negotiating leverage. I do not think it is possible to amend the critical Articles 9-12 in a way that can bridge the very clear policy differences which were fully aired at the meeting.
- c) It is virtually certain the General Congress will approve the draft Convention in October and that it will be ratified by 20 countries fairly quickly. The Convention, however, will only be in force in those countries which ratify it.

20. The possible alternative of the Brice Protocol to the 1989 Salvage Convention which has been considered by the CMI Working Group has no immediate chance of being considered.. An amendment to the Salvage Convention would require intervention by the IMO and this will not take place while the subject of UCH remains within UNESCO's umbrella. On the other hand, if major maritime countries should ultimately conclude that the UNESCO initiative has failed, IMO could possibly be looked to as an alternative and more favorable forum.

21. I recommend that the IWG remain in place to follow developments through the General Congress and thereafter through the ratification phase.

22. I recommend that the President of CMI send a letter to the Director General of UNESCO to record our opposition to the draft Convention. I will be happy to draft such a letter if you agree with this approach.

JOHN D. KIMBALL

**LETTER OF THE PRESIDENT OF THE CMI
TO THE DIRECTOR GENERAL OF UNESCO**

Honorable Koichiro Matsuura
Director General
United Nations Education and Scientific and Cultural Organization
Paris, France

Re: Draft Convention on the Protection of Underwater Cultural Heritage

Dear Mr. Matsuura:

I am writing as President of the Comité Maritime International ("CMI") to advise you of the CMI's position concerning the draft UNESCO Convention on Underwater Cultural Heritage. The CMI is a non-governmental international organization, whose purpose is to contribute to the unification of maritime law. The CMI's members include 56 national maritime law associations, which includes all of the major maritime countries around the world.

My understanding is that the General Conference of UNESCO will give consideration to the Draft Convention when it meets from October 15 to November 3, 2001.

The CMI has taken a close interest in the Draft Convention for some time and has formed an International Working Group which has reviewed the Draft. The CMI supports the basic goal of the Draft Convention of preserving and protecting underwater cultural heritage. Most regrettably, however, I can see no possibility that the CMI would be able to support the Draft Convention in its current form. We see some fundamental problems with the Draft Convention, including the following:

1. Notwithstanding Article 3, the Draft Convention appears to be at variance with the Law of the Sea Convention in creating greatly expanded coastal state jurisdiction over shipwrecks on the Continental shelf. In our view, there are very serious questions as to whether the notification and approval schemes outlined in Articles 9-12 are consistent with the Law of the Sea Convention. The CMI would strongly oppose the Draft Convention to the extent that it is at variance with the Law of the Sea Convention.

2. The definition of "underwater cultural heritage" is far too broad and may have the unintended consequence of making enforcement impossible. The CMI would prefer a definition which restricts the coverage of the Draft

Letter of the president of the CMI to the director general of UNESCO

Convention to underwater property which is of historic, cultural or archaeological significance.

3. We support the intent of Article 4, which deals with the relationship of the law of salvage to the Draft Convention. The CMI is firmly of the opinion that the law of salvage is not incompatible with the goals of the Draft Convention. In our view, there is no reason why the law of salvage should be deemed a threat to the protection and preservation of underwater cultural heritage. The law of salvage has long had international recognition and is explicitly recognized in Article 303 of the Law of The Sea Convention. Although we support Article 4, we are concerned that Article 4(a) is ambiguous as to what entity may be deemed “the competent authority” and that Article 4 could be applied to restrict legitimate salvage operations which are otherwise in conformity with international law.

I would be most grateful if you could advise the delegates to the General Conference of our concerns.

Very truly yours,

PATRICK GRIGGS

PART III

**Status of ratifications to
Maritime Conventions**

**Etat des ratifications
aux conventions de Droit Maritime**

**ETAT DES
RATIFICATIONS ET ADHESIONS
AUX CONVENTIONS INTERNATIONALES
DE DROIT MARITIME DE BRUXELLES**

(Information communiquée par le Ministère des Affaires Etrangères,
du Commerce Extérieur et de la Coopération au Développement
de Belgique, dépositaire des Conventions).

Notes de l'éditeur

(1) - Les dates mentionnées sont les dates du dépôt des instruments. L'indication (r) signifie ratification, (a) adhésion.

(2) - Les Etats dont le nom est suivi par un astérisque ont fait des réserves. Un résumé du texte de ces réserves est publié après la liste des ratifications de chaque Convention.

(3) - Les dates mentionnées pour la dénonciation sont les dates à lesquelles la dénonciation prend effet.

**STATUS OF THE
RATIFICATIONS OF AND ACCESSIONS
TO THE BRUSSELS INTERNATIONAL MARITIME
LAW CONVENTIONS**

(Information provided by the Ministère des Affaires Etrangères,
du Commerce Extérieur et de la Coopération au Développement de Belgique,
depository of the Conventions).

Editor's notes:

(1) - The dates mentioned are the dates of the deposit of instruments. The indication (r) stands for ratification, (a) for accession.

(2) - The States whose names are followed by an asterisk have made reservations. The text of such reservations is published, in a summary form, at the end of the list of ratifications of each convention.

(3) - The dates mentioned in respect of the denunciation are the dates when the denunciation takes effect.

**Convention internationale pour
l'unification de certaines
règles en matière
d'Abordage
et protocole de signature**

Bruxelles, le 23 septembre 1910
Entrée en vigueur: 1er mars 1913

**International convention
for the unification of certain
rules of law relating to
Collision between vessels
and protocol of signature**

Brussels, 23rd September, 1910
Entered into force: 1 March 1913

(Translation)

Angola	(a)	20.VII.1914
Antigua and Barbuda	(a)	1.II.1913
Argentina	(a)	28.II.1922
Australia	(a)	9.IX.1930
Norfolk Island	(a)	1.II.1913
Austria	(r)	1.II.1913
Bahamas	(a)	3.II.1913
Belize	(a)	3.II.1913
Barbados	(a)	1.II.1913
Belgium	(r)	1.II.1913
Brazil	(r)	31.XII.1913
Canada	(a)	25.IX.1914
Cape Verde	(a)	20.VII.1914
China		
Hong Kong⁽¹⁾	(a)	1.II.1913
Macao⁽²⁾	(r)	25.XII.1913
Cyprus	(a)	1.II.1913
Croatia	(a)	8.X.1991
Denmark	(r)	18.VI.1913
<i>(denunciation 1 September 1995)</i>		
Dominican Republic	(a)	1.II.1913
Egypt	(a)	29.XI.1943
Estonia	(a)	15.V.1929
Fiji	(a)	1.II.1913
Finland	(a)	17.VII.1923

(1) With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Collision Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

(2) With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Collision Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

*Abordage 1910**Collision 1910*

France	(r)	1.II.1913
Gambia	(a)	1.II.1913
Germany	(r)	1.II.1913
Ghana	(a)	1.II.1913
Goa	(a)	20.VII.1914
Greece	(r)	29.IX.1913
Grenada	(a)	1.II.1913
Guinea-Bissau	(a)	20.VII.1914
Guyana	(a)	1.II.1913
Haiti	(a)	18.VIII.1951
Hungary	(r)	1.II.1913
India	(a)	1.II.1913
Iran	(a)	26.IV.1966
Ireland	(r)	1.II.1913
Italy	(r)	2.VI.1913
Jamaica	(a)	1.II.1913
Japan	(r)	12.I.1914
Kenya	(a)	1.II.1913
Kiribati	(a)	1.II.1913
Latvia	(a)	2.VIII.1932
Luxembourg	(a)	22.IV.1991
Libyan Arab Jamahiriya	(a)	9.XI.1934
Macao	(a)	20.VII.1914
Madagascar	(r)	1.II.1913
Malaysia	(a)	1.II.1913
Malta	(a)	1.II.1913
Mauritius	(a)	1.II.1913
Mexico	(r)	1.II.1913
Mozambique	(a)	20.VII.1914
Netherlands	(r)	1.II.1913
Newfoundland	(a)	11.III.1914
New Zealand	(a)	19.V.1913
Nicaragua	(r)	18.VII.1913
Nigeria	(a)	1.II.1913
Norway	(r)	12.XI.1913
Papua New Guinea	(a)	1.II.1913
Paraguay	(a)	22.XI.1967
Poland	(a)	2.VI.1922
Portugal	(r)	25.XII.1913
Romania	(r)	1.II.1913
Russian Federation⁽³⁾	(r)	10.VII.1936
Saint Kitts and Nevis	(a)	1.II.1913

⁽³⁾ Pursuant to a notification of the Ministry of foreign affairs of the Russian Federation dated 13th January 1992, the Russian Federation is now a party to all treaties to which the U.S.S.R. was a party. Russia had ratified the convention on the 1st February 1913.

*Abordage 1910**Assistance et sauvetage 1910*

Saint Lucia	(a)	3.III.1913
Saint Vincent and the Grenadines	(a)	1.II.1913
Solomon Islands	(a)	1.II.1913
Sao Tome and Principe	(a)	20.VII.1914
Seychelles	(a)	1.II.1913
Sierra Leone	(a)	1.II.1913
Singapore	(a)	1.II.1913
Slovenia	(a)	16.XI.1993
Somalia	(a)	1.II.1913
Spain	(a)	17.XI.1923
Sri-Lanka	(a)	1.II.1913
Sweden	(r)	12.XI.1913
<i>(denunciation 19 December 1995)</i>		
Switzerland	(a)	28.V.1954
Timor	(a)	20.VII.1914
Tonga	(a)	13.VI.1978
Trinidad and Tobago	(a)	1.II.1913
Turkey	(a)	4.VII.1913
Tuvalu	(a)	1.II.1913
United Kingdom	(r)	1.II.1913
Jersey, Guernsey, Isle of Man, Anguilla, Bermuda, Gibraltar, Falkland Islands and Dependencies, Cayman Islands, British Virgin Islands, Montserrat, Caicos & Turks Islands.		
Saint Helena, Wei-Hai-Wei	(a)	1.II.1913
Uruguay	(a)	21.VII.1915
Zaire	(a)	17.VII.1967

**Convention internationale
pour l'unification de certaines
règles en matière**

**d'Assistance et de sauvetage
maritimes
et protocole de signature**

Bruxelles, le 23 septembre 1910
Entrée en vigueur: 1 mars 1913

**International convention
for the unification of
certain rules of law
relating to**

**Assistance and salvage at
sea
and protocol of signature**

Brussels, 23rd September, 1910
Entered into force: 1 March 1913

(Translation)

Algeria	(a)	13.IV.1964
Angola	(a)	20.VII.1914
Antigua and Barbuda	(a)	1.II.1913

*Assistance et sauvetage 1910**Assistance and salvage 1910*

Argentina	(a)	28.II.1922
Australia	(a)	9.IX.1930
Norfolk Island	(a)	1.II.1913
Austria	(r)	1.II.1913
Bahamas	(a)	1.II.1913
Barbados	(a)	1.II.1913
Belgium	(r)	1.II.1913
Belize	(a)	1.II.1913
Brazil	(r)	31.XII.1913
Canada	(a)	25.IX.1914
<i>(denunciation 22.XI.1994)</i>		
Cape Verde	(a)	20.VII.1914
China		
Hong Kong⁽¹⁾	(a)	1.II.1913
Macao⁽²⁾	(r)	25.VII.1913
Cyprus	(a)	1.II.1913
Croatia	(a)	8.X.1991
<i>(denunciation 16.III.2000)</i>		
Denmark	(r)	18.VI.1913
Dominican Republic	(a)	23.VII.1958
Egypt	(a)	19.XI.1943
Fiji	(a)	1.II.1913
Finland	(a)	17.VII.1923
France	(r)	1.II.1913
Gambia	(a)	1.II.1913
Germany	(r)	1.II.1913
Ghana	(a)	1.II.1913
Goa	(a)	20.VII.1914
Greece	(r)	15.X.1913
Grenada	(a)	1.II.1913
Guinea-Bissau	(a)	20.VII.1914
Guyana	(a)	1.II.1913

⁽¹⁾ With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

⁽²⁾ With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Salvage Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

*Assistance et sauvetage 1910**Assistance and salvage 1910*

Haiti	(a)	18.VIII.1951
Hungary	(r)	1.II.1913
India	(a)	1.II.1913
Iran	(a)	26.IV.1966
<i>(denunciation 11.VII.2000)</i>		
Ireland	(r)	1.II.1913
Italy	(r)	2.VI.1913
Jamaica	(a)	1.II.1913
Japan	(r)	12.I.1914
Kenya	(a)	1.II.1913
Kiribati	(a)	1.II.1913
Latvia	(a)	2.VIII.1932
Luxembourg	(a)	22.IV.1991
Malaysia	(a)	1.II.1913
Madagascar	(r)	1.II.1913
Mauritius	(a)	1.II.1913
Mexico	(r)	1.II.1913
Mozambique	(a)	20.VII.1914
Netherlands	(r)	1.II.1913
Newfoundland	(a)	12.XI.1913
New Zealand	(a)	19.V.1913
Nigeria	(a)	1.II.1913
Norway	(r)	12.XI.1913
<i>(denunciation 9.XII.1996)</i>		
Oman	(a)	21.VIII.1975
Papua - New Guinea	(a)	1.II.1913
Paraguay	(a)	22.XI.1967
Poland	(a)	15.X.1921
Portugal	(r)	25.VII.1913
Romania	(r)	1.II.1913
Russian Federation	(a)	10.VII.1936
Saint Kitts and Nevis	(a)	1.II.1913
Saint Lucia	(a)	3.III.1913
Saint Vincent and the Grenadines	(a)	1.II.1913
Solomon Islands	(a)	1.II.1913
Sao Tomé and Príncipe	(a)	20.VII.1914
Seychelles	(a)	1.II.1913
Sierra Leone	(a)	1.II.1913
Singapore	(a)	1.II.1913
Slovenia	(a)	13.X.1993
Somalia	(a)	1.II.1913
Spain	(a)	17.XI.1923
Sri Lanka	(a)	1.II.1913
Sweden	(r)	12.XI.1913
Switzerland	(a)	28.V.1954
Syrian Arab Republic	(a)	1.VIII.1974

*Assistance et sauvetage 1910**Assistance and salvage - Protocole 1967*

Timor	(a)	20.VII.1914
Tonga	(a)	13.VI.1978
Trinidad and Tobago	(a)	1.II.1913
Turkey	(a)	4.VII.1955
Tuvalu	(a)	1.II.1913
United Kingdom ⁽³⁾	(r)	1.II.1913
Anguilla, Bermuda, Gibraltar, Falkland Islands and Dependencies, British Virgin Islands, Montserrat, Turks & Caicos Islands, Saint Helena	(a)	1.II.1913
<i>(denunciation 12.XII.1994 effective also for Falkland Islands, Montserrat, South Georgia and South Sandwich Islands)</i>		
United States of America	(r)	1.II.1913
Uruguay	(a)	21.VII.1915
Zaire	(a)	17.VII.1967

**Protocole portant modification
de la convention internationale
pour l'unification de
certaines règles en matière
d'Assistance et de sauvetage
maritimes**

**Signée a Bruxelles, le 23
septembre 1910**

Bruxelles, 27 mai 1967
Entré en vigueur: 15 août 1977

**Protocol to amend
the international convention for
the unification of certain
rules of law relating to
Assistance and salvage at
sea**

**Signed at Brussels on 23rd
September, 1910**

Brussels, 27th May 1967
Entered into force: 15 August 1977

Austria	(r)	4.IV.1974
Belgium	(r)	11.IV.1973
Brazil	(r)	8.XI.1982
Croatia	(r)	8.X.1991
<i>(denunciation 16.III.2000)</i>		
Egypt	(r)	15.VII.1977
Jersey, Guernsey & Isle of Man	(a)	22.VI.1977
Papua New Guinea	(a)	14.X.1980
Slovenia	(a)	13.X.1993
Syrian Arab Republic	(a)	1.VIII.1974
United Kingdom	(r)	9.IX.1974

⁽³⁾ Including Jersey, Guernsey and Isle of Man.

*Limitation de responsabilité 1924**Limitation of liability 1924*

**Convention internationale pour
l'unification de certaines
règles concernant la
Limitation de la responsabilité
des propriétaires
de navires de mer
et protocole de signature**

Bruxelles, 25 août 1924
Entrée en vigueur: 2 juin 1931

**International convention for
the unification of certain
rules relating to the
Limitation of the liability
of owners
of sea-going vessels
and protocol of signature**

Brussels, 25th August 1924
Entered into force: 2 June 1931

Belgium	(r)	2.VI.1930
Brazil	(r)	28.IV.1931
Denmark <i>(denunciation - 30. VI. 1983)</i>	(r)	2.VI.1930
Dominican Republic	(a)	23.VII.1958
Finland <i>(denunciation - 30.VI.1983)</i>	(a)	12.VII.1934
France <i>(denunciation - 26.X.1976)</i>	(r)	23.VIII.1935
Hungary	(r)	2.VI.1930
Madagascar	(r)	12.VIII.1935
Monaco <i>(denunciation - 24.I.1977)</i>	(r)	15.V.1931
Norway <i>(denunciation - 30.VI. 1963)</i>	(r)	10.X.1933
Poland	(r)	26.X.1936
Portugal	(r)	2.VI.1930
Spain	(r)	2.VI.1930
Sweden <i>(denunciation - 30.VI.1963)</i>	(r)	1.VII.1938
Turkey	(a)	4.VII.1955

**Convention internationale pour
l'unification de certaines
règles en matière de
Connaissance
et protocole de signature
“Règles de La Haye 1924”**

Bruxelles, le 25 août 1924
Entrée en vigueur: 2 juin 1931

**International convention for
the unification of certain
rules of law relating to
Bills of lading
and protocol of signature
“Hague Rules 1924”**

Brussels, 25 August 1924
Entered into force: 2 June 1931

(Translation)

Algeria	(a)	13.IV.1964
Angola	(a)	2.II.1952
Antigua and Barbuda	(a)	2.XII.1930
Argentina	(a)	19.IV.1961
Australia*	(a)	4.VII.1955
Norfolk	(a)	4. VII.1955
Bahamas	(a)	2.XII.1930
Barbados	(a)	2.XII.1930
Belgium	(r)	2. VI.1930
Belize	(a)	2.XI.1930
Bolivia	(a)	28.V.1982
Cameroon	(a)	2.XII.1930
Cape Verde	(a)	2.II.1952
China		
Hong Kong⁽¹⁾	(a)	2.XII.1930
Macao⁽²⁾	(r)	2.II.1952
Cyprus	(a)	2.XII.1930
Croatia	(r)	8.X.1991
Cuba*	(a)	25.VII.1977

⁽¹⁾ With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

⁽²⁾ With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

*Règles de La Haye**Hague Rules*

Denmark*	(a)	I.VII.1938
<i>(denunciation – 1.III.1984)</i>		
Dominican Republic	(a)	2.XII.1930
Ecuador	(a)	23.III.1977
Egypt* (3)	(a)	29.XI.1943
Fiji	(a)	2.XII.1930
Finland	(a)	1.VII.1939
<i>(denunciation – 1.III.1984)</i>		
France*	(r)	4.I.1937
Gambia	(a)	2.XII.1930
Germany	(r)	1.VII.1939
Ghana	(a)	2.XII.1930
Goa	(a)	2.II.1952
Greece	(a)	23.III.1993
Grenada	(a)	2.XII.1930
Guyana	(a)	2.XII.1930
Guinea-Bissau	(a)	2.II.1952
Hungary	(r)	2.VI.1930
Iran	(a)	26.IV.1966
Ireland*	(a)	30.I.1962
Israel	(a)	5.IX.1959
Italy	(r)	7.X.1938
<i>(denunciation – 22.XI.1984)</i>		
Ivory Coast*	(a)	15.XII.1961
Jamaica	(a)	2.XII.1930
Japan*	(r)	1.VII.1957
<i>(denunciation – 1.VI.1992)</i>		
Kenya	(a)	2.XII.1930
Kiribati	(a)	2.XII.1930
Kuwait*	(a)	25.VII.1969
Lebanon	(a)	19.VII.1975
Malaysia	(a)	2.XII.1930
Madagascar	(a)	13.VII.1965
Mauritius	(a)	24.VIII.1970
Monaco	(a)	15.V.1931
Mozambique	(a)	2.II.1952
Nauru*	(a)	4.VII.1955
Netherlands*	(a)	18.VIII.1956
<i>(denunciation – 26.IV.1982)</i>		
Nigeria	(a)	2.XII.1930
Norway	(a)	1.VII.1938
<i>(denunciation – 1.III.1984)</i>		

(3) On 17 February 1993 Egypt notified to the Government of Belgium that it had become a party to the U.N. Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) but that it deferred the denunciation of the 1924 Brussels Convention, as amended for a period of five years. If, as provided in Article 31 paragraph 4 of the Hamburg Rules the five years period has commenced to run on the date of entry into force of the Hamburg Rules (1 November 1992), the denunciation made on 1 November 1997 has taken effect on 1 November 1998).

Papua New Guinea*	(a)	4.VII.1955
Paraguay	(a)	22.XI.1967
Peru	(a)	29.X.1964
Poland	(r)	4.VIII.1937
Portugal	(a)	24.XII.1931
Romania	(r)	4.VIII.1937
Sao Tomé and Principe	(a)	2.II.1952
Sarawak	(a)	3.XI.1931
Senegal	(a)	14.II.1978
Seychelles	(a)	2.XII.1930
Sierra-Leone	(a)	2.XII.1930
Singapore	(a)	2.XII.1930
Slovenia	(a)	25.VI.1991
Solomon Islands	(a)	2.XII.1930
Somalia	(a)	2.XII.1930
Spain	(r)	2.VI.1930
Sri-Lanka	(a)	2.XII.1930
St. Kitts and Nevis	(a)	2.XII.1930
St. Lucia	(a)	2.XII.1930
St. Vincent and the Grenadines	(a)	2.XII.1930
Sweden	(a)	1.VII.1938
<i>(denunciation – 1.III.1984)</i>		
Switzerland*	(a)	28.V.1954
Syrian Arab Republic	(a)	1.VIII.1974
Tanzania (United Republic of)	(a)	3.XII.1962
Timor	(a)	2.II.1952
Tonga	(a)	2.XII.1930
Trinidad and Tobago	(a)	2.XII.1930
Turkey	(a)	4.VII.1955
Tuvalu	(a)	2.XII.1930
United Kingdom of Great Britain and Northern Ireland (including Jersey and Isle of Man)*	(r)	2.VI.1930
<i>(denunciation – 13.VI.1977)</i>		
Gibraltar	(a)	2.XII.1930
<i>(denunciation – 22.IX.1977)</i>		
Bermuda, Falkland Islands and dependencies, Turks & Caicos Islands, Cayman Islands, British Virgin Islands, Montserrat, British Antarctic Territories.		
<i>(denunciation 20.X.1983)</i>		
Anguilla	(a)	2.XII.1930
Ascension, Saint Helène and Dependencies	(a)	3.XI.1931
United States of America*	(r)	29.VI.1937
Zaire	(a)	17.VII.1967

Reservations

Australia

a) The Commonwealth of Australia reserves the right to exclude from the operation of legislation passed to give effect to the Convention the carriage of goods by sea which is not carriage in the course of trade or commerce with other countries or among the States of Australia.

b) The Commonwealth of Australia reserves the right to apply Article 6 of the Convention in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the last paragraph of that Article.

Cuba

Le Gouvernement de Cuba se réserve le droit de ne pas appliquer les termes de la Convention au transport de marchandises en navigation de cabotage national.

Denmark

...Cette adhésion est donnée sous la réserve que les autres Etats contractants ne soulèvent aucune objection à ce que l'application des dispositions de la Convention soit limitée de la manière suivante en ce qui concerne le Danemark:

1) La Loi sur la navigation danoise en date du 7 mai 1937 continuera à permettre que dans le cabotage national les connaissements et documents similaires soient émis conformément aux prescriptions de cette loi, sans que les dispositions de la Convention leur soient appliquées aux rapports du transporteur et du porteur du document déterminés par ces titres.

2) Sera considéré comme équivalent au cabotage national sous les rapports mentionnés au paragraphe 1) - au cas où une disposition serait édictée en ce sens en vertu de l'article 122, dernier alinéa, de la loi danoise sur la navigation - le transport maritime entre le Danemark et les autres Etats nordiques, dont les lois sur la navigation contiennent des dispositions analogues.

3) Les dispositions des Conventions internationales concernant le transport des voyageurs et des bagages et concernant le transport des marchandises par chemins de fer, signées à Rome, le 23 novembre 1933, ne seront pas affectées par cette Convention."

Egypt

...Nous avons résolu d'adhérer par les présentes à la dite Convention, et promettons de concourir à son application. L'Egypte est, toutefois, d'avis que la Convention, dans sa totalité, ne s'applique pas au cabotage national. En conséquence, l'Egypte se réserve le droit de régler librement le cabotage national par sa propre législation...

France

...En procédant à ce dépôt, l'Ambassadeur de France à Bruxelles déclare, conformément à l'article 13 de la Convention précitée, que l'acceptation que lui donne le Gouvernement Français ne s'applique à aucune des colonies, possessions, protectorats ou territoires d'outre-mer se trouvant sous sa souveraineté ou son autorité.

Ireland

...Subject to the following declarations and reservations: 1. In relation to the carriage of goods by sea in ships carrying goods from any port in Ireland to any other port in Ireland or to a port in the United Kingdom, Ireland will apply Article 6 of the Convention as though the Article referred to goods of any class instead of to particular goods, and as though the proviso in the third paragraph of the said Article were omitted; 2. Ireland does not accept the provisions of the first paragraph of Article 9 of the Convention.

Ivory Coast

Le Gouvernement de la République de Côte d'Ivoire, en adhérant à ladite Convention précise que:

1) Pour l'application de l'article 9 de la Convention relatif à la valeur des unités monétaires employées, la limite de responsabilité est égale à la contre-valeur en francs CFA sur la base d'une livre or égale à deux livres sterling papier, au cours du change de l'arrivée du navire au port de déchargement.

2) Il se réserve le droit de réglementer par des dispositions particulières de la loi nationale le système de la limitation de responsabilité applicable aux transports maritimes entre deux ports de la république de Côte d'Ivoire.

Japan

Statement at the time of signature, 25.8.1925.

Au moment de procéder à la signature de la Convention Internationale pour l'unification de certaines règles en matière de connaissance, le soussigné, Plénipotentiaire du Japon, fait les réserves suivantes:

a) A l'article 4.

Le Japon se réserve jusqu'à nouvel ordre l'acceptation des dispositions du a) à l'alinéa 2 de l'article 4.

b) Le Japon est d'avis que la Convention dans sa totalité ne s'applique pas au cabotage national; par conséquent, il n'y aurait pas lieu d'en faire l'objet de dispositions au Protocole. Toutefois, s'il n'en pas ainsi, le Japon se réserve le droit de régler librement le cabotage national par sa propre législation.

Statement at the time of ratification

...Le Gouvernement du Japon déclare

1) qu'il se réserve l'application du premier paragraphe de l'article 9 de la Convention; 2) qu'il maintient la réserve b) formulée dans la Note annexée à la lettre de l'Ambassadeur du Japon à Monsieur le Ministre des Affaires étrangères de Belgique, du 25 août 1925, concernant le droit de régler librement le cabotage national par sa propre législation; et 3) qu'il retire la réserve a) de ladite Note, concernant les dispositions du a) à l'alinéa 2 de l'article 4 de la Convention.

Kuwait

Le montant maximum en cas de responsabilité pour perte ou dommage causé aux marchandises ou les concernant, dont question à l'article 4, paragraphe 5, est augmenté jusque £ 250 au lieu de £ 100.

The above reservation has been rejected by France and Norway. The rejection of Norway has been withdrawn on 12 April 1974. By note of 30.3.1971, received by the Belgian Government on 30.4.1971 the Government of Kuwait stated that the amount of £ 250 must be replaced by Kuwait Dinars 250.

Nauru

Reservations: a) the right to exclude from the operation of legislation passed to give effect to the Convention on the carriage of goods by sea which is not carriage in the course of trade or commerce with other countries or among the territory of Nauru; b) the right to apply Article 6 of the Convention in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the last paragraph of that Article.

Netherlands

...Désirant user de la faculté d'adhésion réservée aux Etats non-signataires par l'article 12 de la Convention internationale pour l'unification de certaines règles en matière de connaissance, avec Protocole de signature, conclue à Bruxelles, le 25 août 1924, nous avons résolu d'adhérer par les présentes, pour le Royaume en Europe, à ladite Convention, Protocole de signature, d'une manière définitive et promettons de

concourir à son application, tout en Nous réservant le droit, par prescription légale,

1) de préciser que dans les cas prévus par l'article 4, par. 2 de c) à p) de la Convention, le porteur du connaissance peut établir la faute personnelle du transporteur ou les fautes de ses préposés non couverts par l'article 4, par. 2 a) de la Convention;

2) d'appliquer, en ce qui concerne le cabotage national, l'article 6 à toutes les catégories de marchandises, sans tenir compte de la restriction figurant au dernier paragraphe dudit article, et sous réserve:

1) que l'adhésion à la Convention ait lieu en faisant exclusion du premier paragraphe de l'article 9 de la Convention;

2) que la loi néerlandaise puisse limiter les possibilités de fournir des preuves contraires contre le connaissance.

Norway

...L'adhésion de la Norvège à la Convention internationale pour l'unification de certaines règles en matière de connaissance, signée à Bruxelles, le 25 août 1924, ainsi qu'au Protocole de signature y annexé, est donnée sous la réserve que les autres Etats contractants ne soulèvent aucune objection à ce que l'application des dispositions de la Convention soit limitée de la manière suivante en ce qui concerne la Norvège:

1) La loi sur la navigation norvégienne continuera à permettre que dans le cabotage national les connaissances et documents similaires soient émis conformément aux prescriptions de cette loi, sans que les dispositions de la Convention leur soient appliquées ou soient appliquées aux rapports du transporteur et du porteur du document déterminés par ces titres.

2) Sera considéré comme équivalent au cabotage national sous les rapports mentionnés au paragraphe 1) - au cas où une disposition serait édictée en ce sens en vertu de l'article 122, dernier alinéa, de la loi norvégienne sur la navigation - le transport maritime entre la Norvège et autres Etats nordiques, dont les lois sur la navigation contiennent des dispositions analogues.

3) Les dispositions des Conventions internationales concernant le transport des voyageurs et des bagages et concernant le transport des marchandises par chemins de fer, signées à Rome le 23 novembre 1933, ne seront pas affectées par cette Convention.

Papua New Guinea

Reservations: a) the right to exclude from the operation of legislation passed to give effect to the Convention on the carriage of goods by sea which is not carriage in the course of trade or commerce with other countries or among the territories of Papua and New-Guinea; b) the right to apply Article 6 of the Convention in so far as the national coasting trade is concerned to all classes of goods without taking account of the restriction set out in the 1st paragraph of that Article.

Switzerland

...Conformément à l'alinéa 2 du Protocole de signature, les Autorités fédérales se réservent de donner effet à cet acte international en introduisant dans la législation suisse les règles adoptées par la Convention sous une forme appropriée à cette législation.

United Kingdom

...I Declare that His Britannic Majesty's Government adopt the last reservation in the additional Protocol of the Bills of Lading Convention. I Further Declare that my signature applies only to Great Britain and Northern Ireland. I reserve the right of each of the British Dominions, Colonies, Overseas Possessions and Protectorates, and of each of the territories over which his Britannic Majesty exercises a mandate to accede to this Convention under Article 13. "...In accordance with Article 13 of the above named Convention, I declare that the acceptance of the Convention given by His Britannic Majesty in the instrument of ratification deposited this day extends only to the United Kingdom of Great Britain and Northern Ireland and does not apply to any of His Majesty's Colonies or Protectorates, or territories under suzerainty or mandate.

United States of America

...*And whereas*, the Senate of the United States of America by their resolution of April 1 (legislative day March 13), 1935 (two-thirds of the Senators present concurring therein), did advise and consent to the ratification of the said convention and protocol of signature thereto, 'with the understanding, to be made a part of such ratification, that, not withstanding the provisions of Article 4, Section 5, and the first paragraph of Article 9 of the convention, neither the carrier nor the ship shall in any event be or become liable within the jurisdiction of the United States of America for any loss or damage to or in connection with goods in an amount exceeding 500.00 dollars, lawful money of the United States of America, per package or unit unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

And whereas, the Senate of the United States of America by their resolution of May 6, 1937 (two-thirds of the Senators present concurring therein), did add to and make a part of their aforesaid resolution of April 1, 1935, the following understanding: That should any conflict arise between the provisions of the Convention and the provisions of the Act of April 16, 1936, known as the 'Carriage of Goods by Sea Act', the provisions of said Act shall prevail:

Now therefore, be it known that I, Franklin D. Roosevelt, President of the United States of America, having seen and considered the said convention and protocol of signature, do hereby, in pursuance of the aforesaid advice and consent of the Senate, ratify and confirm the same and every article and clause thereof, subject to the two understandings hereinabove recited and made part of this ratification.

**Protocole portant modification de
la Convention Internationale pour
l'unification de certaines
règles en matière de
connaissance, signée a Bruxelles
le 25 août 1924
Règles de Visby**

Bruxelles, 23 février 1968
Entrée en vigueur: 23 juin 1977

**Protocol to amend the
International Convention for
the unification of certain
rules of law relating to
bills of lading, signed at Brussels
on 25 August 1924
Visby Rules**

Brussels, 23rd February 1968
Entered into force: 23 June, 1977

Belgium	(r)	6.IX.1978
China		
Hong Kong⁽¹⁾	(r)	1.XI.1980
Croatia	(a)	28.X.1998
Denmark	(r)	20.XI.1975

⁽¹⁾ With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Visby Protocol will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China. Reservations have been made by the Government of the People's Republic of China with respect to art. 3 of the Protocol.

Ecuador	(a)	23.III.1977
Egypt*	(r)	31.I.1983
Finland	(r)	1.XII.1984
France	(r)	10.VII.1977
Georgia	(a)	20.II.1996
Greece	(a)	23.III.1993
Italy	(r)	22.VIII.1985
Lebanon	(a)	19.VII.1975
Netherlands*	(r)	26.IV.1982
Norway	(r)	19.III.1974
Poland*	(r)	12.II.1980
Russian Federation	(a)	29.IV.1999
Singapore	(a)	25.IV.1972
Sri-Lanka	(a)	21.X.1981
Sweden	(r)	9.XII.1974
Switzerland	(r)	11.XII.1975
Syrian Arab Republic	(a)	1.VIII.1974
Tonga	(a)	13.VI.1978
United Kingdom of Great Britain	(r)	1.X.1976
Bermuda	(a)	1.XI.1980
Gibraltar	(a)	22.IX.1977
Isle of Man	(a)	1.X.1976
British Antarctic Territories, Caimans, Caicos & Turks Islands, Falklands Islands & Dependencies, Montserrat, Virgin Islands (extension)	(a)	20.X.1983

Reservations

Egypt Arab Republic

La République Arabe d’Egypte déclare dans son instrument de ratification qu’elle ne se considère pas liée par l’article 8 dudit Protocole (cette déclaration est faite en vertu de l’article 9 du Protocole).

Netherlands

Ratification effectuée pour le Royaume en Europe. Le Gouvernement du Royaume des Pays-Bas se réserve le droit, par prescription légale, de préciser que dans les cas prévus par l’article 4, alinéa 2 de c) à p) de la Convention, le porteur du connaissance peut établir la faute personnelle du transporteur ou les fautes de ses préposés non couverts par le paragraphe a).

Poland

Confirmation des réserves faites lors de la signature, à savoir: “La République Populaire de Pologne ne se considère pas liée par l’article 8 du présent Protocole”.

*Protocole DTS**SDR Protocol*

Protocole portant modification de la Convention Internationale pour l'unification de certaines règles en matière de connaissance telle qu'amendée par le Protocole de modification du 23 février 1968.

Protocole DTS

Bruxelles, le 21 décembre 1979
Entrée en vigueur: 14 février 1984

Protocol to amend the International Convention for the unification of certain rules relating to bills of lading as modified by the Amending Protocol of 23rd February 1968.

SDR Protocol

Brussels, 21st December 1979
Entered into force: 14 February 1984

Australia	(a)	16.VII.1993
Belgium	(r)	7.IX.1983
China		
Hong Kong⁽¹⁾	(a)	20.X.1983
Denmark	(a)	3.XI.1983
Finland	(r)	1.XII.1984
France	(r)	18.XI.1986
Georgia	(a)	20.II.1996
Greece	(a)	23.III.1993
Italy	(r)	22.VIII.1985
Japan	(r)	1.III.1993
Mexico	(a)	20.V.1994
Netherlands	(r)	18.II.1986
New Zealand	(a)	20.XII.1994
Norway	(r)	1.XII.1983
Poland*	(r)	6.VII.1984
Russian Federation	(a)	29.IV.1999
Spain	(r)	6.I.1982
Sweden	(r)	14.XI.1983
Switzerland*	(r)	20.I.1988
United Kingdom of Great-Britain and Northern Ireland	(r)	2.III.1982
Bermuda, British Antarctic Territories, Virgin Islands, Caimans, Falkland Islands & Dependencies, Gibraltar, Isle of Man, Montserrat, Caicos & Turks Island (extension)	(a)	20.X.1983

⁽¹⁾ With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the SDR Protocol will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China. Reservations have been made by the Government of the People's Republic of China with respect to art. 8 of the Protocol.

Reservations

Poland

Poland does not consider itself bound by art. III.

Switzerland

Le Conseil fédéral suisse déclare, en se référant à l'article 4, paragraphe 5, alinéa d) de la Convention internationale du 25 août 1924 pour l'unification de certaines règles en matière de connaissance, telle qu'amendée par le Protocole de modification du 23 février 1968, remplacé par l'article II du Protocole du 21 décembre 1979, que la Suisse calcule de la manière suivante la valeur, en droit de tirage spécial (DTS), de sa monnaie nationale:

La Banque nationale suisse (BNS) communique chaque jour au Fonds monétaire international (FMI) le cours moyen du dollar des Etats Unis d'Amérique sur le marché des changes de Zürich. La contrevaletur en francs suisses d'un DTS est déterminée d'après ce cours du dollar et le cours en dollars DTS, calculé par le FMI. Se fondant sur ces valeurs, la BNS calcule un cours moyen du DTS qu'elle publiera dans son Bulletin mensuel.

Convention internationale pour l'unification de certaines règles relatives aux

Privilèges et hypothèques maritimes et protocole de signature

Bruxelles, 10 avril 1926
entrée en vigueur: 2 juin 1931

International convention for the unification of certain rules relating to

Maritime liens and mortgages and protocol of signature

Brussels, 10th April 1926
entered into force: 2 June 1931

(Translation)

Algeria	(a)	13.IV.1964
Argentina	(a)	19.IV.1961
Belgium	(r)	2.VI.1930
Brazil	(r)	28.IV.1931
Cuba*	(a)	21.XI.1983
Denmark	(r)	
<i>(denunciation – 1.III.1965)</i>		
Estonia	(r)	2.VI.1930
Finland	(a)	12.VII.1934
<i>(denunciation – 1.III.1965)</i>		
France	(r)	23.VIII.1935
Haiti	(a)	19.III.1965
Hungary	(r)	2.VI.1930
Iran	(a)	8.IX.1966
Italy*	(r)	7.XII.1949
Lebanon	(a)	18.III.1969
Luxembourg	(a)	18.II.1991

*Maritime liens and mortgages 1926**Immunity 1926*

Madagascar	(r)	23.VIII.1935
Monaco	(a)	15.V.1931
Norway	(r)	10.X.1933
<i>(denunciation – 1.III.1965)</i>		
Poland	(r)	26.X.1936
Portugal	(a)	24.XII.1931
Romania	(r)	4.VIII.1937
Spain	(r)	2.VI.1930
Switzerland	(a)	28.V.1954
Sweden	(r)	1.VII.1938
<i>(denunciation – 1.III.1965)</i>		
Syrian Arab Republic	(a)	14.II.1951
Turkey	(a)	4.VII.1955
Uruguay	(a)	15.IX.1970
Zaire	(a)	17.VII.1967

Reservations**Cuba**

(Traduction) L'instrument d'adhésion contient une déclaration relative à l'article 19 de la Convention.

Italy

(Traduction) L'Etat italien se réserve la faculté de ne pas conformer son droit interne à la susdite Convention sur les points où ce droit établit actuellement:

– l'extension des privilèges dont question à l'art. 2 de la Convention, également aux dépendances du navire, au lieu qu'aux seuls accessoires tels qu'ils sont indiqués à l'art. 4;

– la prise de rang, après la seconde catégorie de privilèges prévus par l'art. 2 de la Convention, des privilèges qui couvrent les créances pour les sommes avancées par l'Administration de la Marine Marchande ou de la Navigation intérieure, ou bien par l'Autorité consulaire, pour l'entretien et le rapatriement des membres de l'équipage.

**Convention internationale pour
l'unification de certaines règles
concernant les**

**Immunités des navires
d'Etat**

Bruxelles, 10 avril 1926
et protocole additionnel

Bruxelles, 24 mai 1934
Entrée en vigueur: 8 janvier 1937

**International convention for the
unification of certain rules
concerning the**

**Immunity of State-owned
ships**

Brussels, 10th April 1926
and additional protocol

Brussels, May 24th 1934
Entered into force: 8 January 1937

(Translation)

Argentina	(a)	19.IV.1961
Belgium	(r)	8.I.1936

Brazil	(r)	8.I.1936
Chile	(r)	8.I.1936
Cyprus	(a)	19.VII.1988
Denmark	(r)	16.XI.1950
Estonia	(r)	8.I.1936
France	(r)	27.VII.1955
Germany	(r)	27.VI.1936
Greece	(a)	19.V.1951
Hungary	(r)	8.I.1936
Italy	(r)	27.I.1937
Luxembourg	(a)	18.II.1991
Libyan Arab Jamahiriya	(r)	27.I.1937
Madagascar	(r)	27.I.1955
Netherlands	(r)	8.VII.1936
Curaçao, Dutch Indies		
Norway	(r)	25.IV.1939
Poland	(r)	16.VII.1976
Portugal	(r)	27.VI.1938
Romania	(r)	4.VIII.1937
<i>(denunciation – 21.IX.1959)</i>		
Somalia	(r)	27.I.1937
Sweden	(r)	1.VII.1938
Switzerland	(a)	28.V.1954
Suriname	(r)	8.VII.1936
Syrian Arab Republic	(a)	17.II.1960
Turkey	(a)	4.VII.1955
United Arab Republic	(a)	17.II.1960
United Kingdom*	(r)	3.VII.1979
United Kingdom for Jersey, Guernsey and Island of Man	(a)	19.V.1988
Uruguay	(a)	15.IX.1970
Zaire	(a)	17.VII.1967

Reservations

United Kingdom

We reserve the right to apply Article 1 of the Convention to any claim in respect of a ship which falls within the Admiralty jurisdiction of Our courts, or of Our courts in any territory in respect of which We are party to the Convention. We reserve the right, with respect to Article 2 of the Convention to apply in proceedings concerning another High Contracting Party or ship of another High Contracting Party the rules of procedure set out in Chapter II of the European Convention on State Immunity, signed at Basle on the Sixteenth day of May, in the Year of Our Lord One thousand Nine hundred and Seventy-two.

In order to give effect to the terms of any international agreement with a non-Contracting State, We reserve the right to make special provision:

(a) as regards the delay or arrest of a ship or cargo belonging to such a State, and (b) to prohibit seizure of or execution against such a ship or cargo.

*Compétence civile 1952**Civil jurisdiction 1952*

**Convention internationale pour
l'unification de certaines règles
relatives à la
Compétence civile
en matière d'abordage**

Bruxelles, 10 mai 1952

Entrée en vigueur:

14 septembre 1955

**International convention for the
unification of certain rules
relating to
Civil jurisdiction
in matters of collision**

Brussels, 10th May 1952

Entered into force:

14 September 1955

Algeria	(a)	18.VIII.1964
Antigua and Barbuda	(a)	12.V.1965
Argentina	(a)	19.IV.1961
Bahamas	(a)	12.V.1965
Belgium	(r)	10.IV.1961
Belize	(a)	21.IX.1965
Benin	(a)	23.IV.1958
Burkina Faso	(a)	23.IV.1958
Cameroon	(a)	23.IV.1958
Central African Republic	(a)	23.IV.1958
China		
Hong Kong⁽¹⁾	(a)	29.III.1963
Macao⁽²⁾	(a)	23.III.1999
Comoros	(a)	23.IV.1958
Congo	(a)	23.IV.1958
Costa Rica*	(a)	13.VII.1955
Cote d'Ivoire	(a)	23.IV.1958
Croatia*	(r)	8.X.1991
Cyprus	(a)	17.III.1994
Djibouti	(a)	23.IV.1958
Dominican Republic	(a)	12.V.1965
Egypt	(r)	24.VIII.1955
Fiji	(a)	10.X.1974
France	(r)	25.V.1957

⁽¹⁾ With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

⁽²⁾ The extension of the Convention to the territory of Macao has been notified by Portugal with declaration deposited on 23 March 1999.

With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

Overseas Territories	(a)	23.IV.1958
Gabon	(a)	23.IV.1958
Germany	(r)	6.X.1972
Greece	(r)	15.III.1965
Grenada	(a)	12.V.1965
Guinea	(a)	23.IV.1958
Guyana	(a)	29.III.1963
Haute Volta	(a)	23.IV.1958
Holy Seat	(r)	10.VIII.1956
Ireland	(a)	17.X.1989
Italy	(r)	9.XI.1979
Khmere Republic*	(a)	12.XI.1959
Kiribati	(a)	21.IX.1965
Luxembourg	(a)	18.II.1991
Madagascar	(a)	23.IV.1958
Mauritania	(a)	23.IV.1958
Mauritius	(a)	29.III.1963
Morocco	(a)	11.VII.1990
Niger	(a)	23.IV.1958
Nigeria	(a)	7.XI.1963
North Borneo	(a)	29.III.1963
Paraguay	(a)	22.XI.1967
Poland	(a)	14.III.1986
Portugal	(r)	4.V.1957
Romania	(a)	28.XI.1995
Sarawak	(a)	29.VIII.1962
Senegal	(a)	23.IV.1958
Seychelles	(a)	29.III.1963
Slovenia	(a)	13.X.1993
Solomon Islands	(a)	21.IX.1965
Spain	(r)	8.XII.1953
St. Kitts and Nevis	(a)	12.V.1965
St. Lucia	(a)	12.V.1965
St. Vincent and the Grenadines	(a)	12.V.1965
Sudan	(a)	23.IV.1958
Switzerland	(a)	28.V.1954
Syrian Arab Republic	(a)	1.VIII.1974
Tchad	(a)	23.IV.1958
Togo	(a)	23.IV.1958
Tonga	(a)	13.VI.1978
Tuvalu	(a)	21.IX.1965
United Kingdom of Great Britain and		
Northern Ireland	(r)	18.III.1959
Gibraltar	(a)	29.III.1963
British Virgin Islands	(a)	29.V.1963
Bermuda	(a)	30.V.1963
Caiman Islands, Montserrat	(a)	12.V.1965
Anguilla, St. Helena	(a)	12.V.1965
Turks Isles and Caicos	(a)	21.IX.1965
Guernsey	(a)	8.XII.1966
Falkland Islands and Dependencies	(a)	17.X.1969
Zaire	(a)	17.VII.1967

Reservations**Costa-Rica**

(Traduction) Le Gouvernement de la République du Costa Rica, en adhérant à cette Convention, fait cette réserve que l'action civile du chef d'un abordage survenu entre navires de mer ou entre navires de mer et bateaux de navigation intérieure, pourra être intentée uniquement devant le tribunal de la résidence habituelle du défendeur ou de l'Etat dont le navire bat pavillon.

En conséquence, la République du Costa Rica ne reconnaît pas comme obligatoires les literas b) et c) du premier paragraphe de l'article premier."

"Conformément au Code du droit international privé approuvé par la sixième Conférence internationale américaine, qui s'est tenue à La Havane (Cuba), le Gouvernement de la République du Costa Rica, en acceptant cette Convention, fait cette réserve expresse que, en aucun cas, il ne renoncera à sa compétence ou juridiction pour appliquer la loi costaricienne en matière d'abordage survenu en haute mer ou dans ses eaux territoriales au préjudice d'un navire costaricien.

Croatia

Reservation made by Yugoslavia and now applicable to Croatia: "Le Gouvernement de la République Populaire Fédérative de Yougoslavie se réserve le droit de se déclarer au moment de la ratification sur le principe de "sistership" prévu à l'article 1^o lettre (b) de cette Convention.

Khmere Republic

Le Gouvernement de la République Khmère, en adhérant à ladite convention, fait cette réserve que l'action civile du chef d'un abordage survenu entre navires de mer ou entre navires de mer et bateaux de navigation intérieure, pourra être intentée uniquement devant le tribunal de la résidence habituelle du défendeur ou de l'Etat dont le navire bat pavillon. En conséquence, le Gouvernement de la République Khmère ne reconnaît pas le caractère obligatoire des alinéas b) et c) du paragraphe 1^o de l'article 1^o.

En acceptant ladite convention, le Gouvernement de la République Khmère fait cette réserve expresse que, en aucun cas, elle ne renoncera à sa compétence ou juridiction pour appliquer la loi khmère en matière d'abordage survenu en haute mer ou dans ses eaux territoriales au préjudice d'un navire khmère.

**Convention internationale
pour l'unification de
certaines règles
relatives à la**

**Compétence pénale
en matière d'abordage et
autres événements
de navigation**

Bruxelles, 10 mai 1952

Entrée en vigueur:
20 novembre 1955

**International convention
for the unification of
certain rules
relating to**

**Penal jurisdiction
in matters of collision
and other incidents
of navigation**

Brussels, 10th May 1952

Entered into force:
20 November 1955

Anguilla*

Antigua and Barbuda*

Argentina*

Bahamas*

Belgium*

(a) 12.V.1965

(a) 12.V.1965

(a) 19.IV.1961

(a) 12.V.1965

(r) 10.IV.1961

Belize*	(a)	21.IX.1965
Benin	(a)	23.IV.1958
Burkina Faso	(a)	23.IV.1958
Burman Union*	(a)	8.VII.1953
Cayman Islands*	(a)	12.VI.1965
Cameroon	(a)	23.IV.1958
Central African Republic	(a)	23.IV.1958
China		
Hong Kong⁽¹⁾	(a)	29.III.1963
Macao⁽²⁾	(a)	23.III.1999
Comoros	(a)	23.IV.1958
Congo	(a)	23.IV.1958
Costa Rica*	(a)	13.VII.1955
Croatia*	(r)	8.X.1991
Cyprus	(a)	17.III.1994
Djibouti	(a)	23.IV.1958
Dominica, Republic of*	(a)	12.V.1965
Egypt*	(r)	24.VIII.1955
Fiji*	(a)	29.III.1963
France*	(r)	20.V.1955
Overseas Territories	(a)	23.IV.1958
Gabon	(a)	23.IV.1958
Germany*	(r)	6.X.1972
Greece	(r)	15.III.1965
Grenada*	(a)	12.V.1965
Guyana*	(a)	19.III.1963
Guinea	(a)	23.IV.1958

(1) With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Penal Jurisdiction Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

The following declarations have been made by the Government of the People's Republic of China:

1. The Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right not to observe the provisions of Article 1 of the Convention in the case of any ship if the State whose flag the ship was flying has as respects that ship or any class of ships to which that ship belongs consented to the institution of criminal or disciplinary proceedings before the judicial or administrative authorities of the Hong Kong Special Administrative Region.

2. In accordance with Article 4 of the Convention, the Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right to take proceedings in respect of offences committed within the waters under the jurisdiction of the Hong Kong Special Administrative Region.

(2) The extension of the Convention to the territory of Macao has been notified by Portugal with declaration deposited on 23 March 1999. With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

*Compétence pénale 1952**Penal jurisdiction 1952*

Haiti	(a)	17.IX.1954
Haute-Volta	(a)	23.IV.1958
Holy Seat	(r)	10.VIII.1956
Italy*	(r)	9.XI.1979
Ivory Coast	(a)	23.IV.1958
Khmere Republic*	(a)	12.XI.1956
Kiribati*	(a)	21.IX.1965
Lebanon	(r)	19.VII.1975
Luxembourg	(a)	18.II.1991
Madagascar	(a)	23.IV.1958
Mauritania	(a)	23.IV.1958
Mauritius*	(a)	29.III.1963
Montserrat*	(a)	12.VI.1965
Morocco	(a)	11.VII.1990
Netherlands*	(r)	
Kingdom in Europe, West Indies		
and Aruba	(r)	25.VI.1971
Niger	(a)	23.IV.1958
Nigeria*	(a)	7 XI.1963
North Borneo*	(a)	29.III.1963
Paraguay	(a)	22.XI.1967
Portugal*	(r)	4.V.1957
Romania	(a)	28.XI.1995
Sarawak*	(a)	28.VIII.1962
Senegal	(a)	23.IV.1958
Seychelles*	(a)	29.III.1963
Slovenia	(a)	13.X.1993
Solomon Islands*	(a)	21.IX.1965
Spain*	(r)	8.XII.1953
St. Kitts and Nevis*	(a)	12.V.1965
St. Lucia*	(a)	12.V.1965
St. Helena*	(a)	12.V.1965
St. Vincent and the Grenadines*	(a)	12.V.1965
Sudan	(a)	23.IV.1958
Suriname	(r)	25.VI.1971
Switzerland	(a)	28.V.1954
Syrian Arab Republic	(a)	10.VII.1972
Tchad	(a)	23.IV.1958
Togo	(a)	23.IV.1958
Tonga*	(a)	13.VI.1978
Tuvalu*	(a)	21.IX.1965
United Kingdom of Great Britain and		
Northern Ireland*	(r)	18.III.1959
Gibraltar	(a)	29.III.1963
British Virgin Islands	(a)	29.V.1963
Bermuda	(a)	30.V.1963
Anguilla	(a)	12.V.1965
Turks Islands and Caicos	(a)	21.IX.1965
Guernsey	(a)	8.XII.1966
Falkland Islands and dependencies	(a)	17.X.1969
Viet Nam*	(a)	26.XI.1955
Zaire	(a)	17.VII.1967

Reservations

Antigua, Cayman Island, Montserrat, St. Christopher-Nevis-Anguilla, St. Helena and St. Vincent

The Governments of Antigua, the Cayman Islands, Montserrat, St. Christopher-Nevis-Anguilla (now the independent State of Anguilla), St. Helena and St. Vincent reserve the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has as respects that ship or any class of ship to which that ship belongs assented to the institution of criminal or disciplinary proceedings before judicial or administrative authorities in Antigua, the Cayman Islands, Montserrat, St. Christopher-Nevis-Anguilla, St. Helena and St. Vincent. They reserve the right under Article 4 of this Convention to take proceedings in respect of offences committed within the territorial waters of Antigua, the Cayman Islands, Montserrat, St. Christopher-Nevis-Anguilla, St. Helena and St. Vincent.

Argentina

(Traduction) La République Argentine adhère à la Convention internationale pour l'unification de certaines règles relatives à la compétence pénale en matière d'abordage et autres événements de navigation, sous réserve expresse du droit accordé par la seconde partie de l'article 4, et il est fixé que dans le terme "infractions" auquel cet article se réfère, se trouvent inclus les abordages et tout autre événement de la navigation visés à l'article 1^o de la Convention.

Bahamas

...Subject to the following reservations:

- (a) the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has, as respects that ship or any class of ship to which that ship belongs, assented to the institution of criminal and disciplinary proceedings before judicial or administrative authorities of the Bahamas;
- (b) the right under Article 4 of the said Convention to take proceedings in respect of offences committed within the territorial waters of the Bahamas.

Belgium

...le Gouvernement belge, faisant usage de la faculté inscrite à l'article 4 de cette Convention, se réserve le droit de poursuivre les infractions commises dans les eaux territoriales belges.

Belize

...Subject to the following reservations:

- (a) the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has, as respects that ship or any class of ship to which that ship belongs, consented to the institution of criminal and disciplinary proceedings before judicial or administrative authorities of Belize;
- (b) the right under Article 4 of the said Convention to take proceedings in respect of offences committed within the territorial waters of Belize.

Cayman Islands

See Antigua.

China

Macao

The Government of the People's Republic of China reserves, for the Macao Special Administrative Region, the right not to observe the provisions of Article 1 of the

Convention in the case of any ship if the State whose flag the ship was flying has as respects that ship or any class of ships to which that ship belongs consented to the institution of criminal or disciplinary proceedings before the judicial or administrative authorities of the Macao Special Administrative Region.

In accordance with Article 4 of the Convention, the Government of the People's Republic of China reserves, for the Macao Special Administrative Region, the right to take proceedings in respect of offences committed within the waters under the jurisdiction of the Macao Special Administrative Region.

Within the above ambit, the Government of the People's Republic of China will assume the responsibility for the international rights and obligations that place on a Party to the Convention

Costa-Rica

(Traduction) Le Gouvernement de Costa-Rica ne reconnaît pas le caractère obligatoire des articles 1° and 2° de la présente Convention.

Croatia

Reservation made by Yugoslavia and now applicable to Croatia: "Sous réserve de ratifications ultérieure et acceptant la réserve prévue à l'article 4 de cette Convention. Conformément à l'article 4 de ladite Convention, le Gouvernement yougoslave se réserve le droit de poursuivre les infractions commises dans se propres eaux territoriales".

Dominica, Republic of

... Subject to the following reservations:

- (a) the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has, as respects that ship or any class of ship to which that ship belongs, assented to the institution of criminal and disciplinary proceedings before judicial or administrative authorities of Dominica;
- (b) the right under Article 4 of the said Convention to take proceedings in respect of offences committed within the territorial waters of Dominica.

Egypt

Au moment de la signature le Plénipotentiaire égyptien a déclaré formuler la réserve prévue à l'article 4, alinéa 2. Confirmation expresse de la réserve faite au moment de la signature.

Fiji

The Government of Fiji reserves the right not to observe the provisions of article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has as respect that ship or any class of ship to which that ship belongs consented to the institution of criminal or disciplinary proceedings before judicial or administrative authorities in Fiji. The Government of Fiji reserves the right under article 4 of this Convention to take proceedings in respect of offences committed within the territorial water of Fiji.

France

Au nom du Gouvernement de la République Française je déclare formuler la réserve prévue à l'article 4, paragraphe 2, de la convention internationale pour l'unification de certaines règles relatives à la compétence pénale en matière d'abordage.

Germany, Federal Republic of

(Traduction) Sous réserve du prescrit de l'article 4, alinéa 2.

Grenada

Same reservations as the Republic of Dominica

Guyana

Same reservations as the Republic of Dominica

Italy

Le Gouvernement de la République d'Italie se réfère à l'article 4, paragraphe 2, et se réserve le droit de poursuivre les infractions commises dans ses propres eaux territoriales.

Khmere Republic

Le Gouvernement de la République Khmère, d'accord avec l'article 4 de ladite convention, se réserve le droit de poursuivre les infractions commises dans ses eaux territoriales.

Kiribati

Same reservations as the Republic of Dominica

Mauritius

Same reservations as the Republic of Dominica

Montserrat

See Antigua.

Netherlands

Conformément à l'article 4 de cette Convention, le Gouvernement du Royaume des Pays-Bas, se réserve le droit de poursuivre les infractions commises dans ses propres eaux territoriales.

Nigeria

The Government of the Federal Republic of Nigeria reserve the right not to implement the provisions of Article 1 of the Convention in any case where that Government has an agreement with any other State that is applicable to a particular collision or other incident of navigation and if such agreement is inconsistent with the provisions of the said Article 1. The Government of the Federal Republic of Nigeria reserves the right, in accordance with Article 4 of the Convention, to take proceedings in respect of offences committed within the territorial waters of the Federal Republic of Nigeria.

North Borneo

Same reservations as the Republic of Dominica

Portugal

Au nom du Gouvernement portugais, je déclare formuler la réserve prévue à l'article 4, paragraphe 2, de cette Convention.

Sarawak

Same reservations as the Republic of Dominica

St. Helena

See Antigua.

St. Kitts-Nevis

See Antigua.

St. Lucia

Same reservations as the Republic of Dominica

St. Vincent

See Antigua.

Seychelles

Same reservations as the Republic of Dominica

Solomon Isles

Same reservations as the Republic of Dominica

Spain

La Délégation espagnole désire, d'accord avec l'article 4 de la Convention sur la compétence pénale en matière d'abordage, se réserver le droit au nom de son Gouvernement, de poursuivre les infractions commises dans ses eaux territoriales. Confirmation expresse de la réserve faite au moment de la signature.

Tonga

Same reservations as the Republic of Dominica

Tuvalu

Same reservations as the Republic of Dominica

United Kingdom

1. - Her Majesty's Government in the United Kingdom reserves the right not to apply the provisions of Article 1 of this Convention in any case where there exists between Her Majesty's Government and the Government of any other State an agreement which is applicable to a particular collision or other incident of navigation and is inconsistent with that Article.

2. - Her Majesty's Government in the United Kingdom reserves the right under Article 4 of this Convention to take proceedings in respect of offences committed within the territorial waters of the United Kingdom.

...subject to the following reservations:

(1) The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right not to observe the provisions of Article 1 of the said Convention in the case of any ship if the State whose flag the ship was flying has as respects that ship or any class of ship to which that ship belongs consented to the institution of criminal and disciplinary proceedings before the judicial or administrative authorities of the United Kingdom.

(2) In accordance with the provisions of Article 4 of the said Convention, the Government of the United Kingdom of Great Britain and Northern Ireland reserve the right to take proceedings in respect of offences committed within the territorial waters of the United Kingdom.

(3) The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right in extending the said Convention to any of the territories for whose international relations they are responsible to make such extension subject to the reservation provided for in Article 4 of the said Convention...

Vietnam

Comme il est prévu à l'article 4 de la même convention, le Gouvernement vietnamien se réserve le droit de poursuivre les infractions commises dans la limite de ses eaux territoriales.

**Convention internationale pour
l'unification de certaines
règles sur la
Saisie conservatoire
des navires de mer**

Bruxelles, 10 mai 1952

Entrée en vigueur: 24 février 1956

**International convention for the
unification of certain rules
relating to
Arrest of sea-going ships**

Brussels, 10th May 1952

Entered into force: 24 February 1956

Algeria	(a)	18.VIII.1964
Antigua and Barbuda*	(a)	12.V.1965
Bahamas*	(a)	12.V.1965
Belgium	(r)	10.IV.1961
Belize*	(a)	21.IX.1965
Benin	(a)	23.IV.1958
Burkina Faso	(a)	23.IV.1958
Cameroon	(a)	23.IV.1958
Central African Republic	(a)	23.IV.1958
China		
Hong Kong⁽¹⁾	(a)	29.III.1963
Macao⁽²⁾	(a)	23.IX.1999
Comoros	(a)	23.IV.1958
Congo	(a)	23.IV.1958
Costa Rica*	(a)	13.VII.1955
Côte d'Ivoire	(a)	23.IV.1958
Croatia*	(r)	8.X.1991
Cuba*	(a)	21.XI.1983
Denmark	(r)	2.V.1989
Djibouti	(a)	23.IV.1958
Dominica, Republic of*	(a)	12.V.1965
Egypt*	(r)	24.VIII.1955
Fiji	(a)	29.III.1963
Finland	(r)	21.XII.1995
France	(r)	25.V.1957
Overseas Territories	(a)	23.IV.1958

⁽¹⁾ With letter dated 4 June 1997 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Arrest Convention will continue to apply to the Hong Kong Special Administrative Region with effect from 1 July 1997. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

⁽²⁾ The extension of the Convention to the territory of Macao as from 23 September 1999 has been notified by Portugal with declaration deposited on 23 March 1999. With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

*Saisie des navires 1952**Arrest of ships 1952*

Gabon	(a)	23.IV.1958
Germany*	(r)	6.X.1972
Greece	(r)	27.II.1967
Grenada*	(a)	12.V.1965
Guyana*	(a)	29.III.1963
Guinea	(a)	12.XII.1994
Haiti	(a)	4.XI.1954
Haute-Volta	(a)	23.IV.1958
Holy Seat	(r)	10.VIII.1956
Ireland*	(a)	17.X.1989
Italy*	(r)	9.XI.1979
Khmere Republic*	(a)	12.XI.1956
Kiribati*	(a)	21.IX.1965
Latvia	(a)	17.V.1993
Luxembourg	(a)	18.II.1991
Madagascar		23.IV.1958
Marocco	(a)	11.VII.1990
Mauritania	(a)	23.IV.1958
Mauritius*	(a)	29.III.1963
Netherlands*	(r)	20.I.1983
Niger	(a)	23.IV.1958
Nigeria*	(a)	7.XI.1963
North Borneo*	(a)	29.III.1963
Norway	(r)	1.XI.1994
Paraguay	(a)	22.XI.1967
Poland	(a)	16.VII.1976
Portugal	(r)	4.V.1957
Romania	(a)	28.XI.1995
Russian Federation*	(a)	29.IV.1999
St. Kitts and Nevis*	(a)	12.V.1965
St. Lucia*	(a)	12.V.1965
St. Vincent and the Grenadines*	(a)	12.V.1965
Sarawak*	(a)	28.VIII.1962
Senegal	(a)	23.IV.1958
Seychelles*	(a)	29.III.1963
Slovenia	(a)	13.X.1993
Solomon Islands*	(a)	21.IX.1965
Spain	(r)	8.XII.1953
Sudan	(a)	23.IV.1958
Sweden	(a)	30.IV.1993
Switzerland	(a)	28.V.1954
Syrian Arabic Republic	(a)	3.II.1972
Tchad	(a)	23.IV.1958
Togo	(a)	23.IV.1958
Tonga*	(a)	13.VI.1978
Turks Isles and Caicos*	(a)	21.IX.1965
Tuvalu*	(a)	21.IX.1965
United Kingdom of Great Britain* and Northern Ireland	(r)	18.III.1959
United Kingdom (Overseas Territories)* Gibraltar	(a)	29.III.1963
British Virgin Islands	(a)	29.V.1963

Bermuda	(a)	30.V.1963
Anguilla, Caiman Islands,		
Montserrat, St. Helena	(a)	12.V.1965
Guernsey	(a)	8.XII.1966
Falkland Islands and dependencies	(a)	17.X.1969
Zaire	(a)	17.VII.1967

Reservations

Antigua

...Reserves the right not to apply the provisions of this Convention to warships or to vessels owned by or in the service of a State.

Bahamas

...With reservation of the right not to apply the provisions of this Convention to warships or to vessels owned by or in service of a State.

Belize

Same reservation as the Bahamas.

Costa Rica

(Traduction) Premièrement: le 1er paragraphe de l'article 3 ne pourra pas être invoqué pour saisir un navire auquel la créance ne se rapporte pas et qui n'appartient plus à la personne qui était propriétaire du navire auquel cette créance se rapporte, conformément au registre maritime du pays dont il bat pavillon et bien qu'il lui ait appartenu.

Deuxièmement: que Costa Rica ne reconnait pas le caractère obligatoire des alinéas a), b), c), d), e) et f) du paragraphe 1er de l'article 7, étant donné que conformément aux lois de la République les seuls tribunaux compétents quant au fond pour connaître des actions relatives aux créances maritimes, sont ceux du domicile du demandeur, sauf s'il s'agit des cas visés sub o), p) et q) à l'alinéa 1er de l'article 1, ou ceux de l'Etat dont le navire bat pavillon.

Le Gouvernement de Costa Rica, en ratifiant ladite Convention, se réserve le droit d'appliquer la législation en matière de commerce et de travail relative à la saisie des navires étrangers qui arrivent dans ses ports.

Côte d'Ivoire

Confirmation d'adhésion de la Côte d'Ivoire. Au nom du Gouvernement de la République de Côte d'Ivoire, nous, Ministre des Affaires Etrangères, confirmons que par Succession d'Etat, la République de Côte d'Ivoire est devenue, à la date de son accession à la souveraineté internationale, le 7 août 1960, partie à la Convention internationale pour l'unification de certaines règles sur la saisie conservatoire des navires de mer, signée à Bruxelles le 10 mai 1952, qu'elle l'a été de façon continue depuis lors et que cette Convention est aujourd'hui, toujours en vigueur à l'égard de la Côte d'Ivoire.

Croatia

Reservation made by Yugoslavia and now applicable to Croatia: "...en réservant conformément à l'article 10 de ladite Convention, le droit de ne pas appliquer ces dispositions à la saisie d'un navire pratiquée en raison d'une créance maritime visée au point o) de l'article premier et d'appliquer à cette saisie la loi nationale".

Cuba

(Traduction) L'instrument d'adhésion contient les réserves prévues à l'article 10 de la Convention celles de ne pas appliquer les dispositions de la Convention aux navires de guerre et aux navires d'Etat ou au service d'un Etat, ainsi qu'une déclaration relative à l'article 18 de la Convention.

Dominica, Republic of

Same reservation as Antigua

*Saisie des navires 1952**Arrest of ships 1952***Egypt**

Au moment de la signature le Plénipotentiaire égyptien a déclaré formuler les réserves prévues à l'article 10.

Confirmation expresse des réserves faites au moment de la signature.

Germany, Federal Republic of

(Traduction) ...sous réserve du prescrit de l'article 10, alinéas a et b.

Grenada

Same reservation as Antigua.

Guyana

Same reservation as the Bahamas.

Ireland

Ireland reserves the right not to apply the provisions of the Convention to warships or to ships owned by or in service of a State.

Italy

Le Gouvernement de la République d'Italie se réfère à l'article 10, par. (a) et (b), et se réserve:

- (a) le droit de ne pas appliquer les dispositions de la présente Convention à la saisie d'un navire pratiquée en raison d'une des créances maritimes visées aux o) et p) de l'article premier et d'appliquer à cette saisie sa loi nationale;
- (b) le droit de ne pas appliquer les dispositions du premier paragraphe de l'article 3 à la saisie pratiquée sur son territoire en raison des créances prévues à l'alinéa q) de l'article 1.

Khmere Republic

Le Gouvernement de la République Khmère en adhérant à cette convention formule les réserves prévues à l'article 10.

Kiribati

Same reservation as the Bahamas.

Mauritius

Same reservation as Antigua.

Netherlands

Réserves formulées conformément à l'article 10, paragraphes (a) et (b):

- les dispositions de la Convention précitée ne sont pas appliquées à la saisie d'un navire pratiquée en raison d'une des créances maritimes visées aux alinéas o) et p) de l'article 1, saisie à laquelle s'applique le loi néerlandaise; et
- les dispositions du premier paragraphe de l'article 3 ne sont pas appliquées à la saisie pratiquée sur le territoire du Royaume des Pays-Bas en raison des créances prévues à l'alinéa q) de l'article 1.

Cette ratification est valable depuis le 1er janvier 1986 pour le Royaume des Pays-Bas, les Antilles néerlandaises et Aruba.

Nigeria

Same reservation as Antigua.

North Borneo

Same reservation as Antigua.

Russian Federation

The Russian Federation reserves the right not to apply the rules of the International Convention for the unification of certain rules relating to the arrest of sea-going ships of 10 May 1952 to warships, military logistic ships and to other vessels owned or operated by the State and which are exclusively used for non-commercial purposes.

Pursuant to Article 10, paragraphs (a) and (b), of the International Convention for the

unification of certain rules relating to the arrest of sea-going ships, the Russian Federation reserves the right not to apply:

- the rules of the said Convention to the arrest of any ship for any of the claims enumerated in Article 1, paragraph 1, subparagraphs (o) and (p), of the Convention, but to apply the legislation of the Russian Federation to such arrest;
- the first paragraph of Article 3 of the said Convention to the arrest of a ship, within the jurisdiction of the Russian Federation, for claims set out in Article 1, paragraph 1, subparagraph (q), of the Convention.

St. Kitts and Nevis

Same reservation as Antigua.

St. Lucia

Same reservation as Antigua.

St. Vincent and the Grenadines

Same reservation as Antigua.

Sarawak

Same reservation as Antigua.

Seychelles

Same reservation as the Bahamas.

Solomon Islands

Same reservation as the Bahamas.

Tonga

Same reservation as Antigua.

Turk Isles and Caicos

Same reservation as the Bahamas.

Tuvalu

Same reservation as the Bahamas.

United Kingdom of Great Britain and Northern Ireland

... Subject to the following reservations:

1. The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right not to apply the provisions of the said Convention to warships or to vessels owned by or in the service of a State.
2. The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right in extending the said Convention to any of the territories for whose international relations they are responsible to make such extension subject to the reservations provided for in Article 10 of the said Convention.

United Kingdom (Overseas Territories)

Anguilla, Bermuda, British Virgin Islands, Caiman Islands, Falkland Islands and Dependencies, Gibraltar, Guernsey, Hong Kong, Montserrat, St. Helena, Turks Isles and Caicos

... Subject to the following reservations:

1. The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right not to apply the provisions of the said Convention to warships or to vessels owned by or in the service of a State.
2. The Government of the United Kingdom of Great Britain and Northern Ireland reserve the right in extending the said Convention to any of the territories for whose international relations they are responsible to make such extension subject to the reservations provided for in Article 10 of the said Convention.

*Limitation de responsabilité 1957**Limitation of liability 1957*

**Convention internationale
sur la
Limitation
de la responsabilité
des propriétaires
de navires de mer
et protocole de signature**

Bruxelles, le 10 octobre 1957
Entrée en vigueur: 31 mai 1968

**International convention
relating to the
Limitation
of the liability
of owners
of sea-going ships
and protocol of signature**

Brussels, 10th October 1957
Entered into force: 31 May 1968

Algeria	(a)	18.VIII.1964
Australia	(r)	30.VII.1975
<i>(denunciation – 30.V.1990)</i>		
Bahamas*	(a)	21.VIII.1964
Barbados*	(a)	4.VIII.1965
Belgium	(r)	31.VII.1975
<i>(denunciation – 1.IX.1989)</i>		
Belize	(r)	31.VII.1975
China		
Macao⁽¹⁾	(a)	20.XII.1999
Denmark*	(r)	1.III.1965
<i>(denunciation – 1.IV.1984)</i>		
Dominica, Republic of*	(a)	4.VIII.1965
Egypt (Arab Republic of)		
<i>(denunciation – 8.V.1985)</i>		
Fiji*	(a)	21.VIII.1964
Finland	(r)	19.VIII.1964
<i>(denunciation – 1.IV.1984)</i>		
France	(r)	7.VII.1959
<i>(denunciation – 15.VII.1987)</i>		
Germany	(r)	6.X.1972
<i>(denunciation – 1.IX.1986)</i>		
Ghana*	(a)	26.VII.1961
Grenada*	(a)	4.VIII.1965
Guyana*	(a)	25.III.1966
Iceland*	(a)	16.X.1968
India*	(r)	1.VI.1971
Iran*	(r)	26.IV.1966
Israel*	(r)	30.XI.1967

⁽¹⁾ The extension of the Convention to the territory of Macao as from 23 September 1999 has been notified by Portugal with declaration deposited on 23 March 1999. With letter dated 15 October 1999 the Embassy of the People's Republic of China in the Kingdom of Belgium informed the Minister of Foreign Affairs of Belgium that the Collision Convention will continue to apply to the Macao Special Administrative Region with effect from 20 December 1999. In its letter the Embassy of the People's Republic of China stated that the responsibility for the international rights and obligations arising from the application of the above Convention will be assumed by the Government of the People's Republic of China.

*Limitation de responsabilité 1957**Limitation of liability 1957*

Japan	(r)	1.III.1976
<i>(denunciation – 19.V.1983)</i>		
Kiribati*	(a)	21.VIII.1964
Lebanon	(a)	23.XII.1994
Madagascar	(a)	13.VII.1965
Mauritius*	(a)	21.VIII.1964
Monaco*	(a)	24.I.1977
Netherlands	(r)	10.XII.1965
<i>(denunciation – 1.IX.1989)</i>		
Aruba*	(r)	1.I.1986
Norway	(r)	1.III.1965
<i>(denunciation – 1.IV.1984)</i>		
Papua New Guinea*	(a)	14.III.1980
Poland	(r)	1.XII.1972
Portugal*	(r)	8.IV.1968
St. Lucia*	(a)	4.VIII.1965
St. Vincent and the Grenadines	(a)	4.VIII.1965
Seychelles*	(a)	21.VIII.1964
Singapore*	(a)	17.IV.1963
Solomon Islands*	(a)	21.VIII.1964
Spain*	(r)	16.VII.1959
Sweden	(r)	4.VI.1964
<i>(denunciation – 1.IV.1984)</i>		
Switzerland	(r)	21.I.1966
Syrian Arab Republic	(a)	10.VII.1972
Tonga*	(a)	13.VI.1978
Tuvalu*	(a)	21.VIII.1964
United Arab Republic*	(a)	7.IX.1965
United Kingdom*	(r)	18.II.1959
Isle of Man	(a)	18.XI.1960
Bermuda, British Antarctic Territories, Falkland and Dependencies, Gibraltar, British Virgin Islands	(a)	21.VIII.1964
Guernsey and Jersey	(a)	21.X.1964
Caiman Islands, Montserrat, Caicos and Turks Isles*	(a)	4.VIII.1965
Vanuatu	(a)	8.XII.1966
Zaire	(a)	17.VII.1967

Reservations**Bahamas**

...Subject to the same reservations as those made by the United Kingdom on ratification namely the reservations set out in sub-paragraphs (a) and (b) of paragraph (2) of the Protocol of Signature.

Barbados

Same reservation as Bahamas

China

The Government of the People's Republic of China reserves, for the Macao Special Administrative Region, the right not to be bound by paragraph 1.(c) of Article 1 of the

Convention. The Government of the People's Republic of China reserves, for the Macao Special Administrative Region, the right to regulate by specific provisions of laws of the Macao Special Administrative Region the system of limitation of liability to be applied to ships of less than 300 tons. With reference to the implementation of the Convention in the Macao Special Administrative Region, the Government of the People's Republic of China reserves, for the Macao Special Administrative Region, the right to implement the Convention either by giving it the force of law in the Macao Special Administrative Region, or by including the provisions of the Convention, in appropriate form, in legislation of the Macao Special Administrative Region. Within the above ambit, the Government of the People's Republic of China will assume the responsibility for the international rights and obligations that place on a Party to the Convention.

Denmark

Le Gouvernement du Danemark se réserve le droit:

- 1) de régler par la loi nationale le système de limitation de responsabilité applicable aux navires de moins de 300 tonneaux de jauge;
- 2) de donner effet à la présente Convention, soit en lui donnant force de loi, soit en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.

Dominica, Republic of

Same reservation as Bahamas

Egypt Arab Republic

Reserves the right:

- 1) to exclude the application of Article 1, paragraph (1)(c);
- 2) to regulate by specific provisions of national law the system of limitation to be applied to ships of less than 300 tons;
- 3) on 8 May, 1984 the Egyptian Arab Republic has verbally notified the denunciation in respect of this Convention. This denunciation will become operative on 8 May, 1985.

Fiji

Le 22 août 1972 a été reçue au Ministère des Affaires étrangères, du Commerce extérieur et de la Coopération au Développement une lettre de Monsieur K.K.T. Mara, Premier Ministre et Ministre des Affaires étrangères de Fidji, notifiant qu'en ce qui concerne cette Convention, le Gouvernement de Fidji reprend, à partir de la date de l'indépendance de Fidji, c'est-à-dire le 10 octobre 1970, les droits et obligations souscrits antérieurement par le Royaume-Uni, avec les réserves figurant ci-dessous.

- 1) In accordance with the provisions of subparagraph (a) of paragraph (2) of the said Protocol of signature, the Government of the United Kingdom of Great Britain and Northern Ireland exclude paragraph (1)(c) of Article 1 from their application of the said Convention.
- 2) In accordance with the provisions of subparagraph (b) of paragraph (2) of the said Protocol of signature, the Government of the United Kingdom of Great Britain and Northern Ireland will regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons.

Furthermore in accordance with the provisions of subparagraph (c) of paragraph (2) of the said Protocol of signature, the Government of Fiji declare that the said Convention as such has not been made part in Fiji law, but that the appropriate provisions to give effect thereto have been introduced in Fiji law.

Ghana

The Government of Ghana in acceding to the Convention reserves the right:

- 1) To exclude the application of Article 1, paragraph (1)(c);
- 2) To regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons;
- 3) to give effect to this Convention either by giving it the force of law or by including in national legislation, in a form appropriate to that legislation, the provisions of this Convention.

Grenada

Same reservation as Bahamas

Guyana

Same reservation as Bahamas

Iceland

The Government of Iceland reserves the right:

- 1) to regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons;
- 2) to give effect to this Convention either by giving it the force of law or by including in national legislation, in a form appropriate to that legislation, the provisions of this Convention.

India

Reserve the right:

- 1) To exclude the application of Article 1, paragraph (1)(c);
- 2) To regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons;
- 3) to give effect to this Convention either by giving it the force of law or by including in national legislation, in a form appropriate to that legislation, the provisions of this Convention.

Iran

Le Gouvernement de l'Iran se réserve le droit:

- 1) d'exclure l'application de l'article 1, paragraphe (1)(c);
- 2) de régler par la loi nationale le système de limitation de responsabilité applicable aux navires de moins de 300 tonneaux de jauge;
- 3) de donner effet à la présente Convention, soit en lui donnant force de loi, soit en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.

Israel

The Government of Israel reserves to themselves the right to:

- 1) exclude from the scope of the Convention the obligations and liabilities stipulated in Article 1(1)(c);
- 2) regulate by provisions of domestic legislation the limitation of liability in respect of ships of less than 300 tons of tonnage;

The Government of Israel reserves to themselves the right to give effect to this Convention either by giving it the force of law or by including in its national legislation, in a form appropriate to that legislation, the provisions of this Convention.

Kiribati

Same reservation as Bahamas

Mauritius

Same reservation as Bahamas

Monaco

En déposant son instrument d'adhésion, Monaco fait les réserves prévues au paragraphe 2° du Protocole de signature.

Netherlands-Aruba

La Convention qui était, en ce qui concerne le Royaume de Pays-Bas, uniquement applicable au Royaume en Europe, a été étendue à Aruba à partir du 16.XII.1986 avec effet rétroactif à compter du 1er janvier 1986.

La dénonciation de la Convention par les Pays-Bas au 1er septembre 1989, n'est pas valable pour Aruba.

*Limitation de responsabilité 1957**Limitation of liability 1957*

Note: Le Gouvernement des Pays-Bas avait fait les réservations suivantes:

Le Gouvernement des Pays-Bas se réserve le droit:

- 1) d'exclure l'application de l'article 1, paragraphe (1)(c);
- 2) de régler par la loi nationale le système de limitation de responsabilité applicable aux navires de moins de 300 tonneaux de jauge;
- 3) de donner effet à la présente Convention, soit en lui donnant force de loi, soit en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.

... Conformément au paragraphe (2)(c) du Protocole de signature Nous nous réservons de donner effet à la présente Convention en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.

Papua New Guinea

- (a) The Government of Papua New Guinea excludes paragraph (1)(c) of Article 1.
- (b) The Government of Papua New Guinea will regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons.
- (c) The Government of Papua New Guinea shall give effect to the said Convention by including the provisions of the said Convention in the National Legislation of Papua New Guinea.

Portugal

(Traduction) ...avec les réserves prévues aux alinéas a), b) et c) du paragraphe deux du Protocole de signature...

St. Lucia

Same reservation as Bahamas

Seychelles

Same reservation as Bahamas

Singapore

Le 13 septembre 1977 à été reçue une note verbale datée du 6 septembre 1977, émanant du Ministère des Affaires étrangères de Singapour, par laquelle le Gouvernement de Singapour confirme qu'il se considère lié par la Convention depuis le 31 mai 1968, avec les réserves suivantes:

...Subject to the following reservations:

- a) the right to exclude the application of Article 1, paragraph (1)(c); and
- b) to regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons. The Government of the Republic of Singapore declares under sub-paragraph (c) of paragraph (2) of the Protocol of signature that provisions of law have been introduced in the Republic of Singapore to give effect to the Convention, although the Convention as such has not been made part of Singapore law.

Solomon Islands

Same reservation as Bahamas

Spain

Le Gouvernement espagnol se réserve le droit:

- 1) d'exclure du champ d'application de la Convention les obligations et les responsabilités prévues par l'article 1, paragraphe (1)(c);
- 2) de régler par les dispositions particulières de sa loi nationale le système de limitation de responsabilité applicable aux propriétaires de navires de moins de 300 tonneaux de jauge;
- 3) de donner effet à la présente Convention, soit en lui donnant force de loi, soit en incluant dans la législation nationale les dispositions de la présente Convention sous une forme appropriée à cette législation.

Tonga

Reservations:

- 1) In accordance with the provisions of subparagraph (a) of paragraph (2) of the Protocol of signature, the Government of the Kingdom of Tonga exclude paragraph (1)(c) of Article 1 from their application of the said Convention.
- 2) In accordance with the provisions of subparagraph (b) of paragraph (2) of the Protocol of signature, the Government of the Kingdom of Tonga will regulate by specific provisions of national law the system of liability to be applied to ships of less than 300 tons.

Tuvalu*Same reservation as Bahamas***United Kingdom of Great Britain and Northern Ireland**

Subject to the following observations:

- 1) In accordance with the provisions of subparagraph (a) of paragraph (2) of the said Protocol of Signature, the Government of the United Kingdom of Great Britain and Northern Ireland exclude paragraph (1)(c) of Article 1 from their application of the said Convention.
- 2) In accordance with the provisions of subparagraph (b) of paragraph (2) of the said Protocol of Signature, the Government of the United Kingdom of Great Britain and Northern Ireland will regulate by specific provisions of national law the system of limitation of liability to be applied to ships of less than 300 tons.
- 3) The Government of the United Kingdom of Great Britain and Northern Ireland also reserve the right, in extending the said Convention to any of the territories for whose international relations they are responsible, to make such extension subject to any or all of the reservations set out in paragraph (2) of the said Protocol of Signature. Furthermore, in accordance with the provisions of subparagraph (c) of paragraph (2) of the said Protocol of Signature, the Government of the United Kingdom of Great Britain and Northern Ireland declare that the said Convention as such has not been made part of the United Kingdom law, but that the appropriate provisions to give effect thereto have been introduced in United Kingdom law.

United Kingdom Overseas Territories

Anguilla, Bermuda, British Antarctic Territories, British Virgin Islands, Caiman Islands, Caicos and Turks Isles, Falkland and Dependencies, Gibraltar, Guernsey and Jersey, Hong Kong, Isle of Man, Montserrat

... Subject to the same reservations as those made by the United Kingdom on ratification namely the reservations set out in sub-paragraphs (a) and (b) of paragraph (2) of the Protocol of Signature.

Protocole portant modification de la convention internationale sur la Limitation de la responsabilité des propriétaires de navires de mer du 10 octobre 1957

Bruxelles le 21 décembre 1979
Entré en vigueur: 6 octobre 1984

Australia
Belgium

Protocol to amend the international convention relating to the Limitation of the liability of owners of sea-going ships of 10 October 1957

Brussels, 21st December 1979

(r) 30.XI.1983
(r) 7.IX.1983

*Stowaways 1957**Carriage of passengers 1961*

Luxembourg	(a)	18.II.1991
Poland	(r)	6.VII.1984
Portugal	(r)	30.IV.1982
Spain	(r)	14.V.1982
Switzerland	(r)	20.I.1988
United Kingdom of Great Britain and Northern Ireland	(r)	2.III.1982
<i>(denunciation – 1.XII.1985)</i>		
<i>Isle of Man, Bermuda, Falkland and Dependencies, Gibraltar, Hong-Kong, British Virgin Islands, Guernsey and Jersey, Cayman Islands, Montserrat, Caicos and Turks Isles (denunciation – 1.XII.1985)</i>		

**Convention internationale sur les
Passagers Clandestins**

Bruxelles, 10 octobre 1957
Pas encore en vigueur

**International convention relating to
Stowaways**

Brussels, 10th October 1957
Not yet in force

Belgium	(r)	31.VII.1975
Denmark	(r)	16.XII.1963
Finland	(r)	2.II.1966
Italy	(r)	24.V.1963
Luxembourg	(a)	18.II.1991
Madagascar	(a)	13.VII.1965
Morocco	(a)	22.I.1959
Norway	(r)	24.V.1962
Peru	(r)	23.XI.1961
Sweden	(r)	27.VI.1962

**Convention internationale
pour l'unification de certaines
règles en matière de
Transport de passagers
par mer
et protocole**

Bruxelles, 29 avril 1961
Entrée en vigueur: 4 juin 1965

**International convention
for the unification of
certain rules relating to
Carriage of passengers
by sea
and protocol**

Brussels, 29th April 1961
Entered into force: 4 June 1965

Algeria	(a)	2.VII.1973
Cuba*	(a)	7.I.1963
France	(r)	4.III.1965
<i>(denunciation – 3.XII.1975)</i>		
Haïti	(a)	19.IV.1989
Iran	(a)	26.IV.1966

*Carriage of passengers 1961**Nuclear ships 1962*

Madagascar	(a)	13.VII.1965
Morocco*	(r)	15.VII.1965
Peru	(a)	29.X.1964
Switzerland	(r)	21.I.1966
Tunisia	(a)	18.VII.1974
United Arab Republic*	(r)	15.V.1964
Zaire	(a)	17.VII.1967

Reservations**Cuba**

(Traduction) ...Avec les réserves suivantes:

- 1) De ne pas appliquer la Convention aux transports qui, d'après sa loi nationale, ne sont pas considérés comme transports internationaux.
- 2) De ne pas appliquer la Convention, lorsque le passager et le transporteur sont tous deux ressortissants de cette Partie Contractante.
- 3) De donner effet à cette Convention, soit en lui donnant force de loi, soit en incluant dans sa législation nationale les dispositions de cette Convention sous une forme appropriée à cette législation.

Morocco

...Sont et demeurent exclus du champ d'application de cette convention:

- 1) les transports de passagers effectués sur les navires armés au cabotage ou au bornage, au sens donné à ces expressions par l'article 52 de l'annexe I du dahir du 28 Joumada II 1337 (31 mars 1919) formant code de commerce maritime, tel qu'il a été modifié par le dahir du 29 Chaabane 1380 (15 février 1961).

- 2) les transports internationaux de passagers lorsque le passager et le transporteur sont tous deux de nationalité marocaine.

Les transports de passagers visés...ci-dessus demeurent régis en ce qui concerne la limitation de responsabilité, par les disposition de l'article 126 de l'annexe I du dahir du 28 Joumada II 1337 (31 mars 1919) formant code de commerce maritime, tel qu'il a été modifié par la dahir du 16 Joumada II 1367 (26 avril 1948).

United Arab Republic

Sous les réserves prévues aux paragraphes (1), (2) et (3) du Protocole.

**Convention internationale
relative à la responsabilité
des exploitants de
Navires nucléaires
et protocole additionnel**

Bruxelles, 25 mai 1962

Pas encore en vigueur

**International convention
relating to the liability
of operators of
Nuclear ships
and additional protocol**

Brussels, 25th May 1962

Not yet in force

Lebanon	(r)	3.VI.1975
Madagascar	(a)	13.VII.1965
Netherlands*	(r)	20.III.1974
Portugal	(r)	31.VII.1968
Suriname	(r)	20.III.1974
Syrian Arab Republic	(a)	1.VIII.1974
Zaire	(a)	17.VII.1967

*Carriage of passengers' luggage 1967**Vessels under construction 1967***Reservations****Netherlands**

Par note verbale datée du 29 mars 1976, reçue le 5 avril 1976, par le Gouvernement belge, l'Ambassade des Pays-Bas à Bruxelles a fait savoir:

Le Gouvernement du Royaume des Pays-Bas tient à déclarer, en ce qui concerne les dispositions du Protocole additionnel faisant partie de la Convention, qu'au moment de son entrée en vigueur pour le Royaume des Pays-Bas, ladite Convention y devient impérative, en ce sens que les prescriptions légales en vigueur dans le Royaume n'y seront pas appliquées si cette application est inconciliable avec les dispositions de la Convention.

**Convention internationale
pour l'unification de certaines
règles en matière de
Transport de bagages
de passagers par mer**

Bruxelles, 27 mai 1967
Pas en vigueur

**International Convention
for the unification of
certain rules relating to
Carriage of passengers'
luggage by sea**

Brussels, 27th May 1967
Not in force

Algeria

(a)

2.VII.1973

Cuba*

(a)

15.II.1972

Reservations**Cuba**

(Traduction) Le Gouvernement révolutionnaire de la République de Cuba, Partie Contractante, formule les réserves formelles suivantes:

- 1) de ne pas appliquer cette Convention lorsque le passager et le transporteur sont tous deux ressortissants de cette Partie Contractante.
- 3) en donnant effet à cette Convention, la Partie Contractante pourra, en ce qui concerne les contrats de transport établis à l'intérieur de ses frontières territoriales pour un voyage dont le port d'embarquement se trouve dans lesdites limites territoriales, prévoir dans sa législation nationale la forme et les dimensions des avis contenant les dispositions de cette Convention et devant figurer dans le contrat de transport. De même, le Gouvernement révolutionnaire de la République de Cuba déclare, selon le prescrit de l'article 18 de cette Convention, que la République de Cuba ne se considère pas liée par l'article 17 de ladite Convention.

**Convention internationale relative à
l'inscription des droits relatifs aux**

Navires en construction

Bruxelles, 27 mai 1967
Pas encore en vigueur

**International Convention relating
to the registration of rights
in respect of**

Vessels under construction

Brussels, 27th May 1967
Not yet in force

Croatia	(r)	3.V.1971
Greece	(r)	12.VII.1974
Norway	(r)	13.V.1975
Sweden	(r)	13.XI.1975
Syrian Arab Republic	(a)	1.XIII.1974

**Convention internationale
pour l'unification de
certaines règles relatives aux
Privilèges et hypothèques
maritimes**

Bruxelles, 27 mai 1967
Pas encore en vigueur

**International Convention
for the unification of
certain rules relating to
Maritime liens and
mortgages**

Brussels, 27th May 1967
Not yet in force

Denmark*	(r)	23.VIII.1977
Morocco*	(a)	12.II.1987
Norway*	(r)	13.V.1975
Sweden*	(r)	13.XI.1975
Syrian Arab Republic	(a)	1.VIII.1974

Reservations

Denmark

L'instrument de ratification du Danemark est accompagné d'une déclaration dans laquelle il est précisé qu'en ce qui concerne les Iles Féroé les mesures d'application n'ont pas encore été fixées.

Morocco

L'instrument d'adhésion est accompagné de la réserve suivante: Le Royaume du Maroc adhère à la Convention Internationale pour l'unification de certaines règles relatives aux privilèges et hypothèques maritimes faite à Bruxelles le 27 mai 1967, sous réserve de la non-application de l'article 15 de la dite Convention.

Norway

Conformément à l'article 14 le Gouvernement du Royaume de Norvège fait les réserves suivantes:

- 1) mettre la présente Convention en vigueur en incluant les dispositions de la présente Convention dans la législation nationale suivant une forme appropriée à cette législation;
- 2) faire application de la Convention internationale sur la limitation de la responsabilité des propriétaires de navires de mer, signée à Bruxelles le 10 octobre 1957.

Sweden

Conformément à l'article 14 la Suède fait les réserves suivantes:

- 1) de mettre la présente Convention en vigueur en incluant les dispositions de la Convention dans la législation nationale suivant une forme appropriée à cette législation;
- 2) de faire application de la Convention internationale sur la limitation de la responsabilité des propriétaires de navires de mer, signée à Bruxelles le 10 octobre 1957.

STATUS OF THE RATIFICATIONS OF AND ACCESSIONS TO THE IMO CONVENTIONS IN THE FIELD OF PRIVATE MARITIME LAW

r	=	ratification
a	=	accession
A	=	acceptance
AA	=	approval
S	=	definitive signature
s	=	signature by confirmation

Editor's notes

1. This Status is based on advices from the International Maritime Organisation and reflects the situation as at 31st December, 1998.
2. The dates mentioned are the dates of the deposit of instruments.
3. The asterisk after the name of a State Party indicates that that State has made declarations, reservations or statements the text of which is published after the relevant status of ratifications and accessions.
- 4 The dates mentioned in respect of the denunciation are the dates when the denunciation takes effect.

ETAT DES RATIFICATIONS ET ADHESIONS AUX CONVENTIONS DE L'OMI EN MATIERE DE DROIT MARITIME PRIVE

Notes de l'éditeur

1. Cet état est basé sur des informations recues de l'Organisation Maritime Internationale et reflète la situation au 31 décembre 1998.
2. Les dates mentionnées sont les dates du dépôt des instruments.
3. L'asterisque qui suit le nom d'un Etat indique que cet Etat a fait une déclaration, une reserve ou une communication dont le texte est publié à la fin de chaque état de ratifications et adhesions.
4. Les dates mentionnées pour la dénonciation sont les dates à lesquelles la dénonciation prend effet.

CLC 1969

**International Convention on
Civil liability
for oil pollution damage****(CLC 1969)**

Done at Brussels, 29 November 1969
Entered into force: 19 June 1975

**Convention Internationale sur la
Responsabilité civile pour
les dommages dus à la
pollution par les hydrocarbures
(CLC 1969)**

Signée à Bruxelles, le 29 novembre 1969
Entrée en vigueur: 19 juin 1975

Albania	(a)	6.IV.1994
Antigua and Barbuda <i>(denunciation 14.VI.2001)</i>	(a)	21.XI.1977
Algeria <i>(denunciation 3.VIII.1999)</i>	(a)	14.VI.1974
Antigua and Barbuda	(a)	21.IX.1997
Australia* <i>(denunciation 15.V.1988)</i>	(r)	7.XI.1983
Bahamas <i>(denunciation 15.V.1988)</i>	(a)	22.VII.1976
Bahrain <i>(denunciation 15.V.1988)</i>	(a)	3.V.1996
Barbados <i>(denunciation 7.VII.1999)</i>	(a)	6.V.1994
Belgium* <i>(denunciation 6.X.1999)</i>	(r)	12.I.1977
Belize <i>(denunciation 27.XI.1999)</i>	(a)	2.IV.1991
Benin	(a)	1.XI.1985
Brazil	(r)	17.XII.1976
Brunei Darussalam	(a)	29.IX.1992
Cambodia	(a)	28.XI.1994
Cameroon	(r)	14.V.1984
Canada <i>(denunciation 29.V.1999)</i>	(a)	24.I.1989
Chile	(a)	2.VIII.1977
China <i>(denunciation 5.I.2000)</i>	(a)	30.I.1980
Colombia	(a)	26.III.1990
Costa Rica	(a)	8.III.1998
Côte d'Ivoire	(r)	21.VI.1973
Croatia <i>(denunciation 30.VII.1999)</i>	(r)	8.X.1991
Cyprus <i>(denunciation 15.V.1988)</i>	(a)	19.VI.1989
Denmark <i>(denunciation 15.V.1988)</i>	(a)	2.IV.1975

CLC 1969

Djibouti (denunciation 17.V.2002)	(a)	1.III.1990
Dominican Republic	(r)	2.IV.1975
Ecuador	(a)	23.XII.1976
Egypt	(a)	3.II.1989
Equatorial Guinea	(a)	24.IV.1996
Estonia	(a)	1.XII.1992
Fiji (denunciation 30.XI.2000)	(a)	15.VIII.1972
Finland (denunciation 15.V.1988)	(r)	10.X.1980
France (denunciation 15.V.1988)	(r)	17.III.1975
Gabon	(a)	21.I.1982
Gambia	(a)	1.XI.1991
Georgia	(a)	19.IV.1994
Germany* (denunciation 15.V.1988)	(r)	20.V.1975
Ghana	(r)	20.IV.1978
Greece (denunciation 15.V.1988)	(a)	29.VI.1976
Guatemala*	(a)	20.X.1982
Guyana	(a)	10.XII.1997
Honduras	(a)	2.XII.1998
Iceland (denunciation 10.II.2001)	(r)	17.VII.1980
India (denunciation 21.VI.2001)	(a)	1.V.1987
Indonesia	(r)	1.IX.1978
Ireland (denunciation 15.V.1988)	(r)	19.XI.1992
Italy* (denunciation 8.X.2000)	(r)	27.II.1979
Japan (denunciation 15.V.1988)	(a)	3.VI.1976
Kazakhstan	(a)	7.III.1994
Kenya (denunciation 7.VII.2001)	(a)	15.XII.1992
Korea (Rep.of) (denunciation 15.V.1988)	(a)	18.XII.1978
Kuwait	(a)	2.IV.1981
Latvia	(a)	10.VII.1992
Lebanon	(a)	9.IV.1974
Liberia (denunciation 15.V.1988)	(a)	25.IX.1972
Luxembourg	(a)	14.II.1991
Malaysia	(a)	6.I.1995
Maldives	(a)	16.III.1981

CLC 1969

Malta (denunciation 6.I.2001)	(a)	27.IX.1991
Marshall Islands (denunciation 15.V.1988)	(a)	24.I.1994
Mauritania	(a)	17.XI.1995
Mauritius (denunciation 6.XII.2000)	(a)	6.IV.1995
Mexico (denunciation 15.V.1988)	(a)	13.V.1994
Monaco (denunciation 15.V.1988)	(r)	21.VIII.1975
Morocco (denunciation 25.X.2001)	(a)	11.IV.1974
Mozambique	(a)	11.IV.1974
Netherlands (denunciation 15.V.1988)	(r)	9.IX.1975
New Zealand (denunciation 25.VI.1999)	(a)	27.IV.1976
Nicaragua	(a)	4.VI.1996
Nigeria	(a)	7.V.1981
Norway (denunciation 15.V.1988)	(a)	21.III.1975
Oman (denunciation 15.V.1988)	(a)	24.I.1985
Panama (denunciation 11.V.2000)	(r)	7.I.1976
Papua New Guinea (denunciation 23.I.2002)	(a)	12.III.1980
Peru*	(a)	24.II.1987
Poland (denunciation 21.XII.2000)	(r)	18.III.1976
Portugal	(r)	26.XI.1976
Qatar	(a)	2.VI.1988
Russian Federation* (denunciation 20.III.2001)	(a)	24.VI.1975
Saint Kitts and Nevis*	(a)	14.IX.1994
St.-Vincent and the Grenadines	(a)	19.VI.1989
Sao Tome and Principe	(a)	29.X.1998
Saudi Arabia*	(a)	15.IV.1993
Senegal	(a)	27.III.1972
Seychelles (denunciation 23.VII.2000)	(a)	12.IV.1988
Sierra Leone (denunciation 4.VI.2002)	(a)	13.VIII.1993
Singapore (denunciation 31.XII.1988)	(a)	16.IX.1981
Slovenia (succession) (denunciation 19.VII.2001)	(a)	25.VI.1991

CLC 1969

South Africa	(a)	17.III.1976
Spain	(r)	
<i>(denunciation 15.V.1988)</i>		
Sri Lanka	(a)	12.IV.1983
<i>(denunciation 22.I.2000)</i>		
Sweden	(r)	17.III.1975
<i>(denunciation 15.V.1988)</i>		
Switzerland	(r)	15.XII.1987
<i>(denunciation 15.V.1988)</i>		
Syrian Arab Republic*	(a)	6.II.1975
Tonga	(a)	1.II.1996
<i>(denunciation 10.XII.2000)</i>		
Tunisia	(a)	4.V.1976
<i>(denunciation 15.V.1988)</i>		
Tuvalu (succession)	(a)	1.X.1978
United Arab Emirates	(a)	15.XII.1983
United Kingdom	(r)	17.III.1975
<i>(denunciation⁽¹⁾ 15.V.1988)</i>		
Vanuatu	(a)	2.II.1983
<i>(denunciation 18.II.2000)</i>		
Venezuela	(a)	21.I.1992
<i>(denunciation 22.VII.1999)</i>		
Yemen	(a)	6.III.1979
Yugoslavia	(r)	18.VI.1976

The Convention applies provisionally to the following States:

Kiribati
Solomon Islands

⁽¹⁾ The instrument of denunciation of the United Kingdom contained the following declaration:

“In accordance with the provisions of article 31 of the 1992 Protocol to the 1971 Convention, of article VII of the 1976 Protocol to that Convention, and of article VI of the 1976 Protocol to the 1969 Convention, I hereby give notice that the Government of the United Kingdom of Great Britain and Northern Ireland denounces, with effect from 15 May 1998, the 1969 Convention and the 1976 Protocol thereto, and the 1971 Convention and the 1976 Protocol thereto, in respect of the United Kingdom of Great Britain and Northern Ireland and:

The Bailiwick of Jersey
The Isle of Man
Falkland Islands¹
Montserrat
South Georgia and South Sandwich Islands

being Territories for whose international relations the United Kingdom is responsible and for which the said Conventions and their related Protocols are in force at the present time”.

The United Kingdom declared ratification to be effective also in respect of:

Anguilla	8.V.1984
Bailiwick of Jersey and Guernsey, Isle of Man	1.III.1976
Bermuda	1.III.1976
Belize⁽¹⁾	1.IV.1976
British Indian Ocean Territory	1.IV.1976
British Virgin Islands	1.IV.1976
Cayman Islands	1.IV.1976
Falkland Islands and Dependencies⁽²⁾	1.IV.1976
Gibraltar	1.IV.1976
Gilbert Islands⁽³⁾	1.IV.1976
Hong-Kong⁽⁴⁾	1.IV.1976
Montserrat	1.IV.1976
Pitcairn	1.IV.1976
St. Helena and Dependencies	1.IV.1976
Seychelles⁽⁵⁾	1.IV.1976
Solomon Islands⁽⁶⁾	1.IV.1976
Turks and Caicos Islands	1.IV.1976
Tuvalu	1.IV.1976
United Kingdom Sovereign Base	1.IV.1976
Areas of Akrotiri and Dhekelia	1.IV.1976
in the Island of Cyprus	1.IV.1976

⁽¹⁾ Has since become an independent State and Contracting State to the Convention.

⁽²⁾ The depositary received a communication dated 16 August 1976 from the Embassy of the Argentine Republic in London. The communication, the full text of which was circulated by the depositary, includes the following:

"The extension of the convention to the Islas Malvinas, Georgias del Sur and Sandwich del Sur notified by the Government of the United Kingdom of Great Britain and Northern Ireland to the Secretary-General, on 1 April 1976 ... under the erroneous denomination of "Falkland Islands and Dependencies" - [does] not in any way affect the rights of the Argentine Republic over those islands which are part of its territory and come under the administrative jurisdiction of the Territorio Nacional de Tierra del Fuego, Antártida e Islas del Atlántico Sur.

The afore-mentioned islands were occupied by force by a foreign power. The situation has been considered by the United Nations Assembly which adopted resolutions 2065(XX) and 3160(XXVIII). In both resolutions the existence of a dispute regarding the sovereignty over the archipelago was confirmed and the Argentine Republic and the occupying power were urged to negotiate with a view to finding a definitive solution to the dispute."

The depositary received the following communication dated 20 September 1976 from the Government of the United Kingdom.

"...With reference to the statement of the Embassy of the Argentine Republic ... Her Majesty's Government is bound to state that they have no doubts as to United Kingdom sovereignty over the Falkland Islands and the Falkland Islands Dependencies.

⁽³⁾ Has since become the independent State of Kiribati to which the Convention applies provisionally.

⁽⁴⁾ Cashed to apply to Hong Kong with effect from 1 July 1997.

⁽⁵⁾ Has since become the independent State of Seychelles.

⁽⁶⁾ Has since become an independent State to which the Convention applies provisionally.

Declarations, Reservations and Statements

Australia

The instrument of ratification of the Commonwealth of Australia was accompanied by the following declarations:

“Australia has taken note of the reservation made by the Union of Soviet Socialist Republics on its accession on 24 June 1975 to the Convention, concerning article XI(2) of the Convention. Australia wishes to advise that is unable to accept the reservation. Australia considers that international law does not grant a State the right to immunity from the jurisdiction of the courts of another State in proceedings concerning civil liability in respect of a State-owned ship used for commercial purposes. It is also Australia’s understanding that the above-mentioned reservation is not intended to have the effect that the Union of Soviet Socialist Republics may claim judicial immunity of a foreign State with respect to ships owned by it, used for commercial purposes and operated by a company which in the Union of Soviet Socialist Republic is registered as the ship’s operator, when actions for compensation are brought against the company in accordance with the provisions of the Convention. Australia also declares that, while being unable to accept the Soviet reservation, it does not regard that fact as precluding the entry into force of the Convention as between the Union of Soviet Socialist Republics and Australia.”

“Australia has taken note of the declaration made by the German Democratic Republic on its accession on 13 March 1978 to the Convention, concerning article XI(2) of the Convention. Australia wishes to declare that it cannot accept the German Democratic Republic’s position on sovereign immunity. Australia considers that international law does not grant a State the right to immunity from the jurisdiction of the courts of another State in proceedings concerning civil liability in respect of a State-owned ship used for commercial purposes. Australia also declares that, while being unable to accept the declaration by the German Democratic Republic, it does not regard that fact as precluding the entry into force of the Convention as between the German Democratic Republic and Australia.”

Belgium

The instrument of ratification of the Kingdom of Belgium was accompanied by a Note Verbale (in the French language) the text of which reads as follows:

[Translation]

“...The Government of the Kingdom of Belgium regrets that it is unable to accept the reservation of the Union of Soviet Socialist Republics, dated 24 June 1975, in respect of article XI, paragraph 2 of the Convention.

The Belgian Government considers that international law does not authorize States to claim judicial immunity in respect of vessels belonging to them and used by them for commercial purposes.

Belgian legislation concerning the immunity of State-owned vessels is in accordance with the provisions of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, done at Brussels on 10 April 1926, to which Belgium is a Party.

The Belgian Government assumes that the reservation of the USSR does not in any way affect the provisions of article 16 of the Maritime Agreement between the Belgian-Luxembourg Economic Union and the Union of Soviet Socialist Republics,

of the Protocol and the Exchange of Letters, signed at Brussels on 17 November 1972. The Belgian Government also assumes that this reservation in no way affects the competence of a Belgian court which, in accordance with article IX of the aforementioned International Convention, is seized of an action for compensation for damage brought against a company registered in the USSR in its capacity of operator of a vessel owned by that State, because the said company, by virtue of article I, paragraph 3 of the same Convention, is considered to be the 'owner of the ship' in the terms of this Convention.

The Belgian Government considers, however, that the Soviet reservation does not impede the entry into force of the Convention as between the Union of Soviet Socialist Republics and the Kingdom of Belgium."

China

At the time of depositing its instrument of accession the Representative of the People's Republic of China declared "that the signature to the Convention by Taiwan authorities is illegal and null and void".

German Democratic Republic

The instrument of accession of the German Democratic Republic was accompanied by the following statement and declarations (in the German language):

[Translation]

"In connection with the declaration made by the Government of the Federal Republic of Germany on 20 May 1975 concerning the application of the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 to Berlin (West), it is the understanding of the German Democratic Republic that the provisions of the Convention may be applied to Berlin (West) only inasmuch as this is consistent with the Quadripartite Agreement of 3 September 1971, under which Berlin (West) is no constituent part of the Federal Republic of Germany and must not be governed by it."

"The Government of the German Democratic Republic considers that the provisions of article XI, paragraph 2, of the Convention are inconsistent with the principle of immunity of States."⁽¹⁾

The Government of the German Democratic Republic considers that the provisions of article XIII, paragraph 2, of the Convention are inconsistent with the principle that all States pursuing their policies in accordance with the purposes and principles of the Charter of the United Nations shall have the right to become parties to conventions affecting the interests of all States.

The position of the Government of the German Democratic Republic on article XVII of the Convention, as far as the application of the Convention to colonial and other dependent territories is concerned, is governed by the provisions of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514(XV) of 14 December 1960) proclaiming the necessity of bringing a speedy and unconditional end to colonialism in all its forms and manifestations."

⁽¹⁾ The following Governments do not accept the reservation contained in the instrument of accession of the Government of the German Democratic Republic, and the texts of their Notes to this effect were circulated by the depositary: Denmark, France, the Federal Republic of Germany, Japan, Norway, Sweden and the United Kingdom.

CLC 1969

Federal Republic of Germany

The instrument of ratification of the Federal Republic of Germany was accompanied by a declaration (in the English language) that “with effect from the day on which the Convention enters into force for the Federal Republic of Germany it shall also apply to Berlin (West)”.

Guatemala

The instrument of acceptance of the Republic of Guatemala contained the following declaration (in the Spanish language):

[Translation]

“It is declared that relations that may arise with Belize by virtue of this accession can in no sense be interpreted as recognition by the State of Guatemala of the independence and sovereignty unilaterally decreed by Belize.”

Italy

The instrument of ratification of the Italian Republic was accompanied by the following statement (in the Italian language):

[Translation]

“The Italian Government wishes to state that it has taken note of the reservation put forward by the Government of the Soviet Union (on the occasion of the deposit of the instrument of accession on 24 June 1975) to article XI(2) of the International Convention on civil liability for oil pollution damage, adopted in Brussels on 29 November 1969.

The Italian Government declares that it cannot accept the aforementioned reservation and, with regard to the matter, observes that, under international law, the States have no right to jurisdictional immunity in cases where vessels of theirs are utilized for commercial purposes.

The Italian Government therefore considers its judicial bodies competent - as foreseen by articles IX and XI(2) of the Convention - in actions for the recovery of losses incurred in cases involving vessels belonging to States employing them for commercial purposes, as indeed in cases where, on the basis of article I(3), it is a company, running vessels on behalf of a State, that is considered the owner of the vessel.

The reservation and its non-acceptance by the Italian Government do not, however, preclude the coming into force of the Convention between the Soviet Union and Italy, and its full implementation, including that of article XI(2).”

Peru⁽²⁾

The instrument of accession of the Republic of Peru contained the following reservation (in the Spanish language):

[Translation]

“With respect to article II, because it considers that the said Convention will be understood as applicable to pollution damage caused in the sea area under the

⁽²⁾ The depositary received the following communication dated 14 July 1987 from the Embassy of the Federal Republic of Germany in London (in the English language):

“...the Government of the Federal Republic of Germany has the honour to reiterate its well-known position as to the sea area up to the limit of 200 nautical miles, measured from the base lines of the Peruvian coast, claimed by Peru to be under the sovereignty and

sovereignty and jurisdiction of the Peruvian State, up to the limit of 200 nautical miles, measured from the base lines of the Peruvian coast”.

Russian Federation

See USSR.

Saint Kitts and Nevis

The instrument of accession of Saint Kitts and Nevis contained the following declaration:

“The Government of Saint Kitts and Nevis considers that international law does not authorize States to claim judicial immunity in respect of vessels belonging to them and used by them for commercial purposes”.

Saudi Arabia

The instrument of accession of the Kingdom of Saudi Arabia contained the following reservation (in the Arabic language):

[Translation]

“However, this accession does not in any way mean or entail the recognition of Israel, and does not lead to entering into any dealings with Israel; which may be arranged by the above-mentioned Convention and the said Protocol”.

Syrian Arab Republic

The instrument of accession of the Syrian Arab Republic contains the following sentence (in the Arabic language):

[Translation]

“...this accession [to the Convention] in no way implies recognition of Israel and does not involve the establishment of any relations with Israel arising from the provisions of this Convention”.

USSR

The instrument of accession of the Union of Soviet Republics contains the following reservation (in the Russian language):

[Translation]

“The Union of Soviet Socialist Republic does not consider itself bound by the provisions of article XI, paragraph 2 of the Convention, as they contradict the principle

jurisdiction of the Peruvian State. In this respect the Federal Government points again to the fact that according to international law no coastal State can claim unrestricted sovereignty and jurisdiction beyond its territorial sea, and that the maximum breadth of the territorial sea according to international law is 12 nautical miles.”

The depositary received the following communication dated 4 November 1987 from the Permanent Mission of the Union of Soviet Socialist Republics to the International Maritime Organization (in the Russian language):

[Translation]

“...the Soviet Side has the honour to confirm its position in accordance with which a coastal State has no right to claim an extension of its sovereignty to sea areas beyond the outer limit of its territorial waters the maximum breadth of which in accordance with international law cannot exceed 12 nautical miles.”

CLC 1969

of the judicial immunity of a foreign State.”⁽³⁾

Furthermore, the instrument of accession contains the following statement (in the Russian language):

[Translation]

“On its accession to the International Convention on Civil Liability for Oil Pollution Damage, 1969, the Union of Soviet Socialist Republics considers it necessary to state that:

“(a) the provisions of article XIII, paragraph 2 of the Convention which deny participation in the Convention to a number of States, are of a discriminatory nature and contradict the generally recognized principle of the sovereign equality of States, and

(b) the provisions of article XVII of the Convention envisaging the possibility of its extension by the Contracting States to the territories for the international relations of which they are responsible are outdated and contradict the United Nations Declaration on Granting Independence to Colonial Countries and Peoples (resolution 1514(XV) of 14 December 1960)”.

The depositary received on 17 July 1979 from the Embassy of the Union of Soviet Socialist Republics in London a communication stating that:

“...the Soviet side confirms the reservation to paragraph 2 of article XI of the International Convention of 1969 on the Civil Liability for Oil Pollution Damage, made by the Union of Soviet Socialist Republics at adhering to the Convention. This reservation reflects the unchanged and well-known position of the USSR regarding the impermissibility of submitting a State without its express consent to the courts jurisdiction of another State. This principle of the judicial immunity of a foreign State is consistently upheld by the USSR at concluding and applying multilateral international agreements on various matters, including those of merchant shipping and the Law of the sea.

In accordance with article III and other provisions of the 1969 Convention, the liability for the oil pollution damage, established by the Convention is attached to “the owner” of “the ship”, which caused such damage, while paragraph 3 of article I of the Convention stipulates that “in the case of a ship owned by a state and operated by a company which in that state is registered as the ship’s operator, “owner” shall mean such company”. Since in the USSR state ships used for commercial purposes are under the operational management of state organizations who have an independent liability on their obligations, it is only against these organizations and not against the Soviet state that actions for compensation of the oil pollution damage in accordance with the 1969 Convention could be brought. Thus the said reservation does not prevent the consideration in foreign courts in accordance with the jurisdiction established by the Convention, of such suits for the compensation of the damage by the merchant ships owned by the Soviet state”.

⁽³⁾ The following Governments do not accept the reservation contained in the instrument of accession of the Government of the Union of Soviet Socialist Republics, and the texts of their Notes to this effect were circulated by the depositary: Denmark, France, the Federal Republic of Germany, Japan, the Netherlands, New Zealand, Norway, Sweden, the United Kingdom.

CLC Protocol 1976

**Protocol to the International
Convention on
Civil liability
for oil pollution damage**

(CLC PROT 1976)

Done at London,
19 November 1976
Entered into force: 8 April 1981

**Protocole à la Convention
Internationale sur la
Responsabilité civile pour
les dommages dus à la
pollution par les
hydrocarbures
(CLC PROT 1976)**

Signé à Londres,
le 19 novembre 1976
Entré en vigueur: 8 avril 1981

Albania	(a)	6.IV.1994
Antigua and Barbuda	(a)	23.VI.1997
Australia	(a)	7.XI.1983
<i>(denunciation 22 June 1988)</i>		
Bahamas	(acc)	3.III.1980
Bahrain	(a)	3.V.1996
Barbados	(a)	3.V.1996
Belgium	(a)	15.VI.1989
Belize	(a)	2.IV.1991
Brunei Darussalam	(a)	29.IX.1992
Cameroon	(a)	14.V.1984
Canada	(a)	24.I.1989
China*	(a)	29.IX.1986
Colombia	(a)	26.III.1990
Costa Rica	(a)	8.XII.1997
Cyprus	(a)	19.VI.1989
Denmark	(a)	3.VI.1981
Egypt	(a)	3.II.1989
Finland	(a)	8.I.1981
France	(AA)	7.XI.1980
Georgia	(a)	25.VIII.1995
Germany*	(r)	28.VIII.1980
Greece	(a)	10.V.1989
Iceland	(a)	24.III.1994
India	(a)	1.V.1987
Ireland	(a)	19.XI.1992
<i>(denunciation 15.V.1988)</i>		
Italy	(a)	3.VI.1983
Japan	(a)	24.VIII.1994
Korea, Republic of	(a)	8.XII.1992
Kuwait	(a)	1.VII.1981
Liberia	(a)	17.II.1981
Luxemburg	(a)	14.II.1991
Maldives	(a)	14.VI.1981

CLC Protocol 1976

Malta	(a)	21.I.1995
<i>(denunciation 6.I.2001)</i>		
Marshall Islands	(a)	27.IX.1991
Mauritania	(a)	6.IV.1995
Mauritius	(a)	17.XI.1995
Mexico	(a)	13.V.1994
Netherlands	(a)	3.VIII.1982
Nicaragua	(a)	4.VI.1996
Norway	(a)	17.VII.1978
Oman	(a)	24.I.1985
Peru	(a)	24.II.1987
Poland	(a)	30.X.1985
Portugal	(a)	2.I.1986
Qatar	(a)	2.VI.1988
Russian Federation	(a)	2.XII.1988
Saudi Arabia	(a)	15.IV.1993
Singapore	(a)	15.XII.1981
Spain	(a)	22.X.1981
Sweden	(r)	7.VII.1978
Switzerland	(a)	15.XII.1987
United Arab Emirates	(a)	14.III.1984
United Kingdom	(r)	31.I.1980
<i>(denunciation 15.V.1988)</i>		
Vanuatu	(a)	13.I.1989
Venezuela	(a)	21.I.1992
Yemen	(a)	4.VI.1979

The United Kingdom declared ratification to be effective also in respect of:

Anguilla
Bailiwick of Jersey
Bailiwick of Guernsey
Isle of Man
Belize ⁽¹⁾
Bermuda
British Indian Ocean Territory
British Virgin Islands
Cayman Islands
Falkland Islands ⁽²⁾
Gibraltar
Hong Kong

⁽¹⁾ Has since become an independent State and Contracting State to the Protocol.

⁽²⁾ A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

Montserrat

Pitcairn

Saint Helena and Dependencies

Turks and Caicos Islands

United Kingdom Sovereign Base Areas

of Akrotiri and Dhekelia in the Island of Cyprus

Declarations, Reservations and Statements

Federal Republic of Germany

The instrument of ratification of the Federal Republic of Germany contains the following declaration (in the English language):

“...with effect from the date on which the Protocol enters into force for the Federal Republic of Germany it shall also apply to Berlin (West)”.

Saudi Arabia

The instrument of accession of the Kingdom of Saudi Arabia contained the following reservation (in the Arabic language):

[Translation]

“However, this accession does not in any way mean or entail the recognition of Israel, and does not lead to entering into any dealings with Israel; which may be arranged by the above-mentioned Convention and the said Protocol”.

Notifications

Article V(9)(c) of the Convention, as amended by the Protocol

China

“...the value of the national currency, in terms of SDR, of the People’s Republic of China is calculated in accordance with the method of valuation applied by the International Monetary Fund.”

Poland

“Poland will now calculate financial liabilities in cases of limitation of the liability of owners of sea-going ships and liability under the International Oil Pollution Compensation Fund in terms of the Special Drawing Right, as defined by the International Monetary Fund.

However, those SDR’s will be converted according to the method instigated by Poland, which is derived from the fact that Poland is not a member of the International Monetary Fund.

The method of conversion is that the Polish National Bank will fix a rate of exchange

CLC Protocol 1976

of the SDR to the Polish zloty through the conversion of the SDR to the United States dollar, according to the current rates of exchange quoted by Reuter. The US dollars will then 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.

The above method of calculation is in accordance with the provisions of article II paragraph 9 item “a” (in fine) of the Protocol to the International Convention on Civil Liability for Oil Pollution Damage and article II of the Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.”

Switzerland*[Translation]*

“The Swiss Federal Council declares, with reference to article V, paragraph 9(a) and (c) of the Convention, introduced by article II of the Protocol of 19 November 1976, 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.

USSR

“In accordance with article V, paragraph 9 “c” of the International Convention on Civil Liability for Oil Pollution Damage, 1969 in the wording of article II of the Protocol of 1976 to this Convention it is declared that the value of the unit of “The Special Drawing Right” expressed in Soviet roubles is calculated on the basis of the US dollar rate in effect at the date of the calculation in relation to the unit of “The Special Drawing Right”, determined by the International Monetary Fund, and the US dollar rate in effect at the same date in relation to the Soviet rouble, determined by the State Bank of the USSR”.

United Kingdom

“...in accordance with article V(9)(c) of the Convention, as amended by article II(2) of the Protocol, the manner of calculation employed by the United Kingdom pursuant to article V(9)(a) of the Convention, as amended, shall be the method of valuation applied by the International Monetary Fund.

**Protocol of 1992 to amend the
International Convention on**

**Civil liability for oil
pollution damage, 1969**

(CLC PROT 1992)

Done at London,
19 November 1992
Entry into force: 30 May 1996

**Protocole à la Convention
Internationale sur la
Responsabilité civile pour
les dommages dus à la
pollution par les
hydrocarbures, 1969**

(CLC PROT 1992)

Signé à Londres,
le 19 novembre 1992
Entrée en vigueur: 30 May 1996

Algeria	(a)	11.VI.1998
Antigua and Barbuda	(a)	14.XI.2000
Argentina	(a)	13.X.2000
Australia	(a)	9.X.1995
Bahamas	(a)	1.IV.1997
Bahrain	(a)	3.V.1996
Barbados	(a)	7.VII.1998
Belgium	(a)	6.X.1998
Belize	(a)	27.XI.1998
Cambodia	(a)	8.VI.2001
Canada	(a)	29.V.1998
China	(a)	5.I.1999
Croatia	(a)	12.I.1998
Cyprus	(a)	12.V.1997
Comoros	(a)	15.I.2000
Denmark	(r)	30.V.1995
Djibouti	(a)	8.I.2001
Dominican Republic	(a)	24.VI.1999
Egypt	(a)	21.IV.1995
Fiji	(a)	30.XI.1999
Finland	(A)	24.XI.1995
France	(A)	29.IX.1994
Georgia	(a)	18.IV.2000
Germany*	(r)	29.IX.1994
Greece	(r)	9.X.1995
Grenada	(a)	7.I.1998
Iceland	(a)	13.XI.1998
India	(a)	15.XI.1999
Indonesia	(a)	6.VII.1999
Ireland	(a)	15.V.1997
Italy	(a)	16.IX.1999
Jamaica	(a)	6.VI.1997
Japan	(a)	13.VIII.1994
Kenya	(a)	2.II.2000

CLC Protocol 1992

Korea (Republic of)	(a)	7.III.1997
Latvia	(a)	9.III.1998
Liberia	(a)	5.X.1995
Lithuania	(a)	27.VI.2000
Malta	(a)	6.I.2000
Marshall Islands	(a)	16.X.1995
Mauritius	(a)	6.XII.1999
Mexico	(a)	13.V.1994
Monaco	(a)	8.XI.1996
Morocco	(r)	22.VIII.2000
New Zealand	(a)	25.VI.1998
Netherlands	(a)	15.XI.1996
Norway	(r)	26.V.1995
Oman	(a)	8.VII.1994
Panama	(a)	18.III.1999
Papua New Guinea	(a)	23.I.2001
Philippines	(a)	7.VII.1997
Poland	(a)	21.XII.1999
Romania	(a)	27.XI.2000
Russian Federation	(a)	20.III.2000
Seychelles	(a)	23.VII.1999
Sierra Leone	(a)	4.VI.2001
Singapore	(a)	18.IX.1997
Slovenia	(a)	19.VII.2000
Spain	(a)	6.VII.1995
Sri Lanka	(a)	22.I.1999
Sweden	(r)	25.V.1995
Switzerland	(a)	4.VII.1996
Tonga	(a)	10.XII.1999
Trinidad and Tobago	(?)	6.III.2000
Tunisia	(a)	29.I.1997
Turkey	(a)	17.VIII.2001
United Arab Emirates	(a)	19.XI.1997
United Kingdom	(a)	29.IX.1994
Uruguay	(a)	9.VII.1997
Vanuatu	(a)	18.II.1999
Venezuela	(a)	22.VII.1998

The United Kingdom declared its accession to be effective in respect of:

The Bailiwick of Guernsey

The Isle of Man

Falkland Islands ⁽¹⁾

Montserrat

South Georgia and the South Sandwich Islands

⁽¹⁾ A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

Declarations, Reservations and Statements

Germany

The instrument of ratification of Germany was accompanied by the following declaration:

“The Federal Republic of Germany hereby declares that, having deposited the instruments of ratification of the protocols of 27 November 1992 amending the International Convention on Civil Liability for Oil Pollution Damage of 1969 and amending the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971, it regards its ratification of the Protocols of 25 May 1984, as documented on 18 October 1988 by the deposit of its instruments of ratification, as null and void as from the entry into force of the Protocols of 27 November 1992.”

New Zealand

The instrument of accession of New Zealand contained the following declaration:

“And declares that this accession shall not extend to Tokelau unless and until a declaration to this effect is lodged by the Government of New Zealand with the Depositary”.

International Convention on the Establishment of an International Fund for compensation for oil pollution damage

(FUND 1971)

Done at Brussels, 18 December 1971
Entered into force: 16 October 1978

Convention Internationale portant Création d'un Fonds International d'indemnisation pour les dommages dus à la pollution par les hydrocarbures

(FONDS 1971)

Signée à Bruxelles, le 18 décembre 1971
Entrée en vigueur: 16 octobre 1978

Albania	(a)	6.IV.1994
Algeria (denunciation 3.VIII.1998)	(r)	2.VI.1975
Antigua and Barbuda (denunciation 14.VI.2001)	(a)	23.VI.1997
Australia (denunciation 15.V.1998)	(a)	10.X.1994
Bahamas (denunciation 15.V.1998)	(a)	22.VII.1976
Bahrain (denunciation 15.V.1998)	(a)	3.V.1996

<i>Fund 1971</i>		<i>Fonds 1971</i>
Barbados	(a)	6.V.1994
<i>(denunciation 7.VII.1998)</i>		
Belgium	(r)	1.XII.1994
<i>(denunciation 6.X.1998)</i>		
Benin	(a)	1.XI.1985
Brunei Darussalam	(a)	29.IX.1992
Cameroon	(a)	14.V.1984
Canada*	(a)	24.I.1989
<i>(denunciation 29.V.1998)</i>		
China ⁽¹⁾		
<i>(denunciation 5.I.2000)</i>		
Columbia	(a)	13.III.1997
Cote d'Ivoire	(a)	5.X.1987
Croatia ⁽²⁾	(r)	8.X.1991
<i>(denunciation 30.VII.1998)</i>		
Cyprus	(a)	26.VII.1989
<i>(denunciation 15.V.1998)</i>		
Denmark	(a)	2.IV.1975
<i>(denunciation 15.V.1998)</i>		
Djibouti	(a)	1.III.1990
<i>(denunciation 17.V.2002)</i>		
Estonia	(a)	1.XII.1992
Fiji	(a)	4.III.1983
<i>(denunciation 30.XI.2000)</i>		
Finland	(r)	10.X.1980
<i>(denunciation 15.V.1998)</i>		
France	(a)	11.V.1978
<i>(denunciation 15.V.1998)</i>		
Gabon	(a)	21.I.1982
Gambia	(a)	1.XI.1991
Germany*	(r)	30.XII.1976
<i>(denunciation 15.V.1998)</i>		
Ghana	(r)	20.IV.1978
Greece	(a)	16.XII.1986
<i>(denunciation 15.V.1998)</i>		
Guyana	(a)	10.XII.1997
Iceland	(a)	17.VII.1980
<i>(denunciation 10.II.2001)</i>		
India	(a)	10.VII.1990
<i>(denunciation 21.VI.2001)</i>		

⁽¹⁾ Applies only to the Hong Kong Special Administration Region

⁽²⁾ On 11 August 1992 Croatia notified its succession to this Conventions as of the date of its independence (8.10.1991).

<i>Fund 1971</i>		<i>Fonds 1971</i>
Indonesia (denunciation 15.V.1998)	(a)	1.IX.1978
Ireland (denunciation 15.V.1998)	(r)	19.XI.1992
Italy (denunciation 8.X.2000)	(a)	27.II.1979
Japan (denunciation 15.V.1998)	(r)	7.VII.1976
Kenya (denunciation 7.VII.2001)	(a)	15.XII.1992
Korea, Republic of (denunciation 15.V.1998)	(a)	8.XII.1992
Kuwait	(a)	2.IV.1981
Liberia (denunciation 15.V.1998)	(a)	25.IX.1972
Malaysia	(a)	6.I.1995
Maldives	(a)	16.III.1995
Malta (denunciation 6.I.2001)	(a)	27.IX.1991
Marshall Islands (denunciation 15.V.1998)	(a)	30.XI.1994
Mauritania (denunciation 6.XII.2000)	(a)	17.XI.1995
Mauritius	(a)	6.IV.1995
Mexico (denunciation 15.V.1998)	(a)	13.V.1994
Monaco (denunciation 15.V.1998)	(a)	23.VIII.1979
Morocco	(r)	31.XII.1992
Mozambique	(a)	23.XII.1996
Netherlands (denunciation 15.V.1998)	(A A)	3.VIII.1982
New Zealand (denunciation 25.V.1998)	(a)	22.XI.1996
Nigeria	(a)	11.XI.1987
Norway (denunciation 15.V.1998)	(r)	21.III.1975
Oman (denunciation 15.V.1998)	(a)	10.V.1985
Panama (denunciation II.V.2000)	(a)	18.III.1999
Papua New Guinea (denunciation 23.I.2002)	(a)	12.III.1980
Poland (denunciation 21.XII.2000)	(r)	16.IX.1985

<i>Fund 1971</i>		<i>Fonds 1971</i>
Portugal	(r)	11.IX.1985
Qatar	(a)	2.VI.1988
Russian Federation ⁽³⁾ (denunciation 20.III.2001)	(a)	17.VI.1987
Saint Kitts and Nevis	(a)	14.IX.1994
Seychelles (denunciation 23.VII.2000)	(a)	12.IV.1988
Sierra Leone (denunciation 4.VI.2002)	(a)	13.VIII.1993
Slovenia (succession) (denunciation 19.VII.2001)	(a)	25.VI.1991
Spain (denunciation 15.V.1998)	(a)	8.X.1981
Sri Lanka (denunciation 22.I.2000)	(a)	12.IV.1983
Sweden (denunciation 15.V.1998)	(r)	17.III.1975
Switzerland (denunciation 15.V.1998)	(r)	4.VII.1996
Syrian Arab Republic*	(a)	6. II.1975
Tonga (denunciation 10.XII.2000)	(a)	1.II.1996
Tunisia (denunciation 15.V.1998)	(a)	4.V.1976
Tuvalu ⁽⁴⁾		16.X.1978
United Arab Emirates (denunciation 24.V.2002)	(a)	15.XII.1983
United Kingdom (denunciation 15.V.1998)	(r)	2.IV.1976
Vanuatu (denunciation 18.II.2000)	(a)	13.I.1989
Venezuela (denunciation 15.V.1998)	(a)	21.I.1992
Yugoslavia	(r)	16.III.1978

⁽³⁾ As from 26 December 1991 the membership of the USSR in the Convention is continued by the Russian Federation.

⁽⁴⁾ Date of succession.

The United Kingdom declared ratification to be effective also in respect of:

Anguilla	1 September 1984
<i>(denunciation 15.V.1998)</i>	
Bailiwick of Guernsey)
<i>(denunciation 15.V.1998)</i>	
Bailiwick of Jersey)
<i>(denunciation 15.V.1998)</i>	
Isle of Man)
<i>(denunciation 15.V.1998)</i>	
Belize ⁽¹⁾)
Bermuda)
<i>(denunciation 15.V.1998)</i>	
British Indian Ocean Territory)
<i>(denunciation 15.V.1998)</i>	
British Virgin Islands)
<i>(denunciation 15.V.1998)</i>	
Cayman Islands)
<i>(denunciation 15.V.1998)</i>	
Falkland Islands and Dependencies ⁽²⁾) 16 October 1978
<i>(denunciation 15.V.1998)</i>	
Gibraltar)
<i>(denunciation 15.V.1998)</i>	
Gilbert Islands ⁽³⁾)
Hong Kong ⁽⁴⁾)

⁽¹⁾ Has since become the independent State of Belize.

⁽²⁾ The depositary received a communication dated 16 August 1976 from the Embassy of the Argentina Republic in London. The communication, the full text of which was circulated by the depositary, includes the following:

"...the mentioning of the [Islas Malvinas, Georgias del Sur and Sandwich de Sur] in the instrument of ratification ... deposited on 2 April 1976 ... under the erroneous denomination of 'Falkland Islands and Dependencies' - [does] not in any way affect the rights of the Argentine Republic over those islands which are part of its territory and come under the administrative jurisdiction of the Territorio Nacional de Tierra del Fuego, Antártida e Islas del Atlántico Sur.

The aforementioned islands were occupied by force by a foreign power. The situation has been considered by the United Nations Assembly which adopted resolutions 2065(XX) and 3160(XXVIII). In both resolutions, the existence of a dispute regarding the sovereignty over the archipelago was confirmed and the Argentine Republic and the occupying power were urged to negotiate with a view to finding a definitive solution to the dispute."

The depositary received the following communication dated 21 September 1976 from the Government of the United Kingdom.

"With reference to the statement of the Embassy of the Argentine Republic ... Her Majesty's Government is bound to state that they have no doubts as to United Kingdom sovereignty over the Falkland Islands and the Falkland Islands dependencies."

⁽³⁾ Has since become the independent State of Kiribati.

⁽⁴⁾ Cessed to apply to Hong Kong with effect from 1 July 1997.

*Fund 1971**Fonds 1971*

Montserrat)
<i>(denunciation 15.V.1998)</i>	
Pitcairn Group)
<i>(denunciation 15.V.1998)</i>	
Saint Helena and Dependencies)
<i>(denunciation 15.V.1998)</i>	
Seychelles ⁽⁵⁾)
Solomon Islands ⁽⁶⁾)
Turks and Caicos Islands)
<i>(denunciation 15.V.1998)</i>	
Tuvalu ⁽⁷⁾)
United Kingdom Sovereign Base Areas)
of Akrotiri and Dhekelia in the)
Island of Cyprus)
<i>(denunciation 15.V.1998)</i>	

Declarations, Reservations and Statements

Canada

The instrument of accession of Canada was accompanied by the following declaration (in the English and French languages):

“The Government of Canada assumes responsibility for the payment of the obligations contained in articles 10, 11 and 12 of the Fund Convention. Such payments to be made in accordance with section 774 of the Canada Shipping Act as amended by Chapter 7 of the Statutes of Canada 1987”.

Federal Republic of Germany

The instrument of ratification of the Federal Republic of Germany was accompanied by the following declaration (in the English language):

“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.”

Syrian Arab Republic

The instrument of accession of the Syrian Arab Republic contains the following sentence (in the Arabic language):

[Translation]

“...the accession of the Syrian Arab Republic to this Convention ... in no way implies recognition of Israel and does not involve the establishment of any relations with Israel arising from the provisions of this Convention.”

⁽⁵⁾ Has since become the independent State of Seychelles.

⁽⁶⁾ Has since become the independent State of Solomon Islands.

⁽⁷⁾ Has since become an independent State and a Contracting State to the Convention.

**Protocol to the International
Convention on the
Establishment
of an International Fund
for compensation
for oil pollution damage**

(FUND PROT 1976)

Done at London, 19 November 1976
Entered into force:
22 November 1994

**Protocole à la Convention
Internationale portant
Creation d'un Fonds
International
d'indemnisation pour les
dommages dus à la pollution
par les hydrocarbures**

(FONDS PROT 1976)

Signé a Londres, le 19 novembre 1976
Entré en vigueur:
22 Novembre 1994

Albania	(a)	6.IV.1994
Australia	(a)	10.X.1994
Bahamas	(A)	3.III.1980
Bahrain	(a)	3.V.1996
Barbados	(a)	6.V.1994
Belgium	(r)	1.XII.1994
Canada	(a)	21.II.1995
China ⁽¹⁾		
Colombia	(a)	13.III.1997
Cyprus	(a)	26.VII.1989
Denmark	(a)	3.VI.1981
Finland	(a)	8.I.1981
France	(a)	7.XI.1980
Germany*	(r)	28.VIII.1980
Greece	(a)	9.X.1995
Iceland	(a)	24.III.1994
India	(a)	10.VII.1990
Ireland	(a)	19.XI.1992
<i>(denunciation 15.V.1998)</i>		
Italy	(a)	21.IX.1983
Japan	(a)	24.VIII.1994
Liberia	(a)	17.II.1981
Malta	(a)	27.IX.1991
Marshall Islands	(a)	16.X.1995
Mauritius	(a)	6.IV.1995
Mexico	(a)	13.V.1994
Morocco	(a)	31.XII.1992
Netherlands	(a)	1.XI.1982

⁽¹⁾ Applies only to the Hong Special Administrative Region.

*Fund Protocol 1976**Protocole Fonds 1976*

Norway	(a)	17.VII.1978
Poland*	(a)	30.X.1985
Portugal	(a)	11.IX.1985
Russian Federation ⁽²⁾	(a)	30.I.1989
Spain	(a)	5.IV.1982
Sweden	(r)	7.VII.1978
United Kingdom <i>(denunciation 15.V.1998)</i>	(r)	31.I.1980
Vanuatu	(a)	13.I.1989
Venezuela	(a)	21.I.1992

⁽²⁾ As from 26 December 1991 the membership of the USSR in the Convention is continued by the Russian Federation.

The United Kingdom declared ratification to be effective also in respect of:

Anguilla
Bailiwick of Jersey
Bailiwick of Guernsey
Isle of Man
Belize ⁽¹⁾
Bermuda
British Indian Ocean Territory
British Virgin Islands
Cayman Islands
Falkland Islands ⁽²⁾
Gibraltar
Hong Kong ⁽³⁾
Montserrat
Pitcairn
Saint Helena and Dependencies
Turks and Caicos Islands
United Kingdom Sovereign Base Areas
of Akrotiri and Dhekelia in the
Island of Cyprus

⁽¹⁾ Has since become the independent State of Belize.

⁽²⁾ A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

⁽³⁾ Cessed to apply to Hong Kong with effect from 1 July 1997.

Declarations, Reservations and Statements

Federal Republic of Germany

The instrument of ratification of the Federal Republic of Germany contains the following declaration in the English language:

“... with effect from the date on which the Protocol enters into force for the Federal Republic of Germany, it shall also apply to Berlin (West).”

Poland

(for text of the notification, see page 458)

**Protocol of 1992 to amend
the International
Convention on the
Establishment of an
International
Fund for compensation
for oil pollution damage**

(FUND PROT 1992)

Done at London,
25 November 1992
Entry into force: 30 May 1996

**Protocole de 1992 modifiant
la Convention Internationale
de 1971 portant
Creation d'un Fonds
International
d'indemnisation pour les
dommages dus à la pollution
par les hydrocarbures**

(FONDS PROT 1992)

Signé a Londres,
le 27 novembre 1992
Entrée en vigueur: 30 may 1996

Australia	(a)	9.X.1995
Bahrain	(a)	3.V.1996
Cambodia	(a)	8.VI.2001
Croatia	(a)	12.I.1998
Denmark	(r)	30.V.1995
Djibouti	(a)	8.I.2001
Dominica	(a)	31.VIII.2001
Finland	(a)	24.XI.1995
France	(A)	29.IX.1994
Germany*	(r)	29.IX.1994
Greece	(r)	9.X.1995
Ireland	(a)	15.V.1997
Italy	(a)	16.IX.1999
Japan	(a)	13.VIII.1994
Korea, Republic of	(a)	7.III.1997
Liberia	(a)	5.X.1995
Marshall Islands	(a)	16.X.1995
Mexico	(a)	13.V.1994
Monaco	(r)	8.XI.1996

*Fund Protocol 1992**Protocole Fonds 1992*

Netherlands	(r)	15.XI.1996
Norway	(a)	26.V.1995
Oman	(a)	8.VII.1994
Papua New Guinea	(a)	23.I.2001
Philippines	(a)	7.VIII.1997
Sierra Leone	(a)	4.VI.2001
Spain*	(a)	6.VII.1995
Sweden	(r)	25.V.1995
Switzerland	(a)	4.VII.1996
Tunisia	(a)	29.I.1997
Turkey	(a)	17.VIII.2001
United Kingdom	(a)	29.IX.1994
Uruguay	(a)	9.VII.1997

The United Kingdom declared its accession to be effective in respect of:

The Bailiwick of Guernsey

The Isle of Man

Falkland Islands⁽¹⁾

Montserrat

South Georgia and the South Sandwich Islands

(1) The depositary received a communication dated 21 February 1995 from the Embassy of the Argentine Republic in London.

[Translation]

"...the Argentine Government rejects the statement made by the United Kingdom of Great Britain and Northern Ireland on acceding to the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971. In that statement, accession was declared to be effective in respect of the Malvinas Islands, South Georgia and South Sandwich Islands. The Argentine Republic reaffirms its sovereignty over these islands and their surrounding maritime spaces, which constitute an integral part of its national territory.

The Argentine Republic recalls the adoption, by the General Assembly of the United Nations, of resolutions 2065(XX) and 3160(XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/41, 42/19 and 43/25, acknowledging the existence of a dispute concerning sovereignty and urging the Governments of the Argentine Republic and of the United Kingdom of Great Britain and Northern Ireland to enter into negotiations with a view to identifying means of pacific and final settlement of the outstanding problems between the two countries, including all matters concerning the future of the Malvinas Islands, in accordance with the Charter of the United Nations."

The depositary received a communication dated 22 May 1995 from the Foreign and Commonwealth Office, London:

"The Government of the United Kingdom of Great Britain and Northern Ireland have noted the declaration of the Government of Argentina regarding the extension by the United Kingdom of the application of the Convention to the Falkland Islands and to South Georgia and the South Sandwich Islands.

The British Government have no doubt about the sovereignty of the United Kingdom over the Falkland Islands and over South Georgia and the South Sandwich Islands and their consequent rights to extend the said Convention to these Territories. The British Government reject as unfounded the claims by the Government of Argentina."

Declarations, Reservations and Statements

Canada

The instrument of accession of Canada was accompanied by the following declaration: "By virtue of Article 14 of the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, the Government of Canada assumes responsibility for the payment of the obligations contained in Article 10, paragraph 1."

Federal Republic of Germany

The instrument of ratification by Germany was accompanied by the following declaration: "The Federal Republic of Germany hereby declares that, having deposited the instruments of ratification of the protocols of 27 November 1992 amending the International Convention on Civil Liability for Oil Pollution Damage of 1969 and amending the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971, it regards its ratification of the Protocols of 25 May 1984, as documented on 18 October 1988 by the deposit of its instruments of ratification, as null and void as from the entry into force of the Protocols of 27 November 1992."

New Zealand

The instrument of accession of New Zealand contained the following declaration: "And declares that this accession shall not extend to Tokelau unless and until a declaration to this effect is lodged by the Government of New Zealand with the Depositary".

Spain

The instrument of accession by Spain contained the following declaration:

[Translation]

"In accordance with the provisions of article 30, paragraph 4 of the above mentioned Protocol, Spain declares that the deposit of its instrument of accession shall not take effect for the purpose of this article until the end of the six-month period stipulated in article 31 of the said Protocol".

Convention relating to Civil Liability in the Field of

Maritime Carriage of nuclear material (NUCLEAR 1971)

Done at Brussels,
17 December 1971
Entered into force: 15 July 1975

Convention relative 9 la Responsabilité Civile dans le Domaine du

Transport Maritime de matières nucléaires (NUCLEAR 1971)

Signée a Bruxelles,
le 17 décembre 1971
Entrée en vigueur: 15 juillet 1975

Argentina
Belgium
Denmark ⁽¹⁾

(a)	18.V.1981
(r)	15.VI.1989
(r)	4.IX.1974

⁽¹⁾ Shall not apply to the Faroe Islands.

NUCLEAR 1971

Finland	(A)	6.VI.1991
France	(r)	2.II.1973
Gabon	(a)	21.I.1982
Germany*	(r)	1.X.1975
Italy*	(r)	21.VII.1980
Liberia	(a)	17.II.1981
Netherlands	(a)	1.VIII.1991
Norway	(r)	16.IV.1975
Spain	(a)	21.V.1974
Sweden	(r)	22.XI.1974
Yemen	(a)	6.III.1979

Declarations, Reservations and Statements**Federal Republic of Germany**

The following reservation accompanies the signature of the Convention by the Representative of the Federal Republic of Germany (in the English language):

“Pursuant to article 10 of the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, the Federal Republic of Germany reserves the right to provide by national law, that the persons liable under an international convention or national law applicable in the field of maritime transport may continue to be liable in addition to the operator of a nuclear installation on condition that these persons are fully covered in respect of their liability, including defence against unjustified actions, by insurance or other financial security obtained by the operator.”

This reservation was withdrawn at the time of deposit of the instrument of ratification of the Convention.

The instrument of ratification of the Government 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.

Italy

The instrument of ratification of the Italian Republic was accompanied by the following statement (in the English language):

“It is understood that the ratification of the said Convention will not be interpreted in such a way as to deprive the Italian State of any right of recourse made according to the international law for the damages caused to the State itself or its citizens by a nuclear accident”.

PAL 1974

**Athens Convention relating
to the Carriage
of passengers
and their luggage by sea
(PAL 1974)**

Done at Athens:
13 December 1974
Entered into force:
28 April 1987

**Convention d'Athènes
relative au Transport
par mer de passagers
et de leurs bagages
(PAL 1974)**

Signée à Athènes,
le 13 décembre 1974
Entrée en vigueur:
28 avril 1987

Argentina*	(a)	26.V.1983
Bahamas	(a)	7.VI.1983
Barbados	(a)	6.V.1994
Belgium	(a)	15.VI.1989
China	(a)	1.VI.1994
Croatia	(a)	12.I.1998
Egypt	(a)	18.X.1991
Equatorial Guinea	(a)	24.IV.1996
Georgia	(a)	25.VIII.1995
Greece	(A)	3.VII.1991
Guyana	(a)	10.XII.1997
Ireland	(a)	14.II.1998
Jordan	(a)	3.X.1995
Liberia	(a)	17.II.1981
Luxemburg	(a)	14.II.1991
Jordan	(a)	3.X.1995
Malawi	(a)	9.III.1993
Marshall Islands	(a)	29.XI.1994
Poland	(r)	28.I.1987
Russian Federation* ⁽¹⁾	(a)	27.IV.1983
Spain	(a)	8.X.1981
Switzerland	(r)	15.XII.1987
Tonga	(a)	15.II.1977
Ucraina	(a)	11.XI.1994
United Kingdom	(r)	31.I.1980
Vanuatu	(a)	13.I.1989
Yemen	(a)	6.III.1979

⁽¹⁾ As of 26 December 1991 the membership of the USSR in the Convention is continued by the Russian Federation.

PAL 1974

The United Kingdom declared ratification to be effective also in respect of:

Bailiwick of Jersey

Bailiwick of Guernsey

Isle of Man

Bermuda

British Virgin Islands

Cayman Islands

Falkland Islands

Gibraltar

Hong Kong ⁽¹⁾

Montserrat

Pitcairn

Saint Helena and Dependencies

Declarations, Reservations and Statements

Argentina ⁽²⁾

The instrument of accession of the Argentine Republic contained a declaration of non-application of the Convention under article 22, paragraph 1, as follows (in the Spanish language):

[Translation]

“The Argentine Republic will not apply the Convention when both the passengers and the carrier are Argentine nationals”.

The instrument also contained the following reservations:

[Translation]

“The Argentine Republic rejects the extension of the application of the Athens Convention relating to Carriage of Passengers and Their Luggage by Sea, 1974, adopted in Athens, Greece, on 13 December 1974, and of the Protocol to the Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea, 1974, approved in London on 19 December 1976, to the Malvinas Islands as notified by the United Kingdom of Great Britain and Northern Ireland to the Secretary-General of the International Maritime Organization (IMO) in ratifying the said instrument on 31 January 1980 under the incorrect designation of “Falkland Islands”, and reaffirms its sovereign rights over the said Islands which form an integral part of its national territory”.

German Democratic Republic

The instrument of accession of the German Democratic Republic was accompanied by the following reservation (in the German language):

⁽¹⁾ Cessed to apply to Hong Kong with effect from 1 July 1997.

⁽²⁾ A communication dated 19 October 1983 from the Government of the United Kingdom, the full text of which was circulated by the depositary, includes the following:

“The Government of the United Kingdom of Great Britain and Northern Ireland reject each and every of these statements and assertions. The United Kingdom has no doubt as to its sovereignty over the Falkland Islands and thus its right to include them within the scope of application of international agreements of which it is a party. The United Kingdom cannot accept that the Government of the Argentine Republic has any rights in this regard. Nor can the United Kingdom accept that the Falkland Islands are incorrectly designated”.

[Translation]

“The German Democratic Republic declares that the provisions of this Convention shall have no effect when the passenger is a national of the German Democratic Republic and when the performing carrier is a permanent resident of the German Democratic Republic or has its seat there”.

USSR

The instrument of accession of the Union of Soviet Socialist Republic contained a declaration of non-application of the Convention under article 22, paragraph 1.

**Protocol to the
Athens Convention relating
to the Carriage
of passengers
and their luggage by sea
(PAL PROT 1976)**

Done at London,
19 November 1976
Entered into force: 10 April 1989

**Protocole à la
Convention d'Athènes
relative au Transport
par mer de passagers
et de leurs bagages
(PAL PROT 1976)**

Signé à Londres,
le 19 novembre 1976
Entré en vigueur: 10 avril 1989

Argentina*	(a)	28.IV.1987
Bahamas	(a)	28.IV.1987
Barbados	(a)	6.V.1994
Belgium	(a)	15.VI.1989
China	(a)	1.VI.1994
Croatia	(a)	12.I.1998
Georgia	(a)	25.VIII.1995
Greece	(a)	3.VII.1991
Ireland	(a)	24.II.1998
Liberia	(a)	28.IV.1987
Luxemburg	(a)	14.II.1991
Marshall Islands	(a)	29.XI.1994
Poland	(a)	28.IV.1987
Russian Federation ⁽¹⁾	(a)	30.I.1989
Spain	(a)	28.IV.1987
Switzerland	(a)	15.XII.1987
Ukraine	(a)	11.XI.1994
United Kingdom	(r)	28.IV.1987
Vanuatu	(a)	13.I.1989
Yemen	(a)	28.IV.1987

⁽¹⁾ As of 26 December 1991 the membership of the USSR in the Convention is continued by the Russian Federation.

PAL Protocol 1976

The United Kingdom declared ratification to be effective also in respect of:

Bailiwick of Jersey
Bailiwick of Guernsey
Isle of Man
Bermuda
British Virgin Islands
Cayman Islands
Falkland Islands ⁽²⁾
Gibraltar
Hong Kong
Montserrat
Pitcairn
Saint Helena and Dependencies

⁽²⁾ For the texts of a reservation made by the Argentine Republic and a communication received from the United Kingdom, see page 471 and 472.

Declarations, Reservations and Statements

Argentina ⁽¹⁾

The instrument of accession of the Argentine Republic contained the following reservation (in the Spanish language):

[Translation]

“The Argentine Republic rejects the extension of the application of the Athens Convention relating to Carriage of Passengers and their Luggage by Sea, 1974, adopted in Athens, Greece, on 13 December 1974, and of the Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, approved in London on 19 December 1976, to the Malvinas Islands as notified by the United Kingdom of Great Britain and Northern Ireland to the Secretary-General of the International Maritime Organization (IMO) in ratifying the said instrument on 31 January 1980 under the incorrect designation of “Falkland Islands”, and reaffirms its sovereign rights over the said Islands which form an integral part of its national territory”.

⁽¹⁾ The depositary received the following communication dated 4 August 1987 from the United Kingdom Foreign and Commonwealth Office:

“The Government of the United Kingdom of Great Britain and Northern Ireland cannot accept the reservation made by the Argentine Republic as regards the Falkland Islands.

The Government of the United Kingdom of Great Britain and Northern Ireland have no doubt as to the United Kingdom sovereignty over the Falkland Islands and, accordingly, their right to extend the application of the Convention to the Falkland Islands”.

**Protocol of 1990 to amend the
1974 Athens Convention
relating to the Carriage
of passengers
and their luggage by sea
(PAL PROT 1990)**

Done at London, 29 March 1990
Not yet in force

Croatia
Egypt
Spain

**Protocole de 1990 modifiant
La Convention d'Athènes
de 1974 relative au
Transport par mer de
passagers et de leurs bagages
(PAL PROT 1990)**

Fait à Londres, le 29 mars 1990
Pas encore en vigueur

(a) 12.I.1998
(a) 18.X.1991
(a) 24.II.1993

**Convention on
Limitation of Liability
for maritime claims
(LLMC 1976)**

Done at London, 19 November 1976
Entered into force: 1 December 1986

Australia
Bahamas
Barbados
Belgium*
Benin
China* (1)
Croatia
Denmark
Dominica
Egypt
Equatorial Guinea
Finland
(denunciation 15.VII.2000)
France*
Georgia
Germany*
Greece
Guyana

**Convention sur la
Limitation de la
Responsabilité en matière
de créances maritimes
(LLMC 1976)**

Signée à Londres, le 19 novembre 1976
Entrée en vigueur: 1 décembre 1986

(a) 20.II.1991
(a) 7.VI.1983
(a) 6.V.1994
(a) 15.VI.1989
(a) I.XI.1985
(a) 2.III.1993
(a) 30.V.1984
(a) 31.VIII.2001
(r) 30.III.1988
(a) 24.IV.1996
(a) 8.V.1984
(r) I.VII.1981
(AA) 20.II.1996
(a) 12.V.1987
(r) 3.VII.1991
(a) 10.XII.1997

(1) Applies only to the Hong Kong Special Administrative Region.

LLMC 1976

Ireland	(a)	2.II.1998
Japan*	(a)	4.VI.1982
Latvia	(a)	13.VII.1999
Liberia	(a)	17.II.1981
Marshall Islands	(a)	29.XI.1994
Mexico	(a)	13.V.1994
Netherlands*	(a)	15.V.1990
New Zealand ⁽²⁾	(a)	14.II.1994
Norway*	(r)	30.III.1984
Poland	(a)	28.IV.1986
Sierra Leone	(a)	26.VII.2001
Spain	(r)	13.XI.1981
Sweden*	(r)	30.III.1984
Switzerland*	(a)	15.XII.1987
Trinidad and Tobago	(—)	6.III.2000
Turkey	(a)	6.III.1998
United Arab Emirates	(a)	19.XI.1997
United Kingdom*	(r)	31.I.1980
Vanuatu	(a)	14.IX.1992
Yemen	(a)	6.III.1979

⁽²⁾ The instrument of accession contained the following statement:
 “AND WHEREAS it is not intended that the accession by the Government of New Zealand to the Convention should extend to Tokelau”.

The United Kingdom declared its ratification to be effective also in respect of:

Bailiwick of Jersey
Bailiwick of Guernsey
Isle of Man
Belize ⁽¹⁾
Bermuda
British Virgin Islands
Cayman Islands
Falkland Islands ⁽²⁾
Gibraltar
Hong Kong
Montserrat
Pitcairn
Saint Helena and Dependencies
Turks and Caicos Islands
United Kingdom Sovereign Base Areas of
Akrotiri and Dhekelia in the Island of Cyprus

⁽¹⁾ Has since become the independent State of Belize to which the Convention applies provisionally.

⁽²⁾ For the text of communication received from the Governments of Argentina and the United Kingdom, see page 474.

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”.

LLMC 1976

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”.

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 owners 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.

1. 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 non 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 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

LLMC 1976

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 or the mechanically propelled ships is increased by 100 Units of Account per ton of maximum deadweight of the pushed barges 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 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 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.

*LLMC Protocol 1996**Salvage 1989*

**Protocol of 1996 to amend
the convention on
Limitation of Liability
for maritime claims, 1976**

(LLMC PROT 1996)

Done at London, 3 May 1996
Not yet in force

Finland
Norway
Russian Federation
United Kingdom

**Protocole de 1996 modifiant
la convention de 1976 sur la
Limitation de la
Responsabilité en matière
de créances maritimes**

(LLMC PROT 1996)

Signée à Londres le 3 mai 1996
Pas encore en vigueur

(A)	15.VI.2000
(r)	17.X.2000
(a)	25.V.1999
(r)	11.VI.1999

**International Convention on
Salvage, 1989
(SALVAGE 1989)**

Done at London: 28 April 1989
Entered into force: 14 July 1996

Australia
Canada*
China*
Croatia
Denmark
Dominica
Egypt
Estonia
Georgia
Greece
Guyana
India
Iran, Islamic Republic of*
Ireland*
Italy
Jordan
Kenya
Latvia
Lithuania
Marshall Islands
Mexico*

**Convention Internationale de
1989 sur l'Assistance
(ASSISTANCE 1989)**

Signée à Londres le 28 avril 1989
Entrée en vigueur: 14 juillet 1996

(a)	8.I.1997
(r)	14.XI.1994
(a)	30.III.1994
(a)	10.IX.1998
(r)	30.V.1995
(a)	31.VIII.2001
(a)	14.III.1991
(a)	31.VII.2001
(a)	25.VIII.1995
(a)	3.VI.1996
(a)	10.XII.1997
(a)	18.X.1995
(a)	1.VIII.1994
(r)	6.VI.1995
(r)	14.VII.1995
(a)	3.X.1995
(a)	21.VII.1999
(a)	17.III.1999
(a)	15.XI.1999
(a)	16.X.1995
(r)	10.X.1991

*Salvage 1989**Assistance 1989*

Netherlands	(A)	10.XII.1997
Nigeria	(r)	11.X. 1990
Norway*	(r)	3.XII.1996
Oman	(a)	14.X.1991
Romania	(a)	18.V.2001
Russian Federation	(r)	25.V.1999
Saudi Arabia*	(a)	16.XII.1991
Sierra Leone	(a)	26.VII.2001
Sweden*	(r)	19.XII.1995
Switzerland	(r)	12.III.1993
Tunisia	(a)	5.V.1999
United Arab Emirates	(a)	4.X.1993
United Kingdom*	(r)	29.IX.1994
United States	(r)	27.III.1992
Vanuatu	(a)	18.II.1999

The United Kingdom declared its ratification to be effective in respect of:

The Bailiwick of Jersey

The Isle of Man

Falkland Islands ⁽¹⁾

Montserrat

South Georgia and the South Sandwich Islands

⁽¹⁾ The Argentine Government rejects the statement made by the United Kingdom of Great Britain and Northern Ireland on ratifying the International Convention on Salvage, 1989. In that statement, ratification was declared to be effective in respect of the Malvinas Islands, South Georgia and South Sandwich Islands. The Argentine Republic reaffirms its sovereignty over these islands and their surrounding maritime spaces, which constitute an integral part of its national territory".

The Argentine Republic recalls the adoption by the General Assembly of the United Nations, of resolutions 2065(XX) and 3160(XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/41, 42/19 and 43/25, acknowledging the existence of a dispute concerning sovereignty and urging the Governments of the Argentine Republic and of the United Kingdom of Great Britain and Northern Ireland to enter into negotiations with a view to identifying means of pacific and final settlement of the outstanding problems between the two countries, including all matters concerning the future of the Malvinas Islands, in accordance with the Charter of the United Nations."

The depositary received the following communication, dated 9 May 1995, from the Foreign and Commonwealth Office, London:

"The Government of the United Kingdom of Great Britain and Northern Ireland have noted the declaration of the Government of Argentina regarding the extension by the United Kingdom of the application of the Convention to the Falkland Islands and to South Georgia and the South Sandwich Islands.

The British Government have no doubt about the sovereignty of the United Kingdom over the Falkland Islands and over South Georgia and the South Sandwich Islands and their consequent rights to extend the said Convention to these Territories. The British Government reject as unfounded the claims by the Government of Argentina."

Declarations, Reservations and Statements

Canada

The instrument of ratification of Canada was accompanied by the following reservation:

“Pursuant to Article 30 of the International Convention on Salvage, 1989, the Government of Canada reserves the right not to apply the provisions of this Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed”.

China

The instrument of accession of the People's Republic of China contained the following statement:

[Translation]

“That in accordance with the provisions of article 30, paragraph 1 of the International Convention on Salvage, 1989, the Government of the People's Republic of China reserves the right not to apply the provisions of article 30, paragraphs 1(a), (b) and (d) of the said Convention”.

Islamic Republic of Iran

The instrument of accession of the Islamic Republic of Iran contained the following reservation:

“The Government of the Islamic Republic of Iran reserves the right not to apply the provisions of this Convention in the cases mentioned in article 30, paragraphs 1(a), (b), (c) and (d)”.

Ireland

The instrument of ratification of Ireland contained the following reservation:

“Reserve the right of Ireland not to apply the provisions of the Convention specified in article 30(1)(a) and (b) thereof”.

Mexico

The instrument of ratification of Mexico contained the following reservation and declaration:

[Translation]

“The Government of Mexico reserves the right not to apply the provisions of this Convention in the cases mentioned in article 30, paragraphs 1(a), (b) (c) and (d), pointing out at the same time that it considers salvage as a voluntary act “.

Norway

The instrument of ratification of the Kingdom of Norway contained the following reservation:

“In accordance with Article 30, subparagraph 1(d) of the Convention, the Kingdom of Norway reserves the right not to apply the provisions of this Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed”.

Saudi Arabia⁽¹⁾

The instrument of accession of Saudi Arabia contained the following reservations:

[Translation]

⁽¹⁾ The depositary received the following communication dated 27 February 1992 from the Embassy of Israel:

- “1. This instrument of accession does not in any way whatsoever mean the recognition of Israel; and
2. The Kingdom of Saudi Arabia reserves its right not to implement the rules of this instrument of accession to the situations indicated in paragraphs (a), (b), (c) and (d) of article 30 of this instrument.”

Spain

The following reservations were made at the time of signature of the Convention:

[Translation]

“In accordance with the provisions of article 30.1(a), 30.1(b) and 30.1(d) of the International Convention on Salvage, 1989, the Kingdom of Spain reserves the right not to apply the provisions of the said Convention:

- when the salvage operation takes place in inland waters and all vessels involved are of inland navigation;
- when the salvage operations take place in inland waters and no vessel is involved.

For the sole purposes of these reservations, the Kingdom of Spain understands by ‘inland waters’ not the waters envisaged and regulated under the name of ‘internal waters’ in the United Nations Convention on the Law of the Sea but continental waters that are not in communication with the waters of the sea and are not used by seagoing vessels. In particular, the waters of ports, rivers, estuaries, etc., which are frequented by seagoing vessels are not considered as ‘inland waters’:

- when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed”.

Sweden

The instrument of ratification of the Kingdom of Sweden contained the following reservation:

“Referring to Article 30.1(d) Sweden reserves the right not to apply the provisions of the Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed”.

United Kingdom

The instrument of ratification of the United Kingdom of Great Britain and Northern Ireland contained the following reservation:

“In accordance with the provisions of article 30, paragraph 1(a), (b) and (d) of the Convention, the United Kingdom reserves the right not to apply the provisions of the Convention when:

- (i) the salvage operation takes place in inland waters and all vessels involved are of inland navigation; or
- (ii) the salvage operation takes place in inland waters and no vessel is involved; or .
- (iii) the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed”.

“The Government of the State of Israel has noted that the instrument of accession of Saudi Arabia to the above-mentioned Convention contains a declaration with respect to Israel.

In the view of the Government of the State of Israel such declaration, which is explicitly of a political character, is incompatible with the purposes and objectives of this Convention and cannot in any way affect whatever obligations are binding upon Saudi Arabia under general International Law or under particular Conventions.

The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards Saudi Arabia an attitude of complete reciprocity.”

*Oil pollution preparedness 1990***International Convention on
Oil pollution preparedness,
response and co-operation
1990**

Done at London: 30 November 1990
Entered into force 13 May 1995.

**Convention Internationale de
1990 sur la Preparation, la
lutte et la cooperation en
matière de pollution par les
hydrocarbures**

Signée a Londres le 30 novembre 1990
Entrée en vigueur: 13 Mai 1995.

Antigua and Barbuda	(a)	5.I.1999
Argentina*	(r)	13.VII.1994
Australia	(r)	6.VII.1992
Brazil	(a)	21.VII.1998
Bulgaria	(a)	5.VII.2001
Canada	(a)	7.III.1994
Chile	(a)	15.X.1997
China	(a)	30.III.1998
Croatia	(a)	12.I.1998
Denmark*	(r)	22.X.1996
Djibouti	(a)	19.I.1998
Dominica	(a)	31.VIII.2001
Egypt	(r)	29.VI.1992
El Salvador	(a)	9.X.1995
Finland	(AA)	21.VI.1993
France	(AA)	21.VII.1993
Georgia	(a)	20.II.1996
Germany	(r)	15.II.1995
Greece	(r)	7.III.1995
Guyana	(a)	10.XII.1997
Iceland	(r)	6.XI.1992
India	(a)	17.XI.1997
Iran (Islamic Republic of)	(a)	25.II.1998
Ireland	(a)	26.IV.2001
Israel	(r)	24.III.1999
Italy	(r)	2.III.1999
Japan	(a)	17.X.1995
Kenya	(a)	21.VII.1999
Korea, Republic of	(a)	9.XI.1999
Liberia	(a)	5.X.1995
Malaysia	(a)	30.VII.1997
Marshall Islands	(a)	16.X.1995
Mauritania	(a)	22.XI.1999
Mauritius	(a)	2.XII.1999
Mexico	(a)	13.V.1994
Monaco	(a)	12.X.1999
Netherlands	(r)	1.XII.1994
New Zealand	(a)	2.VII.1999
Nigeria	(a)	25.V.1993

Oil pollution preparedness 1990

Norway	(r)	8.III.1994
Pakistan	(a)	21.VII.1993
Senegal	(r)	24. III.1994
Seychelles	(a)	26.VI.1992
Singapore	(a)	10.III.1999
Slovenia	(a)	31.V.2001
Spain	(r)	12.I.1994
Sweden	(r)	30.III.1992
Switzerland	(a)	4.VII.1996
Tonga	(a)	1.II.1996
Tunisia	(a)	23.X.1995
United Kingdom	(a)	16.IX.1997
United States	(r)	27.III.1992
Uruguay	(s)	27.IX.1994
Vanuatu	(a)	18.II.1999
Venezuela	(r)	12.XII.1994

Declarations, Reservations and Statements**Argentina⁽¹⁾**

The instrument of ratification of the Argentine Republic contained the following reservation:

[Translation]

“The Argentine Republic hereby expressly reserves its rights of sovereignty and of territorial and maritime jurisdiction over the Malvinas Islands, South Georgia and South Sandwich Islands, and the maritime areas corresponding thereto, as recognized and defined in Law No. 23.968 of the Argentine Nation of 14 August 1991, and repudiates any extension of the scope of the International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990, which may be made by any other State, community or entity to those Argentine island territories and/or maritime areas”.

Denmark

The instrument of ratification of the Kingdom of Denmark contained the following reservation:

[Translation]

“That the Convention will not apply to the Faroe Islands nor to Greenland, pending a further decision”.

By a communication dated 27 November 1996 the depositary was informed that Denmark withdraws the reservation with respect to the territory of Greenland.

⁽¹⁾ The depositary received, on 22 February 1996, the following communication from the Foreign and Commonwealth Office of the United Kingdom:

“The Government of the United Kingdom of Great Britain and Northern Ireland have noted the declaration of the Government of Argentina concerning rights of sovereignty and of territorial and maritime jurisdiction over the Falkland Islands and South Georgia and the South Sandwich Islands.

The British Government have no doubt about the sovereignty of the United Kingdom over the Falkland Islands, as well as South Georgia and the South Sandwich Islands. The British Government can only reject as unfounded the claims by the Government of Argentina.”

HNS 1996

**International Convention on
Liability and Compensation
for damage in connection
with the carriage of hazardous
and noxious substances by
sea, 1996**

(HNS 1996)

Done at London, 3 May 1996
Not yet in force.

**Convention Internationale de 1996
sur la responsabilité
et l'indemnisation pour les
dommages liés au transport
par mer de substances nocives
et potentiellement dangereuses**

(HNS 1996)

Signée a Londres le 3 mai 1996
Pas encore en vigueur.

**STATUS OF THE RATIFICATIONS OF
AND ACCESSIONS TO UNITED NATIONS
AND UNITED NATIONS/IMO CONVENTIONS
IN THE FIELD OF PUBLIC AND
PRIVATE MARITIME LAW**

**ETAT DES RATIFICATIONS ET ADHESIONS
AUX CONVENTIONS DES NATIONS UNIES ET
AUX CONVENTIONS DES NATIONS UNIES/OMI
EN MATIERE DE DROIT MARITIME PUBLIC
ET DE DROIT MARITIME PRIVE**

r	=	ratification
a	=	accession
A	=	acceptance
AA	=	approval
S	=	definitive signature

Notes de l'éditeur / Editor's notes:

- Les dates mentionnées sont les dates du dépôt des instruments.
- The dates mentioned are the dates of the deposit of instruments.

**United Nations Convention on a
Code of Conduct
for liner conferences**

Geneva, 6 April 1974

Entered into force: 6 October 1983

**Convention des Nations Unies sur
un
Code de Conduite
des conférences maritimes**

Genève, 6 avril 1974

Entrée en vigueur: 6 octobre 1983

Algeria	(r)	12.XII.1986
Aruba	(a)	1.I.1986
Bangladesh	(a)	24.VII.1975
Barbados	(a)	29.X.1980
Belgium	(r)	30.IX.1987
Belarus	(A)	28.VI.1979
Benin	(a)	27.X.1975
Bulgaria	(a)	12.VII.1979
Burkina Faso	(a)	30.III.1989
Cameroon	(a)	15.VI.1976
Cape Verde	(a)	13.I.1978
Central African Republic	(a)	13.V.1977
Chile	(S)	25.VI.1975
China	(a)	23.IX.1980
Congo	(a)	26.VII.1982
Costa Rica	(r)	27.X.1978
Croatia	(r)	8.X.1991
Cuba	(a)	23.VII.1976
Czech Republic	(AA)	4.VI.1979
Denmark (except Greenland and the Faroe Islands)	(a)	28.VI.1985
Egypt	(a)	25.I.1979
Ethiopia	(r)	1.IX.1978
Finland	(a)	31.XII.1985
France	(AA)	4.X.1985
Gabon	(r)	5.VI.1978
Gambia	(S)	30.VI.1975
Germany	(r)	6.IV.1983
Ghana	(r)	24.VI.1975
Gibraltar	(a)	28.VI.1985
Guatemala	(r)	3.III.1976
Guinea	(a)	19.VIII.1980
Guyana	(a)	7.I.1980
Honduras	(a)	12.VI.1979
Hong Kong	(a)	28.VI.1985
India	(r)	14.II.1978
Indonesia	(r)	11.I.1977
Iraq	(a)	25.X.1978

*Code of conduct 1974**Code de conduite 1974*

Italy	(a)	30.V.1989
Ivory Coast	(r)	17.II.1977
Jamaica	(a)	20.VII.1982
Jordan	(a)	17.III.1980
Kenya	(a)	27.II.1978
Korea, Republic of	(a)	II.V.1979
Kuwait	(a)	31.III.1986
Lebanon	(a)	30.IV.1982
Madagascar	(a)	23.XII.1977
Malaysia	(a)	27.VIII.1982
Mali	(a)	15.III.1978
Mauritania	(a)	21.III.1988
Mauritius	(a)	16.IX.1980
Mexico	(a)	6.V.1976
Morocco	(a)	11.II.1980
Mozambique	(a)	21.IX.1990
Netherlands (for the Kingdom in Europe only)	(a)	6.IV.1983
Niger	(r)	13.I.1976
Nigeria	(a)	10.IX.1975
Norway	(a)	28.VI.1985
Pakistan	(S)	27.VI.1975
Peru	(a)	21.XI.1978
Philippines	(r)	2.III.1976
Portugal	(a)	13.VI.1990
Romania	(a)	7.I.1982
Russian Federation	(A)	28.VI.1979
Saudi Arabia	(a)	24.V.1985
Senegal	(r)	20.V.1977
Sierra Leone	(a)	9.VII.1979
Slovakia	(AA)	4.VI.1979
Slovenia	(AA)	4.VI.1979
Somalia	(a)	14.XI.1988
Spain	(a)	3.II.1994
Sri Lanka	(S)	30.VI.1975
Sudan	(a)	16.III.1978
Sweden	(a)	28.VI.1985
Togo	(r)	12.I.1978
Trinidad and Tobago	(a)	3.III.1983
Tunisia	(a)	15.III.1979
Ukraine	(A)	26.VI.1979
United Kingdom	(a)	28.VI.1985
United Republic of Tanzania	(a)	3.XI.1975
Uruguay	(a)	9.VII.1979
Venezuela	(S)	30.VI.1975
Yugoslavia	(r)	7.VII.1980
Zaire	(a)	25.VII.1977
Zambia	(a)	8.IV.1988

**United Nations Convention
on the
Carriage of goods by sea**

**Hamburg, 31 March 1978
“HAMBURG RULES”**

Entry into force:
1 November 1992

**Convention des Nations Unies
sur le
Transport de marchandises
par mer
Hambourg 31 mars 1978
“REGLES DE HAMBOURG”**

Entrée en vigueur:
1 novembre 1992

Austria	(r)	29.VII.1993
Barbados	(a)	2.II.1981
Botswana	(a)	16.II.1988
Burkina Faso	(a)	14.VIII.1989
Burundi	(a)	4.IX.1998
Cameroon	(a)	21.IX.1993
Chile	(r)	9.VII.1982
Czech Republic ⁽¹⁾	(r)	23.VI.1995
Egypt	(r)	23.IV.1979
Gambia	(r)	7.II.1996
Georgia	(a)	21.III.1996
Guinea	(r)	23.I.1991
Hungary	(r)	5.VII.1984
Jordany	(a)	10.V.2001
Kenya	(a)	31.VII.1989
Lebanon	(a)	4.IV.1983
Lesotho	(a)	26.X.1989
Malawi	(r)	18.III.1991
Morocco	(a)	12.VI.1981
Nigeria	(a)	7.XI.1988
Romania	(a)	7.I.1982
Saint Vincent and the Grenadines	(a)	12.IX.2000
Senegal	(r)	17.III.1986
Sierra Leone	(r)	7.X.1988
Tanzania, United Republic of	(a)	24.VII.1979
Tunisia	(a)	15.IX.1980
Uganda	(a)	6.VII.1979
Zambia	(a)	7.X.1991

⁽¹⁾ The Convention was signed on 6 march 1979 by the former Czechoslovakia. Respectively on 28 May 1993 and on 2 Jun 1993 the Slovak Republic and the Czech Republic deposited instruments of succession. The Czech Republic then deposited instrument of ratification on 23 Jun 1995.

*Multimodal transport 1980**UNCLOS 1982***United Nations Convention
on the
International multimodal
transport of goods**

Geneva, 24 May 1980
Not yet in force.

Chile
Malawi
Mexico
Morocco
Rwanda
Senegal
Zambia

**Convention des Nations Unies
sur le
Transport multimodal
international de
marchandises**

Genève 24 mai 1980
Pas encore en vigueur.

(r) 7.IV.1982
(a) 2.II.1984
(r) 11.II.1982
(r) 21.I.1993
(a) 15.IX.1987
(r) 25.X.1984
(a) 7.X.1991

**United Nations Convention
on the Law of the Sea
(UNCLOS 1982)**

Montego Bay 10 December 1982
Entered into force:
16 November 1994

**Convention des Nations Unies
sur les Droit de la Mer**

Montego Bay 10 decembre 1982
Entrée en vigueur:
16 Novembre 1994

Algeria
Angola
Antigua and Barbuda
Argentina
Australia
Austria
Bahamas
Bahrain
Barbados
Belgium
Belize
Benin
Bolivia
Bosnia and Herzegovina
Botswana
Brazil
Bulgaria
Cameroon
Cape Verde
Chile

11.VI.1996
5.XII.1990
2.II.1989
1.XII.1995
5.X.1994
14.VII.1995
29.VII.1983
30.V.1985
12.X.1993
13.XI.1998
13.VIII.1983
16.X.1997
28.IV.1995
12.I.1994
2.V.1990
22.XII.1988
15.V.1996
19.XI.1985
10.VIII.1987
25.VIII.1997

UNCLOS 1982

China	7.VI.1996
Comoros	21.VI.1994
Congo, Democratic Republic of	17.II.1989
Cook Islands	15.II.1995
Costa Rica	21.IX.1992
Côte d'Ivoire	28.VII.1995
Croatia	5.IV.1995
Cuba	15.VIII.1984
Cyprus	12.XII.1988
Czech Republic	21.VI.1996
Djibouti	8.X.1991
Dominica	24.X.1991
Egypt	26.VIII.1983
Equatorial Guinea	21.VII.1997
European Community	1.IV.1998
Fiji	10.XII.1982
France	11.IV.1996
Gabon	11.III.1988
Gambia	22.V.1984
Germany	14.X.1994
Georgia	21.III.1996
Ghana	7.VI.1983
Greece	21.VII.1995
Grenada	25.IV.1991
Guatemala	11.II.1997
Guinea	6.IX.1985
Guinea-Bissau	25.VIII.1986
Guyana	16.XI.1993
Haiti	31.VII.1996
Honduras	5.X.1993
Iceland	21.VI.1985
India	29.VI.1995
Indonesia	3.II.1986
Iraq	30.VII.1985
Ireland	21.VI.1996
Italy	13.I.1995
Jamaica	21.III.1983
Japan	20.VI.1996
Jordan	27.XI.1995
Kenya	2.III.1989
Korea, Republic of	29.I.1996
Kuwait	2.V.1986
Lao	5.VI.1998
Lebanon	5.I.1995
Macedonia	19.VIII.1994

UNCLOS 1982

Malaysia	14.X.1996
Mali	16.VII.1985
Malta	20.V.1993
Marshall Islands	9.VIII.1991
Mauritania	17.VII.1996
Mauritius	4.XI.1994
Mexico	18.III.1983
Micronesia	29.IV.1991
Monaco	20.III.1996
Mongolia	13.VIII.1996
Mozambique	13.III.1997
Myanmar	21.V.1996
Namibia, United Nations Council for	18.IV.1983
Nauru	23.I.1996
Nepal	2.XI.1998
Netherlands	28.VI.1996
New Zealand	19.VII.1996
Nigeria	14.VIII.1986
Norway	24.VI.1996
Oman	17.VIII.1989
Pakistan	26.II.1997
Palau	30.IX.1996
Panama	1.VII.1996
Papua New Guinea	14.I.1997
Paraguay	26.IX.1986
Philippines	8.V.1984
Poland	13.XI.1998
Portugal	3.XI.1997
Romania	17.XII.1996
Russian Federation	12.III.1997
Samoa	14.VIII.1995
St. Lucia	27. III.1985
St. Kitts and Nevis	7.I.1993
St. Vincent and the Grenadines	1.X.1993
Sao Tomé and Príncipe	3.XI.1987
Saudi Arabia	24.IV.1996
Senegal	25.X.1984
Seychelles	16.IX.1991
Sierra Leone	12.XII.1994
Singapore	17.XI.1994
Slovakia	8.V.1996
Slovenia	16.VI.1995
Solomon Islands	23.VI.1997
Somalia	24.VII.1989
South Africa	23.XII.1997

Spain	15.I.1997
Sri Lanka	19.VII.1994
Sudan	23.I.1985
Suriname	9.VII.1998
Sweden	25.VI.1996
Tanzania	30.IX.1985
Togo	16.IV.1985
Tonga	2.VIII.1995
Trinidad and Tobago	25.IV.1986
Tunisia	24.IV.1985
Uganda	9.XI.1990
Ukraine	26.VII.1999
United Kingdom	25.VII.1997
Uruguay	10.XII.1992
Vanautu	10.VIII.1999
Viet Nam	25.VII.1994
Yemen, Democratic Republic of	21.VII.1987
Yugoslavia	5.V.1986
Zaire	17.II.1989
Zambia	7.III.1983
Zimbabwe	24.II.1993

**United Nations Convention
on Conditions for
Registration of ships**

Geneva, 7 February 1986
Not yet in force.

**Convention des Nations
Unies sur les Conditions d'
Immatriculation des navires**

Genève, 7 février 1986
Pas encore entrée en vigueur.

Egypt	(r)	9.I.1992
Ghana	(a)	29.VIII.1990
Haiti	(a)	17.V.1989
Hungary	(a)	23.I.1989
Iraq	(a)	1.II.1989
Ivory Coast	(r)	28.X.1987
Libyan Arab Jamahiriya	(r)	28.II.1989
Mexico	(r)	21.I.1988
Oman	(a)	18.X.1990

*Liability of operators 1991**Arrest of Ships, 1999***United Nations Convention on the Liability of operators of transport terminals in the international trade****Convention des Nations Unies sur la Responsabilité des exploitants de terminaux transport dans le commerce international**

Done at Vienna 19 April 1991
Not yet in force.

Signée à Vienne 19 avril 1991
Pas encore entrée en vigueur.

Georgia

(a)

21.III.1996

International Convention on Maritime liens and mortgages, 1993**Convention Internationale de 1993 su les Privilèges et hypothèques maritimes**

Done at Geneva,
6 May 1993
Not yet in force.

Signée à Genève
le 6 mai 1993
Pas encore en vigueur.

Monaco

(a)

28.III.1995

Russian Federation

(a)

4.III.1999

Saint Vincent and the Grenadines

(a)

11.III.1997

Tunisia

(r)

2.II.1995

Vanuatu

(a)

10.VIII.1999

International Convention on Arrest of Ships, 1999**Convention Internationale de 1999 sur la saisie conservatoire des navires**

Done at Geneva,
12 March 1999
Not yet in force.

Fait à Genève
le 12 Mars 1999
Pas encore en vigueur.

Bulgaria

(r)

27.VII.2000

Estonia

(a)

11.V.2001

**STATUS OF THE RATIFICATIONS OF
AND ACCESSIONS TO UNIDROIT CONVENTIONS
IN THE FIELD OF PRIVATE MARITIME LAW**

**ETAT DES RATIFICATIONS ET ADHESIONS
AUX CONVENTIONS D'UNIDROIT EN MATIERE
DE DROIT MARITIME PRIVE**

**Unidroit Convention on
International financial
leasing 1988**

Done at Ottawa 28 May 1988
Entered into force.
1 May 1995

**Convention de Unidroit sur
le Creditbail international
1988**

Signée à Ottawa 28 mai 1988
Entré en vigueur:
1 Mai 1995

France	23.IX.1991
Hungary	7.V.1996
Italy	29.XI.1993
Latvia	6.VIII.1997
Nigeria	25.X.1994
Panama	26.III.1997

CONFERENCES OF THE COMITE MARITIME INTERNATIONAL

I. BRUSSELS - 1897

President: Mr. Auguste BEERNAERT.

Subjects: Organization of the International Maritime Committee - Collision - Shipowners' Liability.

II. ANTWERP - 1898

President: Mr. Auguste BEERNAERT.

Subjects: Liability of Owners of sea-going vessels.

III. LONDON - 1899

President: Sir Walter PHILLIMORE.

Subjects: Collisions in which both ships are to blame - Shipowners' liability.

IV. PARIS - 1900

President: Mr. LYON-CAEN.

Subjects: Assistance, salvage and duty to tender assistance - Jurisdiction in collision matters.

V. HAMBURG - 1902

President: Dr. Friedrich SIEVEKING.

Subjects: International Code on Collision and Salvage at Sea - Jurisdiction in collision matters - Conflict of laws as to owner-ship of vessels.

VI. AMSTERDAM - 1904

President: Mr. E.N. RAHUSEN.

Subjects: Conflicts of law in the matter of Mortgages and Liens on ships. - Jurisdiction in collision matters - Limitation of Shipowners' Liability.

VII. LIVERPOOL - 1905

President: Sir William R. KENNEDY.

Subjects: Limitation of Shipowners' Liability - Conflict of Laws as to Maritime Mortgages and Liens - Brussels Diplomatic Conference.

VIII. VENICE - 1907

President: Mr. Alberto MARGHIERI.

Subjects: Limitation of Shipowners' Liability - Maritime Mortgages and Liens - Conflict of law as to Freight.

IX. BREMEN - 1909

President: Dr. Friedrich SIEVEKING.

Subjects: Conflict of laws as to Freight - Compensation in respect of personal injuries - Publication of Maritime Mortgages and Liens.

CONFERENCES

DU COMITE MARITIME INTERNATIONAL

I. BRUXELLES - 1897

Président: Mr. Auguste BEERNAERT.

Sujets: Organisation du Comité Maritime International - Abordage - Responsabilité des propriétaires de navires de mer.

II. ANVERS - 1898

Président: Mr. Auguste BEERNAERT.

Sujets: Responsabilité des propriétaires de navires de mer.

III. LONDRES - 1899

Président: Sir Walter PHILLIMORE.

Sujets: Abordages dans lesquels les deux navires sont fautifs - Responsabilité des propriétaires de navires.

IV. PARIS - 1900

Président: Mr. LYON-CAEN

Sujets: Assistance, sauvetage et l'obligation de prêter assistance - Compétence en matière d'abordage.

V. HAMBURG - 1902

Président: Dr. Friedrich SIEVEKING.

Sujets: Code international pour l'abordage et le sauvetage en mer - Compétence en matière d'abordage. - Conflits de lois concernant la propriété des navires - Privilèges et hypothèques sur navires.

VI. AMSTERDAM - 1904

Président: Mr. E.N. RAHUSEN.

Sujets: Conflits de lois en matières de privilèges et hypothèques sur navires. - Compétence en matière d'abordage - Limitation de la responsabilité des propriétaires de navires.

VII. LIVERPOOL - 1905

Président: Sir William R. KENNEDY.

Sujets: Limitation de la responsabilité des propriétaires de navires - Conflits de lois en matière de privilèges et hypothèques - Conférence Diplomatique de Bruxelles.

VIII. VENISE - 1907

Président: Mr. Alberto MARGHERI.

Sujets: Limitation de la responsabilité des propriétaires de navires Privilèges et hypothèques maritimes - Conflits de lois relatifs au fret.

IX. BREME - 1909

Président: Dr. Friedrich SIEVEKING.

Sujets: Conflits de lois relatifs au fret - Indemnisation concernant des lésions corporelles - Publications des privilèges et hypothèques maritimes.

Conferences of the Comité Maritime International

X. PARIS - 1911

President: Mr. Paul GOVARE.*Subjects:* Limitation of Shipowners' Liability in the event of loss of life or personal injury - Freight.

XI. COPENHAGEN - 1913

President: Dr. J.H. KOCH.*Subjects:* London declaration 1909 - Safety of Navigation - International Code of Affreightment - Insurance of enemy property.

XII. ANTWERP - 1921

President: Mr. Louis FRANCK.*Subjects:* International Conventions relating to Collision and Salvage at sea. - Limitation of Shipowners' Liability - Maritime Mortgages and Liens - Code of Affreightment - Exonerating clauses.

XIII. LONDON - 1922

President: Sir Henry DUKE.*Subjects:* Immunity of State-owned ships - Maritime Mortgage and Liens. - Exonerating clauses in Bills of lading.

XIV. GOTHENBURG - 1923

President: Mr. Efiel LÖFGREN.*Subjects:* Compulsory insurance of passengers - Immunity of State owned ships - International Code of Affreightment - International Convention on Bills of Lading.

XV. GENOA - 1925

President: Dr. Francesco BERLINGIERI.*Subjects:* Compulsory Insurance of passengers - Immunity of State owned ships - International Code of Affreightment - Maritime Mortgages and Liens.

XVI. AMSTERDAM - 1927

President: Mr. B.C.J. LODER.*Subjects:* Compulsory insurance of passengers - Letters of indemnity - Ratification of the Brussels Conventions.

XVII. ANTWERP - 1930

President: Mr. Louis FRANCK.*Subjects:* Ratification of the Brussels Conventions - Compulsory insurance of passengers - Jurisdiction and penal sanctions in matters of collision at sea.

XVIII. OSLO - 1933

President: Mr. Edvin ALTEN.*Subjects:* Ratification of the Brussels Conventions - Civil and penal jurisdiction in matters of collision on the high seas - Provisional arrest of ships - Limitation of Shipowners' Liability.

XIX. PARIS - 1937

President: Mr. Georges RIPERT.*Subjects:* Ratification of the Brussels Conventions - Civil and penal jurisdiction in the event of collision at sea - Arrest of ships - Commentary on the Brussels Conventions - Assistance and Salvage of and by Aircraft at sea.

Conférences du Comité Maritime International

X. PARIS - 1911

Président: Mr. Paul GOVARE.*Sujets:* Limitation de la responsabilité des propriétaires de navires en cas de perte de vie ou de lésions corporelles - Fret.

XI. COPENHAGUE - 1913

Président: Dr. J.H. KOCH.*Sujets:* Déclaration de Londres 1909 - Sécurité de la navigation - Code international de l'affrètement - Assurance de propriétés ennemies.

XII. ANVERS - 1921

Président: Mr. Louis FRANCK.*Sujets:* Convention internationale concernant l'abordage et la sauvetage en mer - Limitation de la responsabilité des propriétaires de navires de mer - Privilèges et hypothèques maritimes - Code de l'affrètement - Clauses d'exonération dans les connaissements.

XIII. LONDRES - 1922

Président: Sir Henry DUKE.*Sujets:* Immunité des navires d'Etat - Privilèges et hypothèques maritimes - Clauses d'exonération dans les connaissements.

XIV. GOTHENBURG - 1923

Président: Mr. Efiel LÖFGREN.*Sujets:* Assurance obligatoire des passagers - Immunité des navires d'Etat. - Code international de l'affrètement - Convention internationale des connaissements.

XV. GENES - 1925

Président: Dr. Francesco BERLINGIERI.*Sujets:* Assurance obligatoire des passagers - Immunité des navires d'Etat. - Code international de l'affrètement - Privilèges et hypothèques maritimes.

XVI. AMSTERDAM - 1927

Président: Mr. B.C.J. LODER.*Sujets:* Assurance obligatoire des passagers - Lettres de garantie - Ratification des Conventions de Bruxelles.

XVII. ANVERS - 1930

Président: Mr. Louis FRANCK.*Sujets:* Ratification des Conventions de Bruxelles - Assurance obligatoire des passagers - Compétence et sanctions pénales en matière d'abordage en mer.

XVIII. OSLO - 1933

Président: Mr. Edvin ALTEN.*Sujets:* Ratification des Conventions de Bruxelles - Compétence civile et pénale en matière d'abordage en mer - Saisie conservatoire de navires - Limitation de la responsabilité des propriétaires de navires.

XIX. PARIS - 1937

Président: Mr. Georges RIPERT.*Sujets:* Ratification des Conventions de Bruxelles - Compétence civile et pénale en matière d'abordage en mer - Saisie conservatoire de navires - Commentaires sur les Conventions de Bruxelles - Assistance et Sauvetage et par avions en mer.

Conferences of the Comité Maritime International

XX. ANTWERP - 1947

President: Mr. Albert LILAR.

Subjects: Ratification of the Brussels Conventions, more especially of the Convention on Immunity of State-owned ships - Revision of the Convention on Limitation of the Liability of Owners of sea-going vessels and of the Convention on Bills of Lading - Examination of the three draft conventions adopted at the Paris Conference 1937 - Assistance and Salvage of and by Aircraft at sea - York and Antwerp Rules; rate of interest.

XXI. AMSTERDAM - 1948

President: Prof. J. OFFERHAUS

Subjects: Ratification of the Brussels International Convention - Revision of the York-Antwerp Rules 1924 - Limitation of Shipowners' Liability (Gold Clauses) - Combined Through Bills of Lading - Revision of the draft Convention on arrest of ships - Draft of creation of an International Court for Navigation by Sea and by Air.

XXII. NAPLES - 1951

President: Mr. Amedeo GIANNINI.

Subjects: Brussels International Conventions - Draft convention relating to Provisional Arrest of Ships - Limitation of the liability of the Owners of Sea-going Vessels and Bills of Lading (Revision of the Gold clauses) - Revision of the Conventions of Maritime Hypothèques and Mortgages - Liability of Carriers by Sea towards Passengers - Penal Jurisdiction in matters of collision at Sea.

XXIII. MADRID - 1955

President: Mr. Albert LILAR.

Subjects: Limitation of Shipowners' Liability - Liability of Sea Carriers towards passengers - Stowaways - Marginal clauses and letters of indemnity.

XXIV. RIJEKA - 1959

President: Mr. Albert LILAR

Subjects: Liability of operators of nuclear ships - Revision of Article X of the International Convention for the Unification of certain Rules of law relating to Bills of Lading - Letters of Indemnity and Marginal clauses. Revision of Article XIV of the International Convention for the Unification of certain rules of Law relating to assistance and salvage at sea - International Statute of Ships in Foreign ports - Registry of operations of ships.

XXV. ATHENS - 1962

President: Mr. Albert LILAR

Subjects: Damages in Matters of Collision - Letters of Indemnity - International Statute of Ships in Foreign Ports - Registry of Ships - Coordination of the Convention of Limitation and on Mortgages - Demurrage and Despatch Money - Liability of Carriers of Luggage.

XXVI. STOCKHOLM - 1963

President: Mr. Albert LILAR

Subjects: Bills of Lading - Passenger Luggage - Ships under construction.

XXVII. NEW YORK - 1965

President: Mr. Albert LILAR

Subjects: Revision of the Convention on Maritime Liens and Mortgages.

Conférences du Comité Maritime International

XX. ANVERS - 1947*Président:* Mr. Albert LILAR.*Sujets:* Ratification des Conventions de Bruxelles, plus spécialement de la Convention relative à l'immunité des navires d'Etat - Revision de la Convention sur la limitation de la responsabilité des propriétaires de navires et de la Convention sur les connaissements - Examen des trois projets de convention adoptés à la Conférence de Paris de 1936 - Assistance et sauvetage de et par avions en mer - Règles d'York et d'Anvers; taux d'intérêt.**XXI. AMSTERDAM - 1948***Président:* Prof. J. OFFERHAUS.*Sujets:* Ratification des Conventions internationales de Bruxelles - Révision des règles d'York et d'Anvers 1924 - Limitation de la responsabilité des propriétaires de navires (clause or) - Connaissements directs combinés - Révision du projet de convention relatif à la saisie conservatoire de navires - Projet de création d'une cour internationale pour la navigation par mer et par air.**XXII. NAPLES - 1951***Président:* Mr. Amedeo GIANNINI.*Sujets:* Conventions internationales de Bruxelles - Projet de Convention concernant la saisie conservatoire de navires - Limitation de la responsabilité des propriétaires de navires de mer - Connaissements (Révision de la clause-or) - Responsabilité des transporteurs par mer à l'égard des passagers - Compétence pénale en matière d'abordage en mer.**XXIII. MADRID - 1955***Président:* Mr. Albert LILAR*Sujets:* Limitation de la responsabilité des propriétaires de navires - Responsabilité des transporteurs par mer à l'égard des passagers - Passagers clandestins - Clauses marginales et lettres de garantie.**XXIV. RIJEKA - 1959***Président:* Mr. Albert LILAR*Sujets:* Responsabilité des exploitants de navires nucléaires - Revision de l'article X de la Convention internationale pour l'unification de certaines règles de droit en matière de connaissements - Lettres de garantie et clauses marginales - Révision de l'article XIV de la Convention internationale pour l'unification de certaines règles de droit relatives à l'assistance et au sauvetage en mer - Statut international des navires dans des ports étrangers - Enregistrement des exploitants de navires.**XXV. ATHENES - 1962***Président:* Mr. Albert LILAR*Sujets:* Domages et intérêts en matière d'abordage - Lettres de garantie - Statut international des navires dans des ports étrangers - Enregistrement des navires - Coordination des conventions sur la limitation et les hypothèques - Surestaries et primes de célérité - Responsabilité des transporteurs des bagages.**XXVI. STOCKHOLM - 1963***Président:* Mr. Albert LILAR*Sujets:* Connaissements - Bagages des passagers - Navires en construction.**XXVII. NEW YORK - 1965***Président:* Mr. Albert LILAR*Sujets:* Révision de la Convention sur les Privilèges et Hypothèques maritimes.

Conferences of the Comité Maritime International

XXVIII. TOKYO - 1969

President: Mr. Albert LILAR*Subjects:* "Torrey Canyon" - Combined Transports - Coordination of International Convention relating to Carriage by Sea of Passengers and their Luggage.

XXIX. ANTWERP - 1972

President: Mr. Albert LILAR*Subjects:* Revision of the Constitution of the International Maritime Committee.

XXX. HAMBURG - 1974

President: Mr. Albert LILAR*Subjects:* Revisions of the York/Antwerp Rules 1950 - Limitation of the Liability of the Owners of Seagoing vessels - The Hague Rules.

XXXI. RIO DE JANEIRO - 1977

President: Prof. Francesco BERLINGIERI*Subjects:* Draft Convention on Jurisdiction, Choice of law and Recognition and enforcement of Judgements in Collision matters. Draft Convention on Off-Shore Mobile Craft.

XXXII. MONTREAL - 1981

President: Prof. Francesco BERLINGIERI*Subjects:* Convention for the unification of certain rules of law relating to assistance and salvage at sea - Carriage of hazardous and noxious substances by sea.

XXXIII. LISBON - 1985

President: Prof. Francesco BERLINGIERI*Subjects:* Convention on Maritime Liens and Mortgages - Convention on Arrest of Ships.

XXXIV. PARIS - 1990

President: Prof. Francesco BERLINGIERI*Subjects:* Uniformity of the Law of Carriage of Goods by Sea in the 1990's - CMI Uniform Rules for Sea Waybills - CMI Rules for Electronic Bills of Lading - Revision of Rule VI of the York-Antwerp Rules 1974.

XXXV. SYDNEY - 1994

President: Prof. Allan PHILIP*Subjects:* Review of the Law of General Average and York-Antwerp Rules 1974 (as amended 1990) - Draft Convention on Off-Shore Mobile Craft - Assessment of Claims for Pollution Damage - *Special Sessions:* Third Party Liability - Classification Societies - Marine Insurance: Is the doctrine of Utmost Good Faith out of date?

XXXVI. ANTWERP - 1997 - CENTENARY CONFERENCE

President: Prof. Allan PHILIP*Subjects:* Off-Shore Mobile Craft - Towards a Maritime Liability Convention - EDI - Collision and Salvage - Wreck Removal Convention - Maritime Liens and Mortgages, Arrest of Ships - Classification Societies - Carriage of Goods by Sea - The Future of CMI.

XXXVII. SINGAPORE - 2001

President: Patrick GRIGGS*Subjects:* Issues of Transport Law - Issues of Marine Insurance - General Average - Implementation of Conventions - Piracy - Passengers Carried by Sea.

Conférences du Comité Maritime International

XXVIII. TOKYO - 1969

Président: Mr. Albert LILAR*Sujets:* "Torrey Canyon" - Transport combiné - Coordination des Conventions relatives au transport par mer de passagers et de leurs bagages.

XXIX. ANVERS - 1972

Président: Mr. Albert LILAR.*Sujets:* Révision des Statuts du Comité Maritime International.

XXX. HAMBOURG - 1974

Président: Mr. Albert LILAR*Sujets:* Révisions des Règles de York/Anvers 1950 - Limitation de la responsabilité des propriétaires de navires de mer - Les Règles de La Haye.

XXXI. RIO DE JANEIRO - 1977

Président: Prof. Francesco BERLINGIERI*Sujets:* Projet de Convention concernant la compétence, la loi applicable, la reconnaissance et l'exécution de jugements en matière d'abordages en mer. Projet de Convention sur les Engins Mobiles "Off-Shore".

XXXII. MONTREAL - 1981

Président: Prof. Francesco BERLINGIERI*Sujets:* Convention pour l'unification de certaines règles en matière d'assistance et de sauvetage maritime - Transport par mer de substances nocives ou dangereuses.

XXXIII. LISBONNE - 1985

Président: Prof. Francesco BERLINGIERI*Sujets:* Convention sur les Hypothèques et privilèges maritimes - Convention sur la Saisie des Navires.

XXXIV. PARIS - 1990

Président: Prof. Francesco BERLINGIERI*Sujets:* Uniformisation de la Loi sur le transport de marchandises par mer dans les années 1990 - Règles Uniformes du CMI relatives aux Lettres de transport maritime - Règles du CMI relatives aux connaissements électroniques - Révision de la Règle VI des Règles de York et d'Anvers 1974.

XXXV. SYDNEY - 1994

Président: Prof. Allan PHILIP*Sujets:* Révision de la loi sur l'Avarie Commune et des Règles de York et d'Anvers 1974 (amendées en 1990) - Projet de Convention sur les Engins Mobiles d'Exploitation des Fonds Marins - *Session Spéciales:* Responsabilité Civile - Sociétés de Classification - Assurances Maritimes: *Is the doctrine of Utmost Good Faith out of date?*

XXXVI. ANVERS - 1997 - CONFERENCE DU CENTENAIRE

Président: Prof. Allan PHILIP*Sujets:* Engins Mobiles Off-Shore - Vers une Convention sur la Responsabilité Maritime - EDI - Abordage et Assistance - Convention sur l'Enlèvement des Epaves - Privilèges et Hypothèques Maritimes, Saisie des Navires - Sociétés de Classification - Transport de Marchandises par Mer - L'Avenir du CMI.

XXXVII. SINGAPOUR - 2001

Président: Patrick GRIGGS*Sujets:* Questions en matière de droit des transport - Questions en matière d'assurance maritime - Avarie commune - Mise en vigueur des conventions - Piraterie - Passagers transportés par mer.